

**SOLUTIONS TO OUTSOURCING ABUSES: THE CREATION OF COLLECTIVE
OBLIGATIONS THROUGH MULTILATERAL CONTRACTS**

By

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ABSTRACT

This thesis is a contribution to the body of literature which aspires to solve the global problem of collective wrongdoing. This collective wrongdoing is committed by individuals, social groups and corporations which includes (to name a few) environmental damage, the violations of human rights, political rights, animal rights and the socio-economic rights of people. The discussion is focused on the solutions for the violations of the socio-economic rights of people who are affected by the business practice of outsourcing (i.e. stakeholders of businesses). It advances the argument that the imposition of legal, social and moral responsibility on those individuals, social groups and corporations which contribute to collective wrongdoing is not an effective method. It suggests departing from this method of holding these individuals, social groups and corporations accountable for their contributions to collective wrongdoing. It advances the argument that collective wrongdoing can be regulated and controlled by the participants who are engaged in a multilateral agreement to practice business sustainably. It suggests that collective obligations (as opposed to responsibility) are contained in multilateral agreements. It is therefore argued that the protection of the socio-economic rights of stakeholders by a theory of collective obligations is plausible and practicable.

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LIST OF ABBREVIATIONS

CID	Corporation's Internal Decision Structure
MI Reduction	Methodological Individualist Reduction
PRA	Principle of Responsive Adjustment
UCA	Union De Cooperativas Agropecuarias

INTRODUCTION

This thesis addresses the problems created by outsourcing and aims to develop a theory which might contribute to the body of literature which aspires to resolve these problems. Outsourcing is a corporation's 'act of transferring work, responsibilities and decision rights to someone else',¹ 'who is external to it'.² The objective of outsourcing is taken as primarily profit maximisation for a corporation. Corporations outsource either to cost-save, or 'to gain – and sustain – revenues and profits in the competitive global marketplace'.³

Here, I find that a corporation which on the one hand maximises profit and on the other hand makes products and services available to consumers at low prices is taking on two contradictory tasks. Outsourcing enables a corporation to shift the costs of production onto others by accessing its business partners' cheap labour and resources. This process is called externalisation. Those business partners who can supply cheap labour and resources gain business with the outsourcing corporation. As a result, there is competition between these outsourced businesses to supply low cost labour and resources in a globalised world. Here, I highlight that much of the collective wrongdoing in the globalised world is caused by this business competitiveness. This wrongdoing affects the stakeholders of businesses. Stakeholders are the individuals who have a non-proprietary interest in a business. I focus on the employees of business, farmers, children (engaging in child labour) and consumers.

I interpret 'wrongdoing' as meaning including the infliction of harm and suffering by businesses on stakeholders. Harm includes physical and psychological harm suffered by stakeholders. For example, it includes physical and psychological abuse of employees at the

¹John Mark Power *et al*, *Outsourcing Handbook: How to Implement a Successful Outsourcing Process* (Kogan Page Ltd. London 2006) 1.

²Power *et al* (n1) 2.

³ibid 2.

workplace. These types of wrongdoing infringe the human rights of stakeholders. The infliction of suffering includes activities which cause discomfort to stakeholders and also activities which create stakeholders' unsustainable lifestyles. This applies, for example, to employees who are placed under heavy work pressure which may include long working hours, no toilet breaks, and hazardous workplaces. In other words, labourers are forced to work in poor conditions and receive bad pay.⁴ It also includes children who are forced into labour,⁵ farmers who are forced to trade produces at unsustainably low prices.⁶ These types of wrongdoing infringe the socio-economic rights of stakeholders. My central argument in this thesis is to hold businesses accountable for all these wrongdoings which they have introduced through their ways of doing business.

I interpret the ‘imposition of accountability’ as meaning establishing that the wrongdoer it is *obliged* not to carry out the wrongdoing. In other words, I take the view that holding a wrongdoer accountable is different from that of holding it responsible. In essence, the holding of a wrongdoer accountable does not necessarily entail the imposition of responsibility on it. It is a matter of demanding from the wrongdoer that it should correct its method of doing business. I interpret the phrase ‘imposition of responsibility’ as meaning the holding of an individual or an entity responsible for a wrongdoing. In this thesis, I give examples of the holding of either an individual or an entity (e.g. a corporation) responsible in legal and social contexts. The question whether they *are* responsible in either the legal or social context is not a concern. The focal point is the principle (i.e. the guidance control principle) which underpins the imposition of responsibility in the legal, social and moral

⁴Kate Raworth, ‘Trading Away our Rights: Women Working in Global Supply Chain’ (Oxfam 2004) <http://www.oxfam.org.uk/resources/policy/trade/downloads/trading_rights.pdf> accessed 14 August 2011

⁵‘Children in Hazardous Work: What we know, what we need to do’ (ILO 2011) <http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_155428.pdf> accessed 14 August 2011

⁶‘FARM Briefing: COTTON – Annex’ (Foundation for World Agriculture and Rural Life 2006) 3 <http://www.fondation-farm.org/IMG/pdf/FARM_FR_NoteCoton_Avril06_annexes_ENG.pdf> accessed 14 August 2011

contexts. I attempt to demonstrate that this underpinning principle fails to hold an entity accountable for its wrongdoing.

Outsourcing also brings benefits to others. It gives other nations – other than the economically strong countries in the global North – the opportunity to participate in the global marketplace. For example, the South-East Asian countries engaging in the garment manufacturing industries⁷ are creating job opportunities for their populations. I however focus on the adverse effect of outsourcing for which a theoretical development of a possible solution is sought. Profit maximisation and the consumer demand for cheaper products are the impetuses for outsourcing. Business partners across all sectors of an industry work together in joint actions to achieve these two tasks.

The apparel and garment industry is an example. The retail sector outsources its activities (e.g. a chain store in retail subcontracts the logistics and warehousing of its stocks to other business partners). This sector also outsources to the manufacturing sector (e.g. the manufacturing of the products is subcontracted to overseas business partners who can provide the cheapest labour). The task of cost cutting in the manufacturing sector is putting pressure on the natural resources sector for cheap raw materials (e.g. it is the business partner in this sector who can supply or is coerced in supplying the cheapest raw materials who are the most favoured). Collective wrongdoing is created by collective acts and joint actions. Collective actions are the actions committed by random collections of individuals who are not working together. The demands for and purchases of products are the collective acts of consumers. Joint actions are the actions of participants working together. The production and supply of products are the joint actions of producers, manufacturers and corporations. I give the details

⁷Power *et al* (n1) 5.

of collective wrongdoing in the discussion of *Doe v Wal-Mart Stores, Inc.*⁸ (hereafter, the ‘Wal-Mart case’) in Chapter One.

This thesis is based on the belief that it is not an effective method for controlling or preventing the process of externalisation to hold individuals, corporations and other social groups - who are involved in collective and joint actions which result in outsourcing – responsible. Thus, I demonstrate that this imposition of responsibility is an inadequate solution for the prevention or control of the addressed collective wrongdoing. Rather, participants who are involved in outsourcing ought to be obliged not to externalise their costs and burdens to each other when they are doing business. I therefore propose that the development of a theory of collective obligations (i.e. the notion of holding wrongdoers accountable) might be a contribution to the literature in resolving these globalised problems.

This thesis is based on the belief that three business projects give support to this theory of collective obligations – (1) the area of project finance which practices the ‘Equator Principles’⁹ (2) the goals shared by UCA Soppexcca¹⁰ and (3) the collective actions performed by Global Business Coalition on HIV/AIDS, Tuberculosis and Malaria.¹¹ The collective obligations are contained in multilateral contractual agreements created by the participants in the three projects. These agreements are noted to be based on the collective normative good. The multilateral contractual agreement ensures that the participants can enforce the terms and conditions on one another at the interpersonal level.

The contractual agreements in outsourcing are bilateral. The partners (as shown in the *Wal-Mart case*) can incorporate terms and conditions requiring them to engage in acts of

⁸(First Instance) 2007 US Dist LEXIS 98102, (Appeal) 572 F 3d 677 2009 US APP LEXIS 15279 Lab Cas (CCH) P60 836 15 Wage & Hour Cas 2d (BNA) 7. See page 17 below.

⁹‘Equator Principles’ (June 2006) <http://equator-principles.com/resources/equator_principles.pdf> accessed 14 August 2011

¹⁰This is a small group of cooperatives in Nicaragua which grows and produces coffee. See ‘UCA Soppexcca’ <<http://www.soppexcca.org/en/index.html>> accessed 14 August 2011

¹¹‘Global Business Coalition’ <<http://www.gbcimpact.org/>> accessed 14 August 2011

collective normative good in these bilateral agreements. However, I find that it is possible for these contractual partners not to enforce them by mutual agreement. Therefore, there can be no enforcement of these terms and conditions at an interpersonal level by the partners in bilateral contracts. I find that the theory of collective obligation cannot work with bilateral outsourcing agreements.

Multilateral contractual agreements are the foundations for the theory of collective obligations because they include participants from all sectors of an industry across the globe. This thesis is based on the belief that the essence of these agreements can be explained by Kutz's theory of complicity.¹² His theory is borrowed as the foundation for the development of collective obligations. In brief, Kutz focuses on collective acts (and not joint actions) in the globalised world. He advances the argument that 'individual participation in collective action means individual responsibility for collective harm'.¹³ He explains:-

'Very large-scale collective harms [like the effects of outsourcing] can only plausibly be brought under control if individuals have internalized collective-oriented motivations of complicity and solidarity and if these motivations can be grounded in the forms of accountability'.¹⁴

In other words, Kutz suggests that the agent (i.e. the participating individual) can be the regulator and preventer of collective wrongdoing created by outsourcing. Kutz's proposal is found to be different from imposition of responsibility. This thesis is based on the belief that the guidance control principle underpins the imposition of responsibility in law and

¹²Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (CUP, 2000).

¹³Kutz (n12) 146.

¹⁴Kutz (n12) 257.

through social mechanisms (e.g. in the actions of NGOs, or through consumer protest). That principle originates from Fischer and Ravizza's theory of moral responsibility.¹⁵

In Chapters Two and Three, I show that the imposition of responsibility on a collectivity in the legal and social contexts adheres to the same guidance control principle in moral theory. This method follows the methodological individualist reduction method (hereafter 'MI reduction')¹⁶ where it reduces the responsibility of the collectivity to the one or a few responsible human agents who are its members. In Chapters Two and Three, I demonstrate that Kutz's theory does not accord with this principle. I then progress to criticise the application of the guidance control principle which underpins the imposition of responsibility on the acts of collectivities.

I target the main participants in outsourcing – corporations. Although corporations have legal personhoods, Part A of Chapter Four advances the argument that, although corporations may be taken to be externalising things, they are not agents. Thus, the application of the guidance control principle - which underpins the imposition of responsibility - to corporations is inadequate. Part B of Chapter Four argues that a statement ascribing responsibility to a corporation is theoretically non-reducible to a statement ascribing responsibility to one or a number of its members. Thus, I take the view that it is inaccurate to impose the responsibility of a collectivity on one or a number of its members.

I therefore advance an argument that an inaccurate method of holding individuals or collectivities responsible results in an inaccurate imposition of responsibility for wrongdoing caused by collective actions. In essence, the imposition of responsibility on corporations does not prevent their business practices from contributing to collective wrongdoing. Thus, I

¹⁵John Martin Fischer and Mark Ravizza, S. J., *Responsibility and Control: A Theory of Moral Responsibility*, (Paperback, CUP, 2000).

¹⁶Peter A French *Collective and Corporate Responsibility* (Hardback, CUP, 1984) 4.

advance an argument that the method of holding individuals, corporations and social groups accountable for collective wrongdoing should depart from the imposition of responsibility on them. I suggest instead that the control and prevention of collective wrongdoing derive from collective obligations.

Collective obligations are contained in multilateral contractual agreements. As mentioned, Kutz's theory can provide an explanation for multilateral contractual agreements in business practice. His theory is explored in detail in Chapter Five on the development of a theory of collective obligations. He suggests that those individuals who have contributed to a collective wrongdoing are participants with overlapping intentions and therefore they are accountable for it.¹⁷

Thus, I take the view that his idea of collective actions does not require these participants to have membership of a group or to engage in joint activity. Furthermore, those complicit participants in collective wrongdoing ought— as agents – to work together to right these wrongs.¹⁸ I find that his proposals are too loose for the development of a theory of collective obligations and thus I suggest sharpening this theory through the examples of the three projects in business. I find that the participants in these three projects are engaged in joint activities and that they base their collective obligations on the collective normative good.

In Chapter Six, I advance an argument that there is no theory of collective normative good. The sources of normativity¹⁹ from which the normative good originates only allow intrapersonal enforcement by an individual for acts of (private) normative good. The examples of private normative good may include self-improvement goals of an individual

¹⁷See page 209-10 below.

¹⁸Kutz (n12) 257.

¹⁹Christine M Korsgaard, *The Sources of Normativity* (14th Reprint, CUP, 2010).

like being smart, healthy, prosperous, and enlightened. This finding implies that the practice of normativity is only for an individual's self-improvement and thus it is not for interpersonal enforcement amongst individuals in social groups. However, I do not consider that the intrapersonal enforcement of (private) normative good is a barrier to the ideas advanced. The multilateral contractual agreements in the three projects are instances of the new business model which is based on a collective (or public) normative good. This collective normative good preserves and prioritises the stakeholders' interests and their socioeconomic well-being.

Multilateral contractual agreements also ensure that business participants minimise their contributions towards collective wrongdoing. Contrary to the theory of normativity, I find that the interpersonal enforcement of these obligations based on the collective normative good is plausible and practicable in business in the globalised world. Thus, I conclude with a plausible theoretical model for outsourcing in legal theory as a contribution to the literature for the prevention of collective wrongdoing created by activities of outsourcing in a globalised world. I base this theoretical model on multilateral outsourcing contracts.

CHAPTER ONE: COLLECTIVE WRONGDOING WHICH IS CREATED BY OUTSOURCING

There are two sections in this chapter. In section (i), I provide an analysis of the *Wal-Mart* case. In this case, certain stakeholders' interests and livelihoods in the manufacturing sector were affected. It documents a dispute between a multinational company, Wal-Mart and those stakeholders who were the employees of its overseas partners. The case analysis highlights two points - (1) the limitation on the degree which the law would hold Wal-Mart responsible for outsourced activities; and (2) the fact that the outsourcing agreement is a bilateral agreement between the outsourcing business and its outsourced partners. This case provides a snippet of the socio-economic violations created by outsourcing. I take the view that these violations are of global proportions. The livelihood and interests of stakeholders in every sector of an industry are affected by these socio-economic violations.

For example, the farmers in the cotton-producing State of Burkina Faso - who are trading cotton at unsustainable prices fixed by the global market - live unsustainable lifestyles.¹ The natural resources sector (i.e. the producers of raw materials such as tin, rice, cotton, sugar and coffee) is at the beginning of the production stage. This sector is badly affected by outsourcing. I find this the case because the externalisation of costs and burdens of outsourcing begins at the tertiary sector (e.g. in retail businesses) and ends at the natural resources sector. The price of resources and labour is reduced to a low price to ensure that the

¹The World Bank's report shows the success of cotton production by participants in a multilateral agreement towards sustainable growth. These participants include the state of Burkina Faso, its farmers and international support groups. However this report also highlights the effect of the international subsidies in the global market's cotton prices which can jeopardise these participants' future successes. See 'Cotton Cultivation in Burkina Faso: A 30 Year Success Story' (Word Bank 2004) 8-9

<http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2004/11/29/000090341_20041129144712/Rendedered/PDF/307600BF0Cotton01see0also0307591.pdf> accessed 14 August 2011

finished products can be supplied at low prices. At the same time, the tertiary sector (which provides the finished products and services) still can maximise profit.

I find that the solution to control and prevent collective wrongdoing is to be found in the three projects which are introduced in section (ii) and for which the discussion aims to develop an underpinning theory. In this section, I compare and contrast the model of outsourcing (as depicted in the *Wal-Mart* case) with the model underlying these three projects. I find that there are three differences between bilateral and multilateral contractual agreements:—

(1) The conventional outsourcing agreement is bilateral which involves an outsourcing partner and an outsourced partner. Both parties enjoy privity of contract whereas these three projects are based on a multilateral agreement where participants must agree to core principles or goals when engaging in joint actions.

(2) A bilateral outsourcing agreement is the exchanging of promises between the two parties. The parties to a multilateral agreement in the three projects agree to covenants.

(3) Both parties to a bilateral outsourcing contract are entitled to mutually agree not to implement any selected terms and conditions. However, every participant to a multilateral agreement for a project is entitled to invoke interpersonal enforcement on the participant who acts contrary to that multilateral agreement.

I reach the following conclusions in this chapter. In section (i). First, the law is limited in its capacity to hold an outsourcing corporation responsible for the socio-economically violating outsourced activities committed by its overseas business partners. Second, corporations can legitimately outsource their activities. Therefore, corporations which can legitimately externalise costs and burdens can also at the same time exclude their

responsibilities to others. Third, bilateral contractual agreements between outsourcing and outsourced partners are not effective legal tools to regulate and control collective wrongdoing in the global world. Fourth, the imposition of responsibility is an ineffective method to hold outsourcing corporations and businesses accountable for collective wrongdoing.

In section (ii). First, multilateral contracts welcome all participants. Therefore, stakeholders can be participants in an outsourcing project and their interests included. This protects the stakeholders' socio-economic and human rights. Second, a multilateral contractual agreement focuses on the agreement of the participants. Third, each participant regulates the terms and conditions of agreement. Therefore, each participant can invoke an interpersonal enforcement on each other. This minimises the chance that all parties will mutually agree not to enforce the agreement. Fourth, holding participants responsible for wrongdoing is not the priority. Rather, the priority is to make participants obliged to act responsibly.

(i) The *Wal-Mart* Case

In the *Wal-Mart* case, the legal issues arose from the outsourcing contracts agreed between Wal-Mart Stores, Inc., a multinational retail company which resides in the United States and its overseas manufacturing partners. The case went through two court hearings, one before the United States District Court for the Central District of California in 2007,² and the other on appeal before the United States Court of Appeals for the Ninth Circuit in 2009.³ The decision by the Court of Appeals affirmed the decision of the Californian court. The courts decided in favour of the defendant, Wal-Mart Stores, Inc.

²2007 US Dist LEXIS 98102. Cited in this chapter as *Wal-Mart* 2007 (n2) (This was seven years after the publication of Kutz's '*Complicity*').

³572 F 3d 677 2009 US APP LEXIS 15279 Lab Cas (CCH) P60 836 15 Wage & Hour Cas 2d (BNA) 7. Cited in this chapter as *Wal-Mart* (2009) (n3) (This was nine years after the publication of Kutz's '*Complicity*').

The facts of the case and selected arguments for discussion presented by the claimants in both 2007 and 2009 are laid out in this analysis. I note that some of the claimants' arguments are different in 2007 and 2009. For example, the claimants' arguments in the areas of tort law and contract law underwent a significant change when the case moved from the Californian court to the Court of Appeals. I analyse this interesting change.

(i)(a) The Facts

There were two groups of claimants in this case – the Californian claimants and the non-Californian claimants. I am interested only in the status of and the arguments put forward by the non-Californian claimants. Therefore, I refer to them as ‘the claimants’ hereafter. These claimants are the employees of the overseas manufacturing partners.⁴

The court summarises the underlying facts of the case thus:-

‘In 1992, [Wal-Mart] developed a code of conduct for its suppliers known as the “Standard for Suppliers” (“the Standards”) and incorporated the Standards into its supply contracts with foreign suppliers. The Standards require foreign suppliers to adhere to all local laws and industry standards. In addition, the Standards require suppliers to comply with various labor and employment conditions, including requirements regarding compensation, hours of labor, forced labor, child labor, discrimination, and freedom of association. To ensure suppliers’ compliance with the Standards, [Wal-Mart] reserves the right to make periodic, unannounced inspections of suppliers’ factories. Each supplier acknowledges that failure to comply with the Standards can result in cancellation of orders and refusal by [Wal-Mart] to do business with the supplier. Suppliers also agree to post a local-language copy of the Standards in their factories for their employees to read’.⁵

⁴The claimants came from countries such as China, Bangladesh, Indonesia, Swaziland and Nicaragua.

⁵Wal-Mart 2007 (n2) 4-5.

The purpose of the Standards was to improve and maintain good working conditions in the overseas manufacturing factory. This case reveals that there was a loophole in the process of implementation at the audit stage. The following facts are taken from the case report:-

'In 2004, only 8% of [Wal-Mart's] audits were unannounced, and workers were often coached on the answers to give inspectors. A former inspector for [Wal-Mart] has claimed that the inspectors are pressured to produce positive reports for factories to avoid disruption of [Wal-Mart's] business. [Wal-Mart] knows that its auditing process can often be the main enforcement mechanism because labor laws are not routinely enforced in many of the foreign countries [where] its suppliers have factories. Additionally, [claimants] believe [Wal-Mart] imposes difficult prices and time requirements on suppliers that forces suppliers to violate the Standards'.⁶

As a result, it was alleged, the claimants suffered socio-economic violations of their working conditions. They suffered, *inter alia*: -

'various poor working conditions including excessive hours or days of work, withheld pay, confiscation of withheld pay, overtime without pay, less than minimum-wage pay, denial of overtime pay, less than required rest periods, lack of safety equipment, denial of maternity benefits, discrimination because of union activities and physical abuse'.⁷

The claimants made five allegations against Wal-Mart. These were allegations of breach of contract, negligence, unjust enrichment, violation of Californian Unfair Competition Law and violation of the Alien Tort statute. I analyse the first two allegations in detail later. First, I briefly deal with other three allegations.

⁶ibid 6.

⁷ibid 7.

(i)(b) The Claimants' Allegations of Unjust Enrichment, Violation of Californian Law and Violation of the Alien Tort Statute

On the allegation of unjust enrichment, the Californian court held that the ‘supposed connection between [Wal-Mart’s] alleged benefit and the expense suffered by [the claimants] is very attenuated’.⁸ Thus, the claimants had not provided sufficient evidence and case authorities to justify a claim for unjust enrichment. The claimants’ allegation failed. On the claim of a violation of Californian unfair competition law, the court held that the California Business and Professional Code Section 17200 did not apply to the claimants. The violating conduct had been outside California, and thus it was outside the court’s jurisdiction.⁹ Therefore, this claim failed.

On the claim of a violation of the Alien Tort statute, the court found that the claimants’ cause of action was not within the remit of the court to take account of violations of international law.¹⁰ Violations of international law which the court could take cognizance of were only ‘a handful of heinous actions that violate definable and universal norms of conduct’.¹¹ The statute did not cover the violations of the claimants’ socio-economic rights. The claimants failed on this issue also.

In this brief analysis of the three failed claims, I highlight two points. First, the individuals’ socio-economic rights were allegedly violated by the outsourcing contracts. I have noted that the Alien Tort statute, which is US transnational law, does not cover these violations of socio-economic rights overseas. It only covers violations of international crimes. Therefore, these violations by the outsourced activities overseas are not governed by this US

⁸ibid 17.

⁹*Norwest Mortgage, Inc. v Superior Court*, 72 Cal. App. 4th 214, 222, 85 Cal. Rptr. 2d 18 (1999), *Wal-Mart* 2007 (n2) 19.

¹⁰*Sosa v Alvarez-Machain*, 542 US 692,724, 124 S Ct 2739, 159 L Ed 2d 718 (2004), *Wal-Mart* 2007 (n2) 21.

¹¹*Tel-Oren v Libyan Arab Republic*, 233 US app DC 384, 726 F 2d 774,781 (DC Cir 1984), *Wal-Mart* 2007 (n2) 21.

transnational law. Second, the enforcement of domestic laws can only apply to the violations committed within the domestic law's jurisdiction. Violations committed outside this jurisdiction cannot fall within the remit of domestic law. Therefore, outsourcing conducted outside a domestic law's jurisdiction also is ungoverned.

I now turn to analyse the remaining two claims. In both of these, the claimants changed their arguments in the appeal in 2009. In this analysis, I propose to note this change in their arguments by comparing those in the appeal with their initial arguments in 2007. I will first analyse the alleged breach of contract by Wal-Mart and then analyse the alleged negligence of Wal-Mart.

(i)(c) The Claim for Breach of Contract against Wal-Mart

In 2007 the claimants argued that they were the intended third-party beneficiaries of the contract.¹² The claimants argued that the parties to the contract owed the third-party beneficiaries a duty to enforce the contract for their benefit. They argued that the failure of Wal-Mart to uphold the agreement in the contract concerning the claimants' treatment by their overseas manufacturer employers gave them a cause of action.¹³ They argued that Wal-Mart ought to have upheld its Standards and that it ought to have stopped dealing with the overseas suppliers who had not complied with those Standards. Thus, they sought to enforce this claim.

The Californian court did not support the claimants' arguments. On the contrary, it took the view that the claimants had incorrectly identified Wal-Mart as the party liable under the contractual promise given to them. Its findings were as follows:-

¹²Wal-Mart 2007 (n2) 9.

¹³ibid.

“A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”... Thus, the third-party beneficiary can enforce such a contract against the party that made the promise (the promisor) and cannot enforce the contract against the party that bargained for the promise (the promisee).... [The Californian court found that] it is the suppliers who have made the promise to comply with the Standards. Therefore, [the claimants’] breach of contract claims would lie against the suppliers (the promisors) and not [Wal-Mart] (the promisee).¹⁴

The promise to uphold the contract for the benefit of the claimants did not flow from Wal-Mart. Rather it flowed from the promisors to that contract. These were the overseas suppliers, which were the claimant’s direct employers. Therefore, the claimants’ allegation on a breach of contract had to be dismissed. The court suggested that the claimants could sue their employers. However these overseas suppliers were situated in countries such as China, Bangladesh, Swaziland, Indonesia and Nicaragua. The legal frameworks in these jurisdictions are not as strong as that of California, which is equipped to protect the claimants’ rights and interests. Therefore, the Californian court’s suggestion of an alternative route for the claimant to seek redress does not seem an efficacious one.

In 2009, the claimants modified their claim for breach of contract before the US Court of Appeals. They still turned to the contractual agreement between Wal-Mart and the overseas suppliers, to which they still asserted that they were third-party beneficiaries. Their focal point now was the fact that Wal-Mart had reserved the ‘Right of Inspection’ of the overseas suppliers’ premises for auditing,¹⁵ on which basis they argued that Wal-Mart had promised to uphold the contract. The US Court of Appeals was not convinced by this argument. It found that the reservation of right to inspect the suppliers did not entail that Wal-

¹⁴ibid 10-11.

¹⁵Wal-Mart 2009 (n3) 9.

Mart had a ‘duty to inspect them’.¹⁶ The argument was not sufficient to show that Wal-Mart had made a promise to the suppliers to inspect their premises and therefore no such promise could flow from Wal-Mart to the claimants to enable them to enforce it. Therefore, the US Court of Appeals upheld the Californian decision that the claim for a breach of contract failed.

(i)(d) The Claim for Negligence against Wal-Mart

The court noted that the claim in negligence was not based on vicarious liability.¹⁷ On the contrary, the claimants argued that it was Wal-Mart’s negligence in its conduct of business that enabled the overseas suppliers (i.e. their employers) to mistreat them intentionally. The court took the view that the claim was not supported by case-law.¹⁸ Furthermore, the claimants had suggested an ‘expansive view of the scope of negligence liability’.¹⁹ The Californian court found that the claimants’ negligence claims ‘go well beyond the recognized limits of liability and cannot be accepted’.²⁰ Therefore, this claim failed.

In 2009, the claimants made several modifications to their allegation of Wal-Mart’s negligence. I note that all their modifications to the arguments failed to convince the US Court of Appeals of Wal-Mart’s negligence. However, I choose to select and analyse an exploration on the modified point that the overseas suppliers (i.e. their employers) and Wal-Mart were joint employers.²¹ The US Court of Appeals made an analysis of whether Wal-Mart had satisfied the definition of an ‘employer’ that is, a person who has ‘the right to

¹⁶ibid.

¹⁷Wal-Mart 2007 (n2) 14.

¹⁸ibid 15.

¹⁹ibid 16.

²⁰ibid.

²¹Wal-Mart 2009 (n3) 11.

control and direct the activities of the person rendering service, or the manner and method in which the work is performed'.²² The definition of 'right of control' is 'a comprehensive and immediate level of 'day-to-day' authority over employment decisions'.²³

The US Court of Appeals decided that 'Wal-Mart [who had] contracted with [its] suppliers [with contractual terms] regarding deadlines, quality of products, materials used, prices, and other common buyer-seller contracts terms.... do not constitute an "immediate level of 'day-to-day'" control over a supplier's employees so as to create an employment relationship between [Wal-Mart] and the suppliers' employees'.²⁴ Therefore, the US Court of Appeals dismissed the argument and affirmed the decision of the Californian court.

(i)(e) *An Evaluation of the Wal-Mart case*

The courts' decisions of 2007 and 2009 suggest the following. Wal-Mart is not contractually responsible for its failure to enforce its outsourcing agreements with its overseas partners. It does not act negligently when conducting its outsourcing agreements. This is because both courts found there was no duty established to link Wal-Mart's responsibility with the outsourced partners' employees. There is no ground to say that it has gained an unjust enrichment by engaging in its outsourcing activities. Finally, it has not violated either the Californian law (i.e. the domestic law) or the Alien Tort Statute (i.e. US transnational law).

The courts have absolved Wal-Mart (and this finding applies to similar corporations, which are also outsourcing) from responsibilities they would have had, had they not

²²*Serv Employees Int'l Union v County of LA*, 225 Cal App 3d 761, 275 Cal. Rpt 508, 513 (Cal. Ct App 1990), *Wal-Mart* 2009 (n3) 11.

²³*Vernon v State*, 116 Cal App 4th 114, 10 Cal Rptr 3d 121, 132 (Cal Ct App 2004), *Wal-Mart* 2009 (n22) 11.

²⁴*Wal-Mart* 2009 (n3) 12.

outsourced these activities. It seems that by way of a bilateral contractual agreement, corporations can legitimately pass on these responsibilities to their outsourced business partners without their responsibilities being necessarily factored into the terms and conditions of these contracts.

An outsourcing agreement is a bilateral agreement between two parties. As mentioned, outsourcing is a business practice which is performed by all sectors in an industry. These outsourced responsibilities cannot be traced back to the original outsourcing body. In addition, these outsourced responsibilities do not need to be enforced by either party to the contract for its implementation. Therefore, a corporation can externalise its responsibilities away from itself by the process of outsourcing. Furthermore, these responsibilities need not be upheld by the business partners, to whom the outsourcing is done, since they are situated in countries where the legal framework does not provide the protection which flows from these responsibilities.

I have demonstrated in my analysis an interesting change in the claimants' arguments for breach of contract and for negligence. I have shown that their modified arguments are grounded on showing that Wal-Mart had 'control' in its contractual agreements with its outsourced partners. Although these modified arguments failed before the US Court of Appeals, they demonstrate that the underlying jurisprudence for the law's imposition of responsibility lies in the agent's (or more precisely the corporation's agent's) exercise of some control over a situation. In Chapter Two, I illustrate that this 'control' is required to ground responsibility on a human agent. In Chapter Three, I provide a detailed discussion of Fischer and Ravizza's²⁵ theory of moral responsibility (where the theory which underpins this control originates), which is grounded on a human agent. In these two chapters, I show the

²⁵John Martin Fischer and Mark Ravizza, S. J., *Responsibility and Control: A Theory of Moral Responsibility*, (Paperback, CUP, 2000). Cited in this chapter as Ficher (n25).

importance of grounding responsibility on a human agent for two kinds of actions. First, those are the actions committed by that human agent. Second, those are the collective actions committed by a collectivity in which the human agent responsible is a member.

Fischer and Ravizza suggest a human agent has the capacity to exercise what they call ‘guidance control’²⁶ over an action. In the *Wal-Mart* case, the modified arguments put forward by the claimants in 2009 were in search of a basis for this ‘guidance control’ exercised by Wal-Mart so as to ground legal responsibility on it. The outcome of the case revealed that the exercise of guidance control needs a human agent. Therefore, Wal-Mart could only be responsible for the violation of socio-economic rights of its outsourced partners’ employees if it was found that Wal-Mart (or its members) had exercised guidance control over these violations.

I find that the outsourcing contracts eliminate the position of the human agent. Once the outsourced activity is passed from one contracting party to another; the corporation which externalised the outsourced activity no longer performed it. Therefore, its members do not exercise guidance control over the outsourced task. No responsibility can be imposed on the outsourcing corporation for the violations of socio-economic rights of the outsourced partners’ employees. In the *Wal-Mart* case, I have highlighted a *lacuna* in the law and its imposition of responsibility on corporations for their collective actions.

Next, I compare bilateral contractual agreements of outsourcing and the multilateral contractual agreements of the three projects. These multilateral contractual agreements are the basis for the development of a theory of collective obligations.

²⁶ibid 34.

(ii) Multilateral Agreements and Voluntary Partners

Here, I introduce the three projects in business in this order - (1) an area of project finance which practices the ‘Equator Principles’,²⁷ (2) the goals shared by UCA Soppexcca²⁸ and (3) the collective actions performed by Global Business Coalition on HIV/AIDS, Tuberculosis and Malaria.²⁹

Each of these three projects has a distinct feature. As the discussion in this thesis progresses, I demonstrate that the distinctive feature of each project aids development of a theory of collective obligations. They are guidelines for the content of the ‘collective’ normative good. I also highlight that there are differences in the bilateral agreements for outsourcing and the multilateral agreements of the three projects.

(ii)(a) The ‘Equator Principles’ of Project Finance

Project finance is defined as ‘a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure’.³⁰ The lenders are the Equator Principles Funding Institutions (EPFIs) which are mainly international banks which fund big projects such as the building of power plants, transportation infrastructure or industries (oil and gas) or mines. In October 2002, nine international banks jointly created the ‘Equator Principles’. These principles provide ‘a banking industry framework for addressing environmental and social risks in project

²⁷‘Equator Principles’ (June 2006) <http://equator-principles.com/resources/equator_principles.pdf> accessed 14 August 2011. Cited in this chapter as Equator Principles (n27).

²⁸‘UCA Soppexcca’ <<http://www.soppexcca.org/en/index.html>> accessed 14 August 2011. Cited in this chapter as Soppexcca (n28).

²⁹‘Global Business Coalition’ <<http://www.gbcimpact.org/>> accessed 14 August 2011

³⁰‘What is Project Finance?’ <<http://equator-principles.com/index.php/about-ep/faqs/42-about/frequently-asked-questions/18>> accessed 14 August 2011

financing that could be applied globally and across all industry sectors'.³¹ These principles are applied to 'Category A' and 'Category B' projects.³²

'Category A' projects are '[p]rojects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented'.³³ 'Category B' projects are '[p]rojects with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures'.³⁴

Participants who are borrowers involved in Categories A or B projects have to abide by the Equator Principles. The key implementing factor is 'Principle 8', involving covenants which borrowers must comply. These covenants are:-

- ‘a) to comply with all relevant host country social and environmental laws, regulations and permits in all material respects;
- b) to comply with the [Action Plan (AP)] (where applicable) during the construction and operation of the project in all material respects;
- c) to provide periodic reports in a format agreed with EPFIs (with the frequency of these reports proportionate to the severity of impacts, or as required by law, but not less than annually), prepared by in-house staff or third party experts, and that i) document compliance with the AP (where applicable), and ii) provide representation of compliance with relevant local, state and host country social and environmental laws, regulations and permits; and
- d) to decommission the facilities, where applicable and appropriate, in accordance with an agreed decommissioning plan.

Where a borrower is not in compliance with its social and environmental covenants, EPFIs will work with the borrower to bring it back into compliance to the extent feasible, and if the borrower fails to re-establish

³¹‘History of the Equator Principles’ <<http://equator-principles.com/index.php/about-ep/faqs/38-about/about/17>> accessed 14 August 2011

³²Equator Principles (n27) 7.

³³ibid.

³⁴ibid.

compliance within an agreed grace period, EPFIs reserve the right to exercise remedies, as they consider appropriate'.³⁵

The EPFIs produced a set of principles according to which all participants (who are borrowers and lenders of funds) are required to do business. Participation in either a Category A or Category B project is the voluntary act of a borrower or lender of funds. Thus, the Equator Principles are adopted through a multilateral agreement by all participants in a project. The bodies (i.e. corporations or States) who do not wish to agree with the 'Equator Principle' are not participants in the project finance team. These bodies lose either the funding required for the project, or business. The model of this project is large scale. Projects of Categories A and B attract participation on a global scale. Examples are the building of wind farms³⁶ and a sugar cane plantation,³⁷ and mining.³⁸

In project finance, the potential violators of socio-economic and environmental rights are the borrowers of funds. These borrowers are the contributors to the project. For example they contribute to the infrastructure, the chemical treatment of the land, sea and air, the displacement of the local habitants, the use of labour and resources. The EPFIs who are the lenders of funds are in a position to regulate these violations. The multilateral agreements

³⁵ibid 5.

³⁶'Renewable News' *Project Finance* (London, 11 April 2011) <[http://www.projectfinancemagazine.com/Article/2805118/Search-Results/April-2011-Renewable-News.html?PartialFields=\(CATEGORY_448_IDS%3a\)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true](http://www.projectfinancemagazine.com/Article/2805118/Search-Results/April-2011-Renewable-News.html?PartialFields=(CATEGORY_448_IDS%3a)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true)> accessed August 2011, 'EnerCap closes on 22MW Scieki Wind Farm' *Project Finance* (London, 03 March 2011) <[http://www.projectfinancemagazine.com/Article/2779963/Search-Results/EnerCap-closes-on-22MW-Scieki-Wind-Farm.html?PartialFields=\(CATEGORY_448_IDS%3a\)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true](http://www.projectfinancemagazine.com/Article/2779963/Search-Results/EnerCap-closes-on-22MW-Scieki-Wind-Farm.html?PartialFields=(CATEGORY_448_IDS%3a)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true)> accessed 14 August 2011

³⁷'Addax Bioenergy wins AFDB Approval' *Project Finance* (London, 27 April 2011) <[http://www.projectfinancemagazine.com/Article/2814629/Search-Results/Addax-Bioenergy-wins-AfDB-approval.html?PartialFields=\(CATEGORY_448_IDS%3a\)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true](http://www.projectfinancemagazine.com/Article/2814629/Search-Results/Addax-Bioenergy-wins-AfDB-approval.html?PartialFields=(CATEGORY_448_IDS%3a)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true)> accessed 14 August 2011

³⁸'African Mining Deal of the Year 2007' *Project Finance* (London, 01 March 2008) <[http://www.projectfinancemagazine.com/Article/2411031/Search-Results/African-Mining-Deal-of-the-Year-2007.html?PartialFields=\(CATEGORY_448_IDS%3a\)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true&PageMove=1](http://www.projectfinancemagazine.com/Article/2411031/Search-Results/African-Mining-Deal-of-the-Year-2007.html?PartialFields=(CATEGORY_448_IDS%3a)&Keywords=equator+principles&OrderType=1&DisplaySearchTerms=true&PageMove=1)> accessed 14 August 2011

provide the EPFIs the interpersonal invocation of obligations imposed upon the lenders of funds. This is the feature which the bilateral agreement created by outsourcing lacks.

In a bilateral outsourcing agreement, both parties can mutually agree not to enforce the terms and conditions preserving the socio-economic and human right of stakeholders. In a multilateral agreement based on the equator principle, the EPFIs and the participating stakeholders invoke the interests of stakeholders and therefore these interests are preserved.

(ii)(b) UCA Soppexcca

Soppexcca³⁹ is a movement in Nicaragua composed of 15 cooperatives. Cooperatives are ‘an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise’.⁴⁰ Soppexcca is a collectivity of coffee planters and producers. This movement is noted not only to produce coffee, but it has also produced ‘coffee inspectors, baristas, counsellors for the improvement of quality, environmentalists and groups of young planters’.⁴¹

The cooperatives share eight goals for their community. These are to:–

- ‘(1) eradicate extreme poverty and hunger,
- (2) achieve universal primary education,
- (3) promote gender equality and empower women,
- (4) reduce child mortality,
- (5) improve maternal health,

³⁹Soppexcca (n28).

⁴⁰HM Treasury, ‘Review of the GB Cooperative and Credit Union Legislation: A Consultation’ (Crown Copyright 2007) 6 <<http://www.uk.coop/consultation/reponsonse/review-gb-cooperative-and-credit-union-legislation-consultation>> accessed 14 August 2011

⁴¹Soppexcca (n28).

- (6) combat HIV/AIDS, malaria and other diseases,
- (7) ensure environmental sustainability, and
- (8) develop a global partnership for development⁴²

Soppexcca also exports its coffee to a number of overseas trading partners.⁴³ Their trading partners are mostly socially responsible organisations or coffee companies. Thus, these collectives of coffee planters and producers have a sociably responsible global appeal. The model of this project is small scale. The cooperatives are not corporations. They are micro companies.⁴⁴ The partners of Soppexcca share collective goals. These goals are the multilateral agreements of Soppexcca which empower these cooperatives to engage in collective bargaining with the global business. Although Soppexcca might lose out on business agreements with trading bodies who may dictate the prices of coffee; there is still a niche in the global market for socially responsibly produced products. This niche is created by business across those sectors in an industry which share collective goals with similar values.

The distinct feature of this project is the collective bargaining of cooperatives. This feature demonstrates that business bodies which are conducting socially responsible methods of production or service cannot act alone sustainably. However, businesses which work together in a shared collective goal can sustain their business. In addition, the cooperatives are in the primary sector which, as mentioned earlier, is the worst affected by outsourcing. In a globalised world, the model of collective bargaining should be prioritised and a legal theory should be created to aid this model. Collective bargaining is not a feature of bilateral agreement for outsourcing. In a bilateral outsourcing agreement, the collective bargaining of

⁴²‘Millennium Development Goals’ <http://www.soppexcca.org/en/millenium_goals.html> accessed 14 August 2011

⁴³‘Soppexcca’s Trading Partner’ <http://www.soppexcca.org/en/trading_partner.html> accessed 14 August 2011

⁴⁴Paul L. Davies, *Principles of Modern Company Law* (Sweet & Maxwell, 18th Ed) 19.

stakeholders is excluded as they are not participants in the contract. Therefore, their interests cannot be preserved.

(ii)(c) Global Business Coalition on HIV/AIDS, Tuberculosis and Malaria

The Global Business Coalition is a group of individual corporations in a collective action to fight against HIV, tuberculosis and malaria. Corporate participants come from a range of multidisciplinary backgrounds including agriculture, automotive, oil and gas industries, media and entertainment, metals and mining to name a few.

The purpose of this coalition is to turn corporate philanthropic actions from unilateral to multilateral acts. Thus, corporations work together to fight diseases. Participation ranges from simply showing solidarity by the payment of a membership fee⁴⁵ to the execution of an impact initiative.⁴⁶ There is a competitive edge amongst these participants. Participants are encouraged to put as much effort as possible into their commitment to collective action. Committed participants win recognition for their efforts.⁴⁷

The collective actions are in the form of impact initiatives. The execution of these initiatives comes in stages. There are ten stages in total:—

(1) **'Idea development and incubation:** Companies, partners or Coalition staff propose an Impact Initiative that meets three key criteria:

- a. Achieves one of GBC's five strategic priorities
 - i. Workplace policies
 - ii. Supply chain

⁴⁵‘Engineering Higher Impact: Q&A with GBC Executive Director John Tedstrom’ <http://www.gbcimpact.org/itcs_node/0/0/article/908> accessed 14 August 2011

⁴⁶‘Collective Action, Cost-Sharing, Bigger Results: GBC Impact Initiatives’ <<http://www.gbcimpact.org/about-gbc/impact-initiatives>> accessed 14 August 2011

⁴⁷See (n45).

- iii. Media and public awareness
 - iv. Sustainable funding sources
 - v. Health-care systems
 - b. Has the potential for major impact through collective action.
 - c. Will be sustainable and enduring.
- (2) **Exploration:** Coalition staff assess[es] the needs, opportunities and potential partners associated with the proposed initiative.
- (3) **Assembling an action team:** Partners are assembled and work with the Coalition to define the scope of their participation.
- (4) **Initial planning meeting:** This meeting brings together key stakeholders, including leading member companies, government representatives and partners to identify roles and responsibilities.
- (5) **Building out the action team:** Following the initial planning meeting, action team stakeholders identify unmet needs and seek out select businesses and partners to fill critical financing and execution gaps.
- (6) **Developing a business plan:** The action team maps the final plan for the initiative.
- (7) **Implementation:** The final team of businesses and partners work collectively to bring the plan to fruition.
- (8) **Monitoring and evaluation:** Rigorous assessments track the initiative's progress and help stakeholders to identify additional needs and opportunities.
- (9) **Sustainability:** The initiative is ensured ongoing success through sustainable sources of funding and resources.
- (10) **Knowledge development and communication:** Throughout the life of the Impact Initiative, the Coalition and its partners will collect and communicate actionable knowledge and insights that can improve the effectiveness of the global fight. Messages about progress and impact will also be communicated to raise awareness of the role of business and the importance of partnerships'.⁴⁸

These impact initiatives have encouraged all participants to share knowledge and solve problems jointly for future improvements in the initiatives.⁴⁹ Corporations also have opportunities to improve their own internal corporate strategies and corporate structures. Thus, the impact initiatives have external influence in fighting disease and also internal influence which can change a corporation's culture.

⁴⁸See (n46).

⁴⁹'Collaboration, Coordination and Collective action that Will End Disease Faster'
<http://www.gbcimpact.org/about-gbc> accessed 14 August 2011

The feature of this model is collective actions and communication between competing participants. It is increasingly difficult for corporations in the globalised world to act alone. Business links are increasingly multidisciplinary. The coalition believes that corporations who are members of an organisation can prosper sustainably.

The stakeholders' interests are thus prioritised. However, these philanthropic corporations only have the resources to fund the impact initiatives. They lack the knowledge to execute the initiatives. Thus, the role of the stakeholders is crucial to disseminate knowledge to the philanthropic corporations. The competitive edge of a corporation has a positive use. It is the general perception that competitive corporations compete with each other in doing bad deeds. The Global Business Coalition proves that these corporations can also compete with each other to do good deeds. In contrast, in the bilateral outsourcing agreements in the *Wal-Mart* case there was an imbalance of bargaining power between the parties. Thus the competitive edge in such cases stems from the stronger contractual partner who may coerce or manipulate the weaker partner to exploit labour and resources.

(iii) A Conclusion of Chapter One

I conclude with five points. First, the law is limited in the capacity to hold an outsourcing corporation responsible for socio-economic violations committed by its outsourced overseas business partners. Second, the bilateral outsourcing agreement is not an effective legal tool to regulate or control the commission of collective wrongdoing across the globalised world. Third, the bilateral agreement ensures that corporations and businesses can legitimately externalise costs and burdens to others and at the same time to exclude their responsibilities to others. Fourth, the bilateral agreement does not necessarily influence the behaviour of the partners. As shown in the *Wal-Mart* case, the incorporation of the standards

seemed to ensure that both parties would refrain from engaging in the exploitation of labour and resources. However, in a bilateral agreement the stronger party can choose whether to enforce the terms and conditions. The stronger partner's business interests are found to override the terms agreed in the contractual agreements. Fifth, multilateral contractual agreements give stakeholders the opportunity to participate in outsourcing projects in which they can utilise collective bargaining and also invoke interpersonal enforcement of their preserved interests against other participating parties.

Thus, I have highlighted here that the imposition of responsibility on businesses contributing to collective wrongdoing is not an effective method to control and prevent these acts. However, it is conventional to hold businesses accountable for their wrongdoing by imposing responsibility on them. In Chapters Two and Three, I show that the imposition of responsibility on a collectivity in the legal and social contexts adheres to the same guidance control principle in moral theory.

CHAPTER TWO: THE GUIDANCE CONTROL PRINCIPLE UNDERPINS THE IMPOSITION OF RESPONSIBILITY IN LEGAL AND SOCIAL CONTEXTS

In this chapter, I attempt to prove that the imposition of responsibility on corporations based on the guidance control principle is inadequate. For this purpose, the problems of outsourcing are set to one side. There are two parts. In Part A, I explore two areas – (1) the imposition of responsibility in law on an individual for his or her wrongdoing and (2) the imposition of responsibility in law on a corporation for its member's wrongdoing. In Part B, I explore two areas – (1) the imposition of responsibility in a social context (i.e. Strawson's account of social interaction)¹ on an individual for his or her wrongdoing and (2) the imposition of responsibility in a social context on a corporation for its member's wrongdoing.

In both parts, I demonstrate that the imposition of responsibility follows the same principle – the guidance control principle. As mentioned in the introduction, this principle originates from Fischer and Ravizza's theory of moral responsibility.² Fischer and Ravizza suggest that responsibility is grounded on the human agent. I therefore interpret the imposition of responsibility as meaning that it requires two elements. It requires the human agent's – (1) exercise of choice and (2) engagement in practical reason. I attempt to extract these two elements from the elements underpinning the imposition of responsibility in law and also in a social context. The imposition of responsibility on the two entities – the human agent and the corporation – is the focal point of this chapter.

In the introduction, Kutz's theory of complicity is indicated not to accord with the guidance control principle. Kutz suggests that a human agent's complicit behaviour is this

¹ PF Strawson, *Freedom and Resentment and Other Essays* (Reprint, Routledge, 2008) 7. Cited in this chapter as Strawson (n1).

² John Martin Fischer and Mark Ravizza, S. J., *Responsibility and Control: A Theory of Moral Responsibility*, (Paperback, CUP, 2000) 241. Cited in this chapter as Fischer (n2).

agent's participation in collective wrongdoing.³ He also suggests that this participation does not need to be causal; a teleological link suffices.⁴ In other words, the participant's contributions to the collective wrongdoing do not need to be intended or chosen. Kutz suggests that the content of participatory intentions is the overlapping of intentions.⁵ Thus, these human agents do not need to engage in practical reason to act on the collective wrongdoing. Kutz suggests that the human agent's participatory intention is the key feature needed to evaluate accountability.⁶ However, I can note that this brief comparison between Kutz's method of complicit accountability and the Fischer and Ravizza's imposition of responsibility demonstrates that there is a contrast. Kutz's suggestions do not meet the criteria for the method to impose responsibility. In the later part of this thesis, I depart from Fischer and Ravizza's method of imposing responsibility and proceed to consider the merits of Kutz's method of complicit accountability.

I conclude this chapter as follows. First, I find that the imposition of responsibility on an individual and a corporation adheres to the guidance control principle. Second, responsibility must be grounded in a human agent. Thus, I find that the human agent (and not a plural entity like a corporation or a social group) exercises guidance control over either an individual or a corporate action. Third, I find that responsibility can be shared only if every human agent has exercised guidance control over the activity. Responsibility cannot be imposed on a human agent who has not exhibited the two components of guidance control. A corporation can circumvent responsibility by externalising one of the two elements of guidance control of an activity or the whole activity. Fourth, I find that the imposition of responsibility on a corporation in a social context results in the expulsion of the member who

³Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (CUP, 2000) 255. Cited in this chapter as Kutz (n3).

⁴Kutz (n3) 256.

⁵Kutz (n3) 94.

⁶See (n3).

is socially responsible. A corporation externalises the socially responsible member (or any of its members who is perceived by the public to be responsible) to exclude responsibility.

PART A

THE LAW'S IMPOSITION OF RESPONSIBILITY

I take the view that responsibility and liability in law are two different things. An individual or a corporation can be liable for their actions when there is a legal mechanism to impose liability on them regardless of fault. Strict liability is an example of the imposition of liability. The discussion in this thesis does not expand on strict liability for two reasons. First, the enforcement of strict liability cannot transcend national boundaries. Second, I find that this legal doctrine does not aid with the development of a theory of collective obligations.

Thus, I conduct the study of responsibility in law in Part A. The issue of whether there might or might not be a legal mechanism to impose responsibility on either the individual or corporation is not a concern. The purpose of my discussion here is to illustrate that the imposition of responsibility in law adheres to the guidance control principle.

(1) THE LAW'S IMPOSITION OF RESPONSIBILITY ON A HUMAN AGENT

I explore two areas of law to show that the human agent's exercise of guidance control is the basis for the imposition of legal responsibility. These areas are – criminal responsibility for theft and negligence in tort. For each area of law, the underlying principles are firstly laid down and then an analysis shows how these legal tests ensure that the human

agent who has acted must have both exercised choice and engaged with practical reasoning to be responsible.

(i) A Human Agent's Criminal Responsibility for Theft

Here, I explore the criminal responsibility of a human agent who is acting alone. Consider this example – Adam takes Brenda's umbrella for his own use. This results in Brenda accusing him of theft. This example is designed to be vague. The different scenarios for it demonstrate the importance of establishing the two elements of the human agent's exercise of choice and the engagement in practical reason to prove that there is the exercise of 'guidance control' over that action. In this case, the question for this analysis is whether Adam has exercised guidance control over his action in using Brenda's umbrella, so as to uphold the finding of theft.

The Theft Act 1968 governs theft. S1(1) describes theft as follows:-

'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly'.

(i)(a) The Legal Elements of Theft

There are two parts for the legal elements of theft – the *actus reus* and the *mens rea*. The establishment of an *actus reus* justifies in law the finding of the commission of a criminal act. For theft, the elements of an *actus reus* are (1) the appropriation of (2) property which (3) belongs to another. The establishment of a *mens rea* justifies in law a finding of a criminal intent. The elements of *mens rea* for theft are (1) dishonesty with the (2) intention of permanently depriving the other of the property. The following scenarios for Adam's taking and using of Brenda's umbrella illustrate the issues:-

Scenario One. Adam picks up Brenda's umbrella to shelter himself from the rain when he goes out to get a sandwich on his lunch break. He intends to place it back where he took it.

Scenario Two. This is similar to scenario one. However, Adam then disposes of the umbrella by giving it to an old lady to keep her from the rain. He returns from his lunch break without Brenda's umbrella.

Scenario Three. Adam initially took Brenda's umbrella by mistake. Having realised his mistake, however, he chooses not to return it and keeps it.

Scenario Four. Brenda's umbrella is not just any ordinary umbrella. It is a token autographed by the tennis star, Maria Sharapova. Adam picks up this umbrella with the intention to use it for gain by selling it.

In all four of these scenarios, the elements of the *actus reus* are present. S4(1) of the Act provides the definition of property, stating that it 'includes money and all other property, real or personal, including things in action and other intangible property'. Suppose Brenda has purchased this umbrella, it is her personal property. S5(1) of the Act provides:-

'Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary interest (not being an equitable interest arising only from an agreement to transfer or grant an interest').

When Adam picks up her umbrella, he picks up a property belonging to Brenda. In addition, Adam has appropriated this umbrella. S3(1) of the Act defines an appropriation in the following words:-

'Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner'.

The interpretation of s3(1) is made clear in *R v Gomez*⁷ where the term ‘appropriation’ is taken by Lord Brown-Wilkinson ‘in isolation as being an objective description of the act done irrespective of the mental state of either the owner or the accused’.⁸ Therefore, the element of appropriation of the property is not dependent upon the mental state of the appropriator. It is rather dependent upon whether the owner of the property would have consented to or authorised the appropriator’s behaviour. In the four scenarios, Adam has appropriated Brenda’s umbrella if his conduct ‘is, or would be, inconsistent with the owner’s rights if [the owner] had not consented to or authorized it’.⁹

Therefore, ‘appropriation’ constitutes something which is more than just a person’s assertion of his or her right over the property. It is the combination of the assertion of a person’s right over the property belonging to another (i.e. s3(1) of the Act) without that owner’s consent or authorisation (i.e. the principle in *Gomez*).

Suppose Brenda in all four scenarios had initially consented to Adam’s assertion of rights over her umbrella. In other words, Brenda allows Adam to use her umbrella for a while (for example in scenario four, Brenda allows Adam to examine her autographed token). This initial consent is withdrawn when Brenda finds that Adam has disposed of her umbrella in the following ways - to an old lady (scenario two); or he decided to keep the umbrella indefinitely (scenario three); or he intended to sell the umbrella for cash (scenario four).

‘Appropriation’ is found in scenarios two, three and four where Brenda had not authorised or consented to Adam’s later treatment of her property. In addition, Adam’s behaviour in scenarios three and four had developed from a neutral assertion of rights over

⁷[1993] AC 442.

⁸[1993] 1 All ER 39.

⁹David Ormerod *et al*, *Smith’s Law of Theft* (9th Ed, OUP, 2007) 52. Cited as Ormerod *et al* (n9).

Brenda's property to a behaviour which warrants a withdrawal of Brenda's consent because it involves dishonesty. Ormerod and Williams suggest that 'a secret dishonest intention may... turn an authorized act into theft'.¹⁰ The owner's authorisation of another's handling of his or her property depends on the handler's behaviour. There is a relation between the element of appropriation and the element of dishonesty to which this discussion leads when analysing the elements of *mens rea*.

The elements of *mens rea* are 'dishonesty' and the 'intention to permanently deprive the owner of the property'. 'Dishonesty' is not explained in s2 of the Act. Rather, s2 describes the instances which do not constitute dishonesty. These instances are:-

- ‘(1) A person’s appropriation of property belonging to another is not to be regarded as dishonest –
 - (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
 - (b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or
 - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
- (2) A person’s appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property’.

R v Ghosh establishes the test for dishonesty.¹¹ It is a two-stage test where both questions must be answered in the affirmative for the accused to be dishonest:-

¹⁰ibid.

¹¹[1982] QB 1053.

‘(i) Was what was done dishonest according to the ordinary standards of reasonable and honest people? If no, D is not guilty. If yes –

(ii) Did the defendant realize that reasonable and honest people regard what he did as dishonest. If yes, he is guilty; if no, he is not’.¹²

Finally, the intention of permanently depriving the other of the property is found in s6(1) of the Act, which reads:-

‘A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other’s rights, and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstance making it equivalent to an outright taking or disposal’.

I discuss the *mens rea* aspects in relation to each scenario. I consider in scenario one that Adam falls within s2(1)(b) if he thinks that Brenda would have consented had she known the circumstances of his appropriation. Under the scrutiny of the *Ghosh* test, Adam’s behaviour is not dishonest on the first limb. The ordinary reasonable person does not regard his action as dishonest. In addition, Adam intends to return Brenda’s umbrella after he has used it. The manner and purpose of how Adam uses the umbrella (i.e. to shield himself from the rain and to return it after his lunch break) does not fall within the definition of s6 of the Act. Although Adam has satisfied the *actus reus* elements for theft, he does not have the *mens rea* elements to justify the conclusion that he has committed a theft. Brenda’s accusation against Adam of theft is not successful.

¹²This was put succinctly by Ormerod *et al* (n9) 110.

Prior to Adam's act of disposing Brenda's umbrella to the old lady in scenario two, he may be regarded as falling within s2(1)(b). Brenda might have consented to him appropriating her umbrella to shield him from the rain. However, when Adam decides to dispose of her umbrella to the old lady, the issue that arises here is whether Adam can fall within s2(1)(a). I find that Adam 'is not dishonest if he believes, whether reasonably or not, that he has the legal right to do the act which is alleged to constitute an appropriation of the property of another'.¹³ The legal right to deprive another of the property depends on how Adam appropriates Brenda's property.

Brenda might or might not have consented to Adam's behaviour of disposing her property. If she had not consented to Adam's behaviour, then the next issue is to scrutinise Adam's behaviour under the *Ghosh* test. The answer to the first limb of the test appears to be in the affirmative. In the eyes of the ordinary reasonable and honest people, Adam's had disposed property which did not belong to him. Therefore, his behaviour is dishonest. Thus, Brenda's accusation against Adam of theft is successful.

Scenario three was described above as the case where Adam initially takes Brenda's umbrella by mistake, and then decides to keep it after he has realised his mistake. This turns his neutral appropriation of the property into one which might constitute theft.¹⁴ For his *mens rea* of dishonesty, Adam may fall within s2(1)(c) of the Act. However, the conclusion might be different in another case where Adam (supposedly) had mistakenly picked up Brenda's umbrella from the coat corner of a restaurant after a work lunch with colleagues, and then realised his mistake when he got home. If he believes that the owner of the property 'cannot be discovered by taking reasonable steps',¹⁵ he may not be dishonest.

¹³Ormerod *et al* (n9) 104.

¹⁴See (n9).

¹⁵Theft Act 1968 Ch. 60, s2(1)(c).

However, if he knew that the umbrella belonged to Brenda and omitted to return it to her, the issue of whether he is dishonest lies within the definition of s2(1)(b). Adam must show he believes Brenda would have consented to his behaviour had she known of the circumstances. His behaviour therefore brings up the issue of whether he has the intention to permanently deprive Brenda of the umbrella. If Adam intends to deprive Brenda of her umbrella for a day or two during the heavy rain, it may be argued that Adam does not intend to permanently deprive Brenda of her property. In this circumstance, perhaps, Brenda may consent to this. Her consent turns Adam's appropriation of her umbrella into a course of behaviour which she has authorised. Therefore, Adam has not committed any theft.

However, if Adam intends to keep Brenda's umbrella forever, this amounts to the intention to permanently deprive Brenda of her property. Brenda cannot objectively be believed to consent to this behaviour. Thus, Adam's behaviour will not fall within the definition of s2(1)(b). The *Ghosh* test for dishonesty results in answers to both limbs in the affirmative. First, ordinary reasonable and honest people would view his behaviour as dishonest. Second, Adam must realise that ordinary reasonable and honest people regard his behaviour as dishonest. Therefore, in this scenario where Adam knows the umbrella is Brenda's and chooses to keep it indefinitely, he has committed a theft.

In scenario four, Adam's behaviour does not fall within the definition of s2 of the Act. Under *Ghosh*, both limbs can be answered in the affirmative. First, ordinary reasonable and honest people would regard his behaviour as dishonest. Second, he realises that the ordinary reasonable and honest people regard his behaviour as dishonest. Therefore, Adam's act of taking Brenda's umbrella, which is a valuable token, autographed by Maria Sharapova, is dishonest. The final element to establish his theft is to prove his intention to permanently deprive Brenda of the item. If Adam intends to dispose (i.e. to sell) the autographed umbrella

regardless of Brenda's rights, he has the intention to permanently deprive Brenda of her property. In this case, Adam commits a theft. If Adam intends to pawn the autographed umbrella, but he is unable to retrieve it, he falls within the definition of s6(2) of the Act, which states:-

'Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he *may not* be able to perform, this (if done for purpose of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights'.

In this case, Adam commits theft. The next discussion in subsection (i)(b) shows that the effect of the legal tests which determine the imposition of responsibility on Adam is that if he is to be held responsible he must have guidance control over his actions.

(i)(b) Drawing the Two Components for the Guidance Control Principle from the Elements of Theft

As mentioned above, the two components establishing that a human agent has exercised guidance control over the action are the – (1) exercise of choice and (2) engagement in practical reason. Here, I show that these two elements are required by the legal tests which determine whether Adam has committed theft of Brenda's umbrella. The *actus reus* elements for theft establish the individual's exercise of choice over the action. In the example where Adam picks up Brenda's umbrella, the analysis has shown that it is Adam's choice to pick up an umbrella.

It is Adam's decision in scenario one to use the umbrella to shelter from the rain. Adam chose to dispose of that umbrella to the old lady in scenario two. Adam's choice of picking up Brenda's umbrella was a mistake in scenario three. However, his later decision to keep it was an exercise of choice, which fulfils the law's condition of an appropriation.¹⁶ Adam's decision to steal Brenda's autographed umbrella in scenario four for his personal gain was also an exercise of choice.

In these legal contexts, Adam's decisions on the exercise of choice are effectively the appropriation of property belonging to another. The first element for guidance control of his action, as required for the establishment of criminal responsibility, is present in all but one of the scenarios.¹⁷ The legal test measures 'appropriation' as treating property belonging to another in a way which the owner will not consent to. Thus, Brenda will have consented to Adam's choice when he borrowed her umbrella in scenario one. In scenarios two, three and four, Adam's choice to treat Brenda's umbrella is not what she would have consented to.

Here, I demonstrate that the element of engagement in practical reason is shown in the legal tests for the *mens rea* for theft. S2(1) of the Act describes the practical reason of a person which does not legally constitute dishonesty. By s2(1)(a), if an individual has reason to believe that they have 'in law the right to deprive the other of the property', then the act is not dishonest. Adam's behaviour in scenario two may fall within this section. However, I take the view that his behaviour cannot withstand the *Ghosh test* of dishonesty. Therefore, Adam's use of practical reasoning may be considered as a dishonest one. By s2(1)(b), if an individual has reason to believe that they 'would have the other's consent' for his behaviour, then the act is not dishonest. Adam's behaviour in scenario one may fall within this section. Finally in s2(1)(c), if the individual has reason to believe that 'the person to whom the

¹⁶See (n9).

¹⁷See pages 42-3 above.

property belongs cannot be discovered by taking reasonable steps'; then the act is not dishonest. Adam's behaviour in scenario three may fall within this section.

The two limbs in the *Ghosh* test are to prove that an individual's action was dishonest because they would have engaged in their practical reason to behave dishonestly. When assessing the alleged wrongdoer's actions, the first limb ascertains what constitutes a person's objective practical reason for dishonest behaviour. An affirmative answer to this limb shows that an alleged wrongdoer's behaviour was objectively dishonest.

The second limb ascertains whether the wrongdoer has engaged with their practical reasoning by questioning whether they have realised that their behaviour was dishonest. An affirmative answer to this limb shows that the alleged wrongdoer has engaged with their practical reasoning to behave dishonestly. An affirmative answer to both limbs in the *Ghosh* test shows that an alleged wrongdoer certainly has acted dishonestly with reason.

Furthermore, s6 of the Act governing the *mens rea* in the intention to permanently deprive the other of the property establishes that there must be practical reason behind the individual's intention to deprive the owner of the property. Adam had the reasoned intention to deprive Brenda of her property for a short while in scenario one. This reason does not constitute a *mens rea* satisfying s6 of the Act. In the other three scenarios, Adam had the reasoned intention to permanently deprive Brenda of her property. With the combination of being dishonest and the intention to permanently deprive Brenda of her umbrella, the legal tests for *men rea* of theft show that Adam has engaged with his practical reasoning to commit theft.

(i)(c) A Summary of Discussions

I have highlighted two points on theft by a human agent. First, the legal tests in the *actus reus* and the *mens rea* prove that the human agent has undertaken the choice to take action and also has engaged with practical reason to commit it. Since these legal tests established both of the components for guidance control, I can argue that the imposition of responsibility in theft is therefore based on the guidance control principle. Second, a human agent is able to exercise guidance control over an action.

In Chapter One, I have demonstrated that in the *Wal-Mart* case the law failed to impose responsibility on Wal-Mart for its violations of socio-economic rights of its partners' employees. This is because there is no evidence to show that Wal-Mart exercised guidance control over the outsourced activities. Wal-Mart's outsourcing contracts also produced the human agent missing link. The human agent is the important establishment for responsibility in law. This is because the law can make a human agent responsible for actions committed by that human agent. Next, I explore the importance of actions committed by a human further on the tort of negligence.

(ii) A Human Agent's Careless/Reckless Act in Negligence

I give two examples in this section. The first example shows that a standard of care by a test of reasonableness is used to measure an individual's careless act. The second example shows that for some specific scenarios, like that in the case of negligent driving, a standard of care by a set objective (i.e. high) standard is used to measure an individual's careless act. The purpose of these two examples is to demonstrate that the moderate and high standards of care

do the same job in determining whether a human agent had exercised their practical reasoning in the way which falls below that standard.

Consider example one:–

Sally's hobby is power-kiting. This is a dangerous extreme sport. One day and out-of-the-blue, Sally decides to go power-kiting in a park. Although Sally has experience in this sport, she has nevertheless lost control of the power-kite. It crashes into a child, John who is a stranger to Sally and is most unlucky. The force of the crash cuts John across forehead and causes him to bleed heavily.

Consider example two:–

Sam is driving a van. He makes an error of judgment, which causes the van to collide with another motor vehicle. Carla, who is in the other vehicle, suffers a whiplash.

(ii)(a) The Elements of the Tort of Negligence

I analyse the two examples one after the other. Sally injured John in example one. The assessment is to ascertain whether Sally is responsible for causing injury to John. The incident was an accident. Thus, Sally can argue that she had not intended to injure John. However, Sally's action may give rise to a claim in negligence. Four elements have to be established for a successful argument in negligence.

The first element requires that John must suffer injury, which constitutes an actionable damage. The definition of actionable damage is the violation of an individual's rights in the form of property damage or personal injury.¹⁸ John bleeds heavily from the cut across his forehead. This can be categorised as personal injury. The first element is present.

¹⁸*Brunsdon v Humphery* (1884) 14 QBD 141.

The second element is a duty of care owed by Sally to John. Since Sally and John had not known one another prior to the accident, they did not have a pre-tort relationship. Thus, Sally did not owe John an automatic duty of care (e.g. as in a parent-child relationship). However, it is possible that individuals without a pre-tort relationship can owe a duty of care to others if their situation satisfies the *Caparo* test.¹⁹ The *Caparo* test establishes that there is a duty of care when three elements are present – (1) when the harm inflicted on the victim by the tortfeasor is foreseeable²⁰ (2) when there is sufficient proximity between the victim and the tortfeasor²¹ and (3) when it is deemed fair, just and reasonable to impose a duty of care on the tortfeasor.²²

Sally's situation demonstrates that her action with engaging in an extreme sport in the park does create a highly foreseeable probability that her behaviour can cause harm to others. Thus, the harm suffered by John is foreseeable and the first *Caparo* test is satisfied. There is sufficient proximity between Sally and John. Both individuals were present in the park. Thus, both individuals are proximate in space and time. The second *Caparo* test is satisfied. Finally, it can be strongly deemed that it is fair, just and reasonable to impose a duty of care on Sally. This imposition of duty does not go in contradiction to public policy interests. Therefore, the third *Caparo* test is satisfied. In conclusion, the second legal requirement is present.

The third element is to prove a breach of the standard of care by Sally. The test of reasonableness is the measurement, which determines whether Sally has either upheld or breached this standard of care.²³ There are four factors, which are guides to ascertain whether

¹⁹*Caparo Industries Plc v Dickman* [1990] 2 AC 605.

²⁰*Caparo* (n19) 633.

²¹*ibid.*

²²*Caparo* (n19) 643. In addition, the decision on whether it is fair, just and reasonable to impose a duty of care on a tortfeasor is also based on the 'floodgates' arguments. See also WHV Rogers, *Winfield and Jolowicz on Tort* (18th Ed, Sweet and Maxwell, 2010) 174.

²³*Blyth v Birmingham Waterworks Co.* (1856) 11 Ex 781.

Sally has breached her standard. These factors are (1) magnitude of the risk (2) gravity of the harm (3) cost of the precaution and (4) the utility of the tortfeasor's conduct.

Sally engages in a dangerous extreme sport and chooses to practice in a park. The magnitude of the risk of harm to which any potential victim is exposed by Sally is high. If the likelihood of harm which an activity can cause is reasonably high, then the reasonable person in Sally's position may be taken to decide either to take precautions to minimise the risk²⁴ or not to engage in the activity at all. The gravity of the harm can be severe (i.e. the risk of serious injury or death) to the individuals who power kites and also to others in the vicinity.²⁵ A reasonable person in Sally's position may consider the possible serious injury which may be caused to oneself and also to others.²⁶ Thus, a reasonable person may decide to take the precaution of not engaging in this sport in a park.

Thus the cost of the precaution by a reasonable person in Sally's position in making the decision not to power-kite in a park does not outweigh the possibility of the potential harm this activity may cause.²⁷ The risk of the serious injury caused by this activity outweighs Sally's attempt to minimise this risk. Even if Sally brings up the argument that she is an experienced power-kiter, her abilities to minimise the risk of injury cannot satisfy this element of the reasonable person test. Finally, the utility of the tortfeasor's conduct is in the advancement of a personal interest. Sally's hobby does not have any social importance.²⁸ Her objective is personal in nature, it does not concern any benefit to society. In conclusion, the test of reasonableness shows that Sally had acted in a way in which a reasonable person

²⁴*Bolton v Stone* [1950] AC 850.

²⁵'Power kites banned from beaches' *BBC News* (London, 17 April 2006)

<<http://news.bbc.co.uk/1/hi/england/lancashire/4916440.stm>> accessed 14 August 2011, 'Inquest into Kite Stunt Death' *BBC News* (London 21 May 2003) <<http://news.bbc.co.uk/1/hi/england/suffolk/3045789.stm>> accessed 14 August 2011, 'Kite Surfer Dragged Along the Beach' *Hayling Islander* (Hayling Island 04 June 2009) <http://www.haylingtoday.co.uk/news/local/kitesurfer_dragged_along_beach_1_1349670> accessed 14 August 2011

²⁶*Paris v Stepney Borough Council* [1951] AC 367.

²⁷*Latimer v AEC* [1953] AC 643.

²⁸Contrast with *Watt v Hertfordshire County Council* [1954] 1 WLR 835.

would not have chosen to act. Therefore, Sally falls below the standard of care and has breached her duty to John.

The fourth element is to establish the factual and legal causal links between Sally's act and John's injury. The factual link is established by asking the question – 'but for Sally's act, is there at least a 51% probability that John would not have suffered his injury?'²⁹ In this hypothetical scenario, it can be correct to answer in the affirmative. One half of the causal link has been established. The legal causation question is framed thus – 'is John's injury the kind of harm which is reasonably foreseeable?'^³⁰ A hypothesised assessment may conclude that a child who is struck by a power kite with force may sustain injury from a bruise to a cut or maybe a fracture of the skull. Therefore, John's injury which is a cut across the forehead is the reasonably foreseeable kind of harm sustained by Sally's act. The full causal links have been established.

All four elements of negligence had been established. I can conclude that Sally owed a duty of care to John which she breached by acting in a way which has fallen below the required standard of care. The injury sustained by John is causally linked to Sally's action in fact and in law. Therefore, Sally is responsible for her negligent action.

Sam - in example two - injured Carla, who suffers a whiplash because Sam's van crashed into hers. The four elements need to be established to ascertain whether Sam is responsible for Carla's injury in negligence. The first element required Carla to suffer actionable damage. A whiplash is personal injury and so this element is satisfied. The second element concerns the duty of care. It is a legal principle that every driver owes a duty of care to the passenger(s) in the vehicle and also to other road users.³¹ Sam was the driver of a van

²⁹*Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 AB 428.

³⁰*The Wagon Mound (No. 1)* [1996] AC 388.

³¹*Nettleship v Weston* [1971] 2 QB 691.

and so he owed a duty to Carla. The third element concerns a breach of the standard of care. Every driver (and this includes learner drivers) must uphold an objective standard which one has to perform like a competent and experienced driver.³² The standard test for this area of law is very high. The test of reasonableness is not applied. The act of carelessness by Sam in making an error of judgment is enough to argue that he has fallen below this high standard of care. Therefore, this element is established.

The fourth element requires the establishment of causation between Sam's act and Carla's injury. The causation in fact can be established in asking the following question – ‘but for Sam’s error of judgment, is there at least a 51% probability Carla would not have suffered a whiplash?’³³ If this answer is in the affirmative, then Sam’s action has factually caused Carla’s injury. One half of the causal link is present. The legal causation can be established by asking the following question – ‘is Carla’s whiplash the kind of harm which is reasonably foreseeable?’³⁴ A hypothesised assessment may view that in a collision of that sort, a person may come out with something minor like cuts and bruises, injured wrists, sore head up to something serious like internal bleeding, fractured bones and also a whiplash. Thus, the full causal link is established in law and in fact.

Therefore, the four elements of negligence are present. Sam did owe a duty of care to Carla and his error of judgment caused him to breach his standard of care. His act is linked in fact and in law to Carla’s injury and so Sam is responsible. Sam can argue against being wholly responsible for Carla’s injury. If Sam can successfully argue that Carla was also partially to blame in course of her contributory negligence – say, Carla had also made an error of judgment or, say, Carla’s whiplash was partly due to her not wearing a seatbelt³⁵ -

³²ibid.

³³Barnett (n30).

³⁴Wagon Mound (n30).

³⁵Froom v Butcher [1976] QB 286.

then Sam's blame can be reduced by a degree to which Carla was blameworthy. For example, Sam may be 70% responsible as Carla was 30% blameworthy by virtue of her own actions.

These are the two examples where the assessment of the standard of care is different. Example one concerns the measurement of the standard of care at a moderate level. Example two measures the standard of care at a high level. Next, I will show how the two components for the guidance control principle can be drawn from these examples.

(ii)(b)Drawing the Two Components for the Guidance Control Principle from the Elements of the Tort of Negligence

Here I demonstrate that there is an underlying guidance control principle in the legal tests for negligence. The two components which create guidance control, are the human agent's (1) exercise of choice and (2) engagement in practical reason. I put forward the suggestion that the elements of the first component of guidance control are 'duty of care' and 'factual causation'. 'Standard of care' and 'legal causation' are the elements of the second component of guidance control.

In the two examples of Sally and Sam's negligent acts, I demonstrate how the elements of the tort of negligence and the components for guidance control work together in the task of imposing responsibility on a human agent in law. Sally and Sam both had exercised their choice to act in the way they did. Sally chose to power-kite in the park. Sam chose to drive a van. These two choices entail a duty owed by each of them to others. In Sally's case, her choice determines that she owes a duty of care to anyone who satisfies the *Caparo* test.³⁶ John, her victim, falls within the test and thus Sally owes a duty of care to him.

³⁶*Caparo* (n19).

In Sam's case, his choice to drive a van, or rather his choice to be a driver, entails he owes a duty of care to all road users to be a competent and experienced driver.³⁷ Therefore, Sam owed a duty of care to Carla, his victim.

These choices made by these individuals are also assessed under the factual causation element of negligence. The 'but for' test ascertains whether the individual's choice to act, and thus have acted does have a causal link of at least 51% probability in fact of causing the victim harm.³⁸ In Sally's case there is a causal link of at least a 51% probability that, but for her action, John would not have suffered a cut across his forehead by a power-kite. In Sam's case there is at least a 51% probability that, but for Sam's error of judgment - or rather but for Sam's carelessness - Carla would not have suffered a whiplash. Although, Sam had not chosen to be careless, his initial choice to be the driver had placed him in the position that he ought not to be careless. The same principle does apply to a careless driver who chooses to drive a vehicle. The choice to undertake this role determines that one upholds the standard of a competent and experienced driver.³⁹

These two legal tests of negligence (i.e. the *Caparo* test and the 'But For' test) demonstrate that the law's imposition of responsibility requires the human agent to exercise its choice to act. Thus, here I show that one of the two components for guidance control is present. The second component is the human agent's engagement in practical reason when making the choice to act.

The legal tests for the measurement of the standard of care concern the question whether the human agent has engaged in practical reason which meets this standard. In Sally's case, the application of the test of reasonableness shows that Sally has fallen below

³⁷*Nettleship* (n31).

³⁸*Barnett* (n29).

³⁹*Nettleship* (n31).

the standard of care. Therefore, Sally's engagement in practical reason did not live up to the expectations of the law. Since a reasonable person would not have reasoned the way in which Sally reasoned, I can argue that her practical reason is flawed and therefore attracts responsibility. In Sam's case, he is assessed against an objective standard of care whereby he is expected by law to perform as a competent and experienced driver. There is no room for Sam to be careless. Although Sam had not intended to be careless, his flawed decision-making made it sufficient to fall below the standard of care. His error of judgment may be due to not paying full attention or to being tired. These can be the flaws in the practical reason which caused him to attract responsibility.

Sam may not be responsible if his practical reason is held to meet the standard required by law. An example would be if Sam caused the collision because he swerved the van to avoid hitting a child who had dashed into the road. This would be even more the case if Sam can argue that the collision was executed in a calculated manner where the injury caused was at a minimum or, in other words, if he argues that he avoided the possibility of causing death either to the child or to Carla. He may then be successful in arguing that his actions were not careless or reckless. In this line of thought, Sam's practical reasoning behind the choice in making the collision is not flawed.⁴⁰ Thus, his action does not attract responsibility. Thus the legal test of the standard of care is shown to be an assessment of whether a human agent engaged in practical reason, which is acceptable in law.

The final legal test of negligence, which concerns the establishment of legal causation between the harm suffered by the victim and the tortfeasor's act, does have the underlying component of practical reason. In Sally's case, the assessment is whether the kind of harm suffered by the victim is reasonably foreseeable. I have established in the prior test for the standard of care that Sally's practical reason to engage in her activity had been flawed and

⁴⁰See *Snelling v. Whitehead* [1998] RTR 385.

thereby she could argue that she could not have foreseen the kind of harm she had inflicted on her victim. However, this assessment takes the objective view whereby a reasonable person without that flawed practical reasoning can perhaps reasonably foresee the kind of harm, which may be inflicted upon Sally's victim. Thus, had Sally engaged in unflawed practical reasoning she would have foreseen the harm she had inflicted on John. Therefore, she is responsible for causing the harm.

In Sam's case, this similar test is applied. Being found to be careless in his driving, this has established that Sam engaged in flawed practical reasoning. The assessment for legal causation is to ascertain whether a reasonable person without that flawed practical reason could have reasonably foreseen the kind of harm which was inflicted upon Sam's victim. Thus, had Sam engaged in unflawed practical reasoning, he would have foreseen the harm he inflicted on Carla. Therefore, he has responsibility for causing the harm.

In conclusion, the elements of the tort of negligence do have an underlying essence of guidance control. The two components for guidance control are present to justify the law's imposition of responsibility on a human agent's negligent act. Next, I will summarise the discussion in section (ii) thus far.

(ii)(c) A Summary of Discussions

A human agent's negligent act occurs because that agent has exercised guidance control over this action. Therefore, the negligent human agent is responsible for the harm caused. In the *Wal-Mart* case, the claim for negligence against Wal-Mart failed on two bases. First, the claimants argued that Wal-Mart had been negligent when it had enabled its overseas outsourcing partners to exploit their employees. The case ruled that this argument did not

have a legal basis to stand on and therefore it found that there was no duty owed between Wal-Mart and its overseas outsourcing partners' employees.

I can further analyse that Wal-Mart did satisfy the first component of guidance control. It exercised the decision to outsource its activities and this decision formed the factual causal link between the decision made by Wal-Mart and the harm suffered by its overseas partner's employees. However, Wal-Mart had not conducted the practical reason behind the exploitation of labour. It was its outsourced partners, which had engaged in labour exploitation by failing to uphold the standard of care. Therefore, the negligent agents (or the negligent human agents) are the overseas outsourced partners. Wal-Mart had no duty of care to the overseas partner's employees and therefore it was not responsible.

Second, the claimants argued that Wal-Mart had joint-employer status with its overseas partners. The essence of this argument (if successful) would show that Wal-Mart did have the two components for guidance control. As a joint-employer, I presume that Wal-Mart played a role in the component of practical reason for guidance control. Thus, if it were true that the overseas partners had fallen below their standard of care and that the socio-economic harm inflicted on the claimants was foreseeable harm, there is a plausible argument under the guidance control principle that Wal-Mart – by virtue of its joint status - can also be jointly negligent. However, the case ruled that Wal-Mart had no capacity to gain the status of a joint-employer. Therefore, Wal-Mart (or its members) could not be an agent or co-agent with the exploitative business partners.

Nevertheless, the claimants' arguments in the *Wal-Mart* case have shown the importance of framing an argument of responsibility on the principle of guidance control. Furthermore, I have also shown the importance of a human agent for the law's imposition of responsibility.

(2) THE ESSENCE OF ‘CORPORATE’ RESPONSIBILITY: THE HUMAN AGENT IS THE FOUNDATION FOR THE LAW’S IMPOSITION OF RESPONSIBILITY ON CORPORATIONS FOR CORPORATE ACTIVITIES

As stated at the beginning of this chapter, my discussion is purely on the law’s imposition of responsibility, as opposed to liability. Although the notions of direct liability (such as direct employer’s liability) and strict liability (such as liabilities under Health and Safety laws) are effective legal means to hold a corporation liable, these methods are restricted by the limits of jurisdiction. The *Wal-Mart* case has highlighted this limitation created by outsourcing contracts to overseas partners. The notion of responsibility on the other hand has a global appeal. In subsection (i)(d) of the previous chapter, I have demonstrated the possibility of a plausible argument for holding Wal-Mart responsible if there were legal principles which created either a duty in Wal-Mart or a joint-employer status with joint duties of Wal-Mart and its overseas partners towards its overseas partners’ employees. In the light of this argument, I make an observation that there is a possibility that the notion of responsibility traverses national boundaries.

When harm is caused by corporate activities, the difficulty in establishing responsibility is the difficulty of determining who (i.e. which human agent) incurs responsibility on behalf of the corporation. A corporation has a separate legal identity from the individuals who compose it.⁴¹ A corporate identity enables the corporation to carry out its business activities as an individual would. For example, it can own premises, enter into contracts and act as an employer. A separate legal identity also protects the individuals who own the corporation (i.e. the shareholders) from incurring personal liability.⁴² This protection

⁴¹Continental Tyre & Rubber Co (Great Britain Ltd) v Daimler Co Ltd [1915] 1 KB 813.

⁴²Saloman v Saloman & Co Ltd [1897] A. C. 22.

is called the ‘corporate veil’.⁴³ The liability of the shareholders is limited, so that in the worst case scenario they will only lose the investment they have made in the corporation. Therefore, the purpose of the corporate veil is to avoid the imposition of responsibility on the individuals who own the corporation.

There are ways to pierce this ‘corporate veil’ at common law. The judges can - when they see fit - look behind the veil and impose responsibility on individuals for corporate activities which involve illegal matters, such as a shareholder’s concealment of acts of fraud.⁴⁴ It may be unlikely that the judges will look behind the ‘corporate veil’ of a corporation to impose responsibility on each shareholder for the exploitation of labour by their corporation’s outsourced partners. The creation of outsourcing agreements are legitimate forms of trade. Therefore, I do not propose that the ‘corporate veil’ ought to be pierced on this matter. I only indicate here that the ‘corporate veil’ prevents the law’s imposition of responsibility on the shareholders. As a result, shareholders in general are not responsible for the corporate activities. Other human agents can however be found responsible for these corporate activities.

I explore two areas of law to show that responsibility for corporate activities may be imposed in law on a corporation through its human agents. Responsibility must initially be grounded in its human agents to hold the corporation indirectly liable. The notion of vicarious liability in the area of employer’s liability is first considered. This is because the principle behind the vicarious liability of a corporate-employer heavily depends on the individual’s responsibility. Thus, if a corporate activity causing harm to others cannot be held to be the responsibility of a member employed by the corporation, the corporation cannot be vicariously liable for causing the harm.

⁴³Stephen Girvin *et al*, *Charlesworth’s Company Law* (18th Ed, Sweet and Maxwell,2010) 31.

⁴⁴*Wallersteiner v Moir* [1974] 1 WLR 991.

The area of corporate criminal liability for homicide or manslaughter is second considered. The senior management - as human agents – are responsible for deaths caused by corporate activities. Each area of law will be analysed to show the importance of the human agent as the foundation of the law's imposition of responsibility for the acts of a corporation. I omit the directors' duties and responsibilities in company law here.⁴⁵ Director's duties are taken to entail personal responsibilities. These responsibilities are not passed on to the corporation. I therefore consider that there is no notion of 'corporate' responsibility in director's responsibility.

(iii) Employer's Liability in Terms of Vicarious liability

The human agent is the foundation of an employer's vicarious liability. Vicarious liability means 'liability which D may incur to C for damage caused to C by the negligence or other tort of A'.⁴⁶ More precisely, if a tort is committed by an employee, A, during the course of his or her employment and harms an individual, C; the employer, D, can be held liable for the harm caused by A to C. Vicarious liability is the indirect liability of the employer for the harm caused by its employee. It is a form of strict liability imposed on the employer. The employer is not necessarily at fault. The fault lies in the employee. An employer-employee relationship is the essential feature for the doctrine of vicarious liability to work. This relationship is created out of a contract of service.⁴⁷ There are four indicia of a contract of service:-⁴⁸

- ‘(1) the employer’s power of selection of his servant;

⁴⁵Companies Act 2006 Ch 46, ss170-77.

⁴⁶WHV Rogers, *Winfield and Jolowicz on Tort* (18th Ed, Sweet and Maxwell, 2010) 943. Cited in this chapter as Rogers (n46).

⁴⁷ibid 944.

⁴⁸*Short v J.&W. Henderson Ltd* (1946) 62 TLR 427.

- (2) the employer's payment of wages or other remuneration;
- (3) the employer's right to control the method of doing the work;
- (4) the employer's right of suspension or dismissal'.⁴⁹

A corporation is an employer if it has a contract of service with the individuals it hires.

If an individual who works with a corporation does not have any of the four indicia, this individual may be under a contract for services.⁵⁰ In this case, this individual will not be classified as an employee. Rather, he or she is taken as an independent contractor. An employer in general will not be vicariously liable for the harm caused to others (apart from the harm caused to its own employees) by the acts of an independent contractor.⁵¹ This is so even if the victim can prove that the employer was negligent in hiring an incompetent independent contractor, because in this case the employer is liable, but this is direct liability and not vicarious liability.

(iii)(a) The Elements of Employer's Liability

The employee is the human agent on whom the law's imposition of responsibility must first fall before the employer-corporation can be held responsible for its corporate action. In this line of argument, consider this example (which is a modification of the second example in section (ii) of this chapter):-

Sam is an employee of a courier company, DeliverThat. He drives the courier van. During one of his deliveries, Sam makes an error of judgment, which causes the courier van to collide with another motor vehicle. Carla, who is in the other vehicle, suffers a whiplash.

⁴⁹Rogers (n46) 951.

⁵⁰ibid 948.

⁵¹ibid 978.

In section (ii)(a) of Part A of this chapter, I concluded that Sam is responsible in law for causing Carla the whiplash.⁵² Furthermore, I also concluded that Sam, as the human agent, has exercised guidance control over his action for which he is responsible in theory for causing Carla the whiplash. Here, I ascertain whether this initial imposition of responsibility on Sam as the employee of DeliverThat can render the corporation as the employer vicariously liable. For this purpose, this scenario shall be called ‘DeliverThat’s case’, as opposed to ‘Sam’s case’.

The legal tests are the followings – (1) the employee must have acted during the course of employment. (2) The employee must have acted within the scope of the employment. These two tests ensure that the employee’s role forms ‘an integral part of the business’.⁵³ Thus, the employee’s work is a part of the corporate activity. If harm is caused by the employee’s action, this harm is also taken as harm caused by the corporate activity. Therefore, it is logical that the employer-corporation should also be responsible.

In DeliverThat’s case, Sam as its employee caused the collision when he was making a delivery. The collision was made during Sam’s course of employment. Sam was performing a role, which promotes both the image and purpose of DeliverThat. The act of making the delivery is within the scope of employment. How Sam makes the delivery is not a matter of relevance.⁵⁴ When the two legal tests are satisfied, there is a strong argument that the corporate-employer – DeliverThat - is vicariously liable for Sam’s negligence. I argue on the basis that Sam’s role as an employee forms an integral part of the employer’s corporate activity. As a result, any negligence in his performance of the role is related to the corporate

⁵²See pages 55-6 above.

⁵³*Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101.

⁵⁴*Limpus v London General Omnibus Co* (1862) 1 H&C 526, *LCC v Cattermoles (Garages) Ltd* [1953] 1 WLR 997, *Lister v Hesley Hall Ltd* [2001] UKHL 22, *Rose v Plenty* [1976] 1 WLR 141.

activity. Thus, the corporate-employer ought to be responsible for the negligence of its employees.

A corporation is not vicariously liable when its employee's action is not an integral part of the employer's corporate activity. In other words, a corporation is not responsible when its employee is on his own frolic. For example, Sam is off-duty; he nevertheless drives the company van for his individual recreational use. If Sam causes an accident, it can be argued that DeliverThat will not be vicariously liable because he caused the accident on his own frolic.

(iii)(b) The Guidance Control Principle is the Foundation for the Doctrine of Vicarious Liability

Even if the doctrine of vicarious liability is one of strict liability, this doctrine relies on the initial fault-based liability which is imposed on a human agent. In terms of employer's liability, the doctrine of vicarious liability cannot be applied without that initial imposition of responsibility on a human agent who is part of the corporate-employer. Thus, if the victim of a corporate activity (who is not an employee of that corporation) cannot attribute the damage suffered to the negligence of an employee of the corporation, then the corporate-employer will not be found vicariously liable.

In DeliverThat's case, Sam's negligent act is part of its corporate activity. Sam's role promotes the image and function of DeliverThat. Although DeliverThat can be found directly liable for harm caused to its employees, Carla is the victim who does not fall within that category. Therefore, the law's only method to impose responsibility on DeliverThat is to indirectly impose it through the negligent act of its employee. The legal tests for an

employer's vicarious liability are formulated to ensure that the employee's negligence is part of the corporate activity. If an act is shown to be part of the corporate activity, then one can possibly argue that the corporate-employer ought to be liable or responsible for the harm caused by its employees. If, in contrast, Sam happened to cause harm to Carla during his own frolic – for example, Sam drove the courier van when he was off-duty and for a personal purpose – then this act cannot be taken as part of the corporate activity. Acts by employees which are not part of the corporate activity do not support arguments to hold the corporate-employer vicariously liable for the harm caused by them.

Therefore, the focus of the doctrine of vicarious liability is not the fact that an individual is a member of a particular category (i.e. has the status of employee). The focus is on whether the act of the employee (over which this employee has guidance control) is an integral part of the employer's business.

(iii)(c) An Evaluation of the Discussions of Employer's Liability

Corporate activities are carried out by individuals who are working together in the pursuit of the corporation's goal and function. The imposition of responsibility on a human agent is an important basis for the imposition of indirect responsibility on the corporation for the harm caused to others (who are not employees of that corporation). In the context of employer's liability, the doctrine of vicarious liability focuses on the activity of the employees. If the negligent act of the employee was within the scope and course of employment, then the employee's negligent act is considered as an integral part of the corporate-employer's business. Therefore, the corporate-employer ought to be indirectly liable for the harm caused.

The employee-employer relationship is the basis for the application of the doctrine of vicarious liability. Corporations which outsource their activities to other business partners minimise the number of employees they need to hire, but they still retain their function. For example, Wal-Mart sells products with their brand name on them. Its function is to make its self-branded products available to their customers. It however does not manufacture its own products. It outsources these manufacturing tasks to its sub-contractors, which produce these products for it. By this process, the function of Wal-Mart is not lost through the process of outsourcing. Wal-Mart only reduces the number of its employees which it would otherwise hire for that manufacturing task.

Outsourcing contracts eliminates this employee-employer relationship. In the absence of an employee-employer relationship, no-one can be called to account for the harm caused to others by the outsourcing. In the *Wal-Mart* case, the decision of Wal-Mart to outsource its manufacturing tasks to its overseas partner is part of its corporate activity. This corporate activity causes socio-economic damage to the overseas manufacturer's employees. Wal-Mart cannot be held responsible for this socio-economic damage due to two factors. First, an employee-employer relationship is not created by the outsourcing agreement between Wal-Mart and its overseas business partners. Rather, a relationship of contractor-subcontractor is formed between the parties. Second, in the light of the nature of this relationship, the outsourced activity is not considered to be an integral part of Wal-Mart's business.

In conclusion, Wal-Mart cannot be vicariously liable for the harm suffered by its overseas business partner's employees. This is because there is no human agent acting on its behalf which has caused the harm suffered by the business partner's employees. This link has been eliminated by the creation of bilateral outsourcing contracts. Thus, the act of a human agent on behalf of the corporation is the fundamental basis for the law's imposition of

responsibility to a corporation. Next, I will explore the imposition of corporate criminal responsibility.

(iv) Corporate Criminal Responsibility

I have demonstrated above that human agency is important for the law's imposition of civil responsibility on a corporation. The law's imposition of criminal responsibility on a corporation is no different. The law grounds corporate criminal responsibility in the actions committed by human agents acting on behalf of the corporation. I focus on the elements for the establishment of criminal responsibility.

In subsection (iv)(a), I take account of the principles of criminal law prior to the Corporate Manslaughter and Corporate Homicide Act 2007⁵⁵ (hereafter, 'the Act') and its difficulties with corporations. In subsection (iv)(b), I analyse the essential sections of the Act for the elements of corporate criminal responsibility. I then apply the Act to the example of Sam's negligent driving during his course of employment in subsection (iv)(c). In subsection (iv)(d), I show that this Act is based on the guidance control principle. In subsection (iv)(e), I evaluate the difficulties in the imposition of corporate criminal responsibility by tracking down the corresponding elements of guidance control which are within the activities of a corporation. Here, I highlight the application of the strict guidance control principle by judges in courts and legislators in parliament which does not solve the problems in the *Wal-Mart* case.

⁵⁵Ch 19.

(iv)(a) *Criminal Law Principles and the Corporation*

The *actus reus* and the *mens rea* are the elements establishing a human agent's criminal responsibility. In section (i) of Part A, I explained how these elements justify holding a human agent who has exercised guidance control over the action criminally responsible. Gobert and Punch find that it is not difficult to establish the *actus reus* element of a corporation which has chosen to break the law.⁵⁶ For example when a corporation sets up a sweatshop, it engages in socially deplorable activities. This choice of corporate action can be taken as an *actus reus* of, say, setting up an illegal sweatshop. The *Wal-Mart* case is another example. Wal-Mart would have been in breach of US laws if it had treated its employees in a similar fashion to how its outsourcing partners had treated theirs. Thus, a corporation's choice of exploiting labour can be taken as an *actus reus* of, say, engaging in an illegal business behaviour. Gobert and Punch argue that corporations which choose to break the law have exercised 'choice, and, like human offenders, [they] should be held accountable when they exercise their power of choice in a criminal way'.⁵⁷ This assessment for the criminal responsibility of corporate homicide and manslaughter is unfortunately too simple.

The difficulty lies in ascribing both the *actus reus* and the *mens rea* of corporate homicide and corporate manslaughter to either the corporation or to a number of members of the corporation (e.g. the senior management). A corporation is a complex body by which its activities are operated through the various acts of its members. Therefore, it does not exhibit clear *actus reus* and *mens rea* elements as does a human agent. Gobert and Punch criticise the assumption that the legal principles of criminal law can be simply applied to corporations, arguing that the '[t]raditional legal doctrines were developed with respect to human

⁵⁶James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths, 2003) 35. Cited in this chapter as Gobert (n56).

⁵⁷ibid.

offenders'.⁵⁸ In other words, the law justifying the imposition of criminal responsibility on the ground of the guilty mind and the guilty acts of a human agent is clear. A human agent possesses one mind and authors a set of actions. The result is certain when it has been proven that a human agent possessed a guilty mind when doing his or her action. The mind of a corporation (if there is such a thing) is composed of the numerous participants' minds. The *mens rea* element drawn from the minds of the participants in a corporation is problematic.

In the past, common law took the view that the *mens rea* element of a corporation was in the mind of an individual who could be identified with the company.⁵⁹ In other words, the 'mind' of the company was the controlling mind of an identified individual.⁶⁰ This is known as the identification doctrine. Gobert and Punch criticise this doctrine as 'a rudimentary understanding of how corporate decisions are made'.⁶¹ Corporate decisions are made by numerous teams of individuals from a range of various departments and at various hierarchical levels. Therefore, an individual's role in making corporate decisions (save, perhaps, for small companies or cooperatives where the decision-making can be done by one or a few people) amounts to only a small percentage of the agreed whole. Thus, the scholars argue that the identified individual's mind – from which the doctrine suggests that the corporate mind originates – might not reflect the direction or purpose of the corporate decision. They explain this in the following words:-

'In a company, ideas that may originate with an individual will be reviewed by working parties, committees, senior managers, CEOs and ultimately, a board of directors. The final product may bear little resemblance to the originator's conception. Where responsibility is so diffused, it makes little sense to strive to link decisions with particular individuals'.⁶²

⁵⁸Gobert (n56) 38.

⁵⁹*R v ICR Haulage Ltd* [1944] KB 551.

⁶⁰*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

⁶¹Gobert (n56) 38.

⁶²ibid.

This doctrine is now replaced by s1(4)(c) of the Act. A corporation's criminal responsibility is no longer grounded in the *mens rea* of an identified individual. It is now grounded in the decision-making or the organising of corporate activities by the senior management.

'Senior management' is defined in S1(4)(c) as:-

'the persons who play significant roles in:-

- (i) the making of decisions about how the whole or substantial parts of [the corporation's] activities are to be managed or organised, or
- (ii) the actual managing or organising of the whole or substantial parts of those activities'.

In comparison with the identification doctrine, a wider scope is provided in this section. There can be several individuals involved with the corporate 'mind'. However, it is difficult to see how this wider scope of the corporate mind can justify the law's imposition of responsibility on the corporation. The attachment of the corporate *mens rea* element to the individuals who constitute the senior management of a corporation, concluding that they are the holders of its guilty 'mind', does not meet the objective of the notion of having corporations responsible for their criminal action. Two problems arise here, which might show that the law does not provide satisfactory reasons for imposing corporate criminal responsibility.

First, the identification doctrine is still adhered to in s1(4)(c). Although this section identifies one or more individuals as the senior management, this does not satisfy the difficult task of finding the corporate 'mind'. The convoluted network of participants' minds in the decision-making process as highlighted by Gobert and Punch in the passage quoted above,

still presents a difficulty to the law's identification doctrine. There is then no establishment of a corporate criminal act when the minds of one or more human agents cannot be identified as holding the *mens rea* of the corporation.

It is only the very small corporations which can be held criminally liable in practice for death caused. Small corporations like Cotswold Geotechnical - discussed below - do not have a convoluted organisational structure. Its managing director is the identified person who made the corporate decisions and organised the corporate activities, which caused the death of one of its employees. S1(4)(c) is considered to be difficult to apply to corporations larger than Cotswold Geotechnical. The corporate choice is not made by a single individual, but by a group of individuals. Perhaps, s1(4)(c) of the Act can apply when the identified group of criminally responsible individuals are found in one department or at one managerial level. However, I will discuss below the possibility that engagement in one act of practical reasoning can be undertaken by several individuals who are at different levels in the corporate structure (e.g. the managing director, the senior manager and the supervisors). This may pose a problem in the application of s1(4)(c).

Second, the imposition of corporate criminal responsibility is possible only when the corporate activity is conducted by one corporation. The death must be caused by the corporate activity and the senior management must possess the corporate mind. In other words, the corporate act and the corporate mind have to co-exist inside one corporation. In considering the *Wal-Mart* case, I have demonstrated that modern corporations in a globalised world no longer function in that manner. The violation of socio-economic rights (though they are not criminal, they can alternatively be argued to be violations of human rights) are carried out by outsourcing partners for the outsourcing corporation.

In these situations, the elements of criminal responsibility are not strictly confined inside either of these outsourcing business partners. The *Wal-Mart* case demonstrates that the senior management's decision-making to exploit labour can be conceived by one corporation, Wal-Mart; but this activity is actually conducted by another (i.e. the overseas manufacturers). The overseas manufacturers possessed the elements for a possible criminal liability. However, these corporations are situated outside the jurisdiction of US law. In the next two subsections, I will show the traditional underpinning legal doctrine in the Act. I will also show that the Act does not solve the problem faced in the *Wal-Mart* case.

(iv)(b) An Analysis of the Corporate Manslaughter and Corporate Homicide Act 2007

I analyse the elements required to hold a corporation criminally responsible for the death of a person. S1(1) of the Act describes the offence as follows:-

'An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised –

- (a) caused a person's death, and
- (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.

A corporation is within the definition of 'organisation' under s1(2)(a). Corporate manslaughter and corporate homicide involves a death resulting from a corporate activity when the corporation owes a duty of care to the deceased and a gross breach of this duty has led to that person's death. The first element for the establishment of corporate criminal responsibility is the duty or the several duties of care owed by the corporation to the deceased. S2(1) states “a relevant duty of care”, in relation to an organisation, means any of

the following duties owed by it under the law of negligence.' S2(1) lists the various instances of the 'relevant duty of care' as follows:-

- (a) a duty to its employees or to other persons working for the organisation or performing services for it;
- (b) a duty owed as occupier of premises;
- (c) a duty owed in connection with-
 - (i) the supply by the organisation of goods or services (whether for consideration or not),
 - (ii) the carrying on by the organisation of any construction or maintenance operations,
 - (iii) the carrying on by the organisation of any other activity on a commercial basis, or
 - (iv) the use or keeping by the organisation of any plant or vehicle or other thing'.

Only a specific kind of actor is recognised by the Act to have owed this duty of care to the deceased. As mentioned above, these actors are part of the corporation's senior management. S1(4)(c) shows that the controlling mind of the corporation does not need to extend over the whole of its activity. The senior management's control over 'substantial parts' of the corporate activity suffices. In addition to the controlling 'mind' of the corporation, a 'gross breach' of the duty of care by the senior management also has to be established. S1(4)(b) gives the meaning of 'gross breach' as the situation where the senior management's conduct 'falls far below what can be expected of the organisation in the circumstances'.

S8 stipulates that the issue of gross breach of the duty of care is a matter for the jury to decide. S8(2), s8(3) and s8(4) show how a gross breach of the duty of care is assessed. S8(2) states:-

‘The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so-

- (a) how serious the failure was;
- (b) how much of a risk of death it posed’.

S8(3) states:-

‘The jury may also –

- (a) consider the extent to which the evidence shows that there are attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any failure as is mentioned in subsection (2), or to have produced tolerance of it;
- (b) have regard to any health and safety guidance that relates to the alleged breach’.

Lastly, s8(4) states ‘[t]his section does not prevent the jury from having regard to any other matters they consider relevant’. The factors are assessed objectively by the jury. S8 may provide a fair and just reason for establishing a breach of duty. However, this can be looked at only after the establishment of the relevant duty of care in s2(1) and the senior management’s identification in s1(4)(c).

In conclusion, the legal requirements for a corporation to be criminally responsible for causing the death of a person are – (1) a relevant duty of care (2) owed to the deceased by the senior management the members of which had (3) grossly breached it. Next, I analyse the Act’s application to the DeliverThat scenario.

(iv)(c) The Application of the Act to the DeliverThat Scenario

I attempt to apply the Act to the DeliverThat scenario explored in subsection (iii)(a) of Part A. For the purpose of this discussion, the scenario undergoes an alteration:-

Supposing DeliverThat's employee, Sam caused Carla's death. Prior to that accident, DeliverThat had imposed ambitious tasks and targets on its delivery force. No consideration was paid to whether these tasks and targets could be adequately managed by its existing members of staff. As a result, Sam had to work long hours. The accident was caused by tiredness.

DeliverThat is an organisation under s1(2)(a). Carla's estate would like to know whether an action against DeliverThat under the Act can be successful. First, Carla's estate must satisfy s2(1) by showing that a 'relevant duty of care' was owed to Carla by the senior management. Sam's role as the van driver of DeliverThat falls under s2(1)(c)(iv), according to which a duty is owed in the use or keeping by the organisation of any plant, vehicle or other thing. Therefore, an establishment of a duty of care owned to Carla by DeliverThat is present provided it is foreseeable that the activity of DeliverThat's employee could cause the death of someone.

Second, a link needs to be made connecting this duty of care with the senior management of DeliverThat. The identification of the senior management must satisfy s1(4)(c). Carla's estate must ascertain the people in charge who imposed the ambitious tasks and targets on DeliverThat's employees. These persons identified must play significant roles in either the decision making or the actual managing or organising of the whole or substantial parts of DeliverThat's activities. Case law⁶³ has shown that the individuals identified must

⁶³*R v ICR Haulage Ltd [1944] KB 551, Moore v Bresler Ltd [1944] 2 All ER 515, Seaboard Offshore Ltd v Secretary of State for Transport [1994] 2 All ER 99, Tesco Supermarkets Ltd v Nattrass [1972] AC 153.*

hold executive positions in the corporation. The spirit of the case law has been reproduced in s1(4)(c).

Here, I explore two possibilities. (1) In the situation where it transpires that DeliverThat's directors were the persons who created and implemented the ambitious tasks and targets, I can argue that these directors can be identified as the senior management. This argument establishes a duty of care owed to Carla by DeliverThat's directors. (2) Suppose however it transpires that DeliverThat's directors had only put pressure on their supervisors to look for a way to increase their company's turnover. They had played no role in the creation or implementation of DeliverThat's ambitious tasks and targets. In response to the directors' demands, the supervisors had created and implemented these tasks and targets. The issue therefore is to ascertain whether these supervisors can be identified as the senior management of DeliverThat.

The case of *Tesco v Nattrass*⁶⁴ employed a narrow category for the identified 'mind' of a corporation. Supervisors are a class which falls outside this category. Therefore, DeliverThat's supervisors might not be identified as the senior management. The principle in *Tesco v Nattrass* is applied to DeliverThat's case as follows. The supervisors are not categorised as the senior management. The breach of the supervisor's duty does not amount to the breach of the senior management's duty. S1(4)(c) is therefore narrowly applied. I would argue that criminal responsibility can be successfully imposed only in a scenario where the directors handed down to their employees the tasks and targets that led to the death of a person. Corporate criminal responsibility cannot be imposed in the scenario where the individuals who created or managed the tasks and targets are not part of the senior management. Any deaths occurring as a result of corporate activities which were undertaken by individuals who are not the senior management do not arise from the criminal 'mind' of

⁶⁴See (n60) above.

the corporation. In other words, a corporation is only responsible for death caused by ‘the aggregation of failings by a number of senior management’ (or the failings of one of them).⁶⁵

If Carla’s estate can establish a relevant duty of care owed to Carla by the senior management of DeliverThat, they must then establish the third requirement which is that there must be a gross breach of that duty of care. It must be proven that the senior management’s conduct fell ‘*far below* what can be expected of the organisation in the circumstances’.⁶⁶ The jury determines whether there has been a gross breach of duty. S8 provides the guidelines for this assessment. The jury has to observe the health and safety legislation and other matters that they see as relevant to ascertain the seriousness of the failure and the risk it posed of causing death.⁶⁷ The test for a gross breach is objective. If the jury finds that DeliverThat has been in gross breach of its duty of care to Carla, DeliverThat will be criminally responsible for her death. Next, I show the underlying guidance control principle in the Act.

(iv)(d) This Act is based on the Guidance Control Principle

The elements of choice and practical reason of the guidance control principle can be drawn from the Act. Corporations exercise choice by making decisions on corporate activities. The relevant duty of care is attached to the choices they make. For instance, the senior management owes a duty of care to their employees when they decide to employ ‘x’ number of employees to carry out the corporate tasks. A duty of care is owed when the corporation decides to occupy premises. A duty of care is also owed to others when the

⁶⁵Guy Bastable ‘Corporate Convictions’ (2011) CRIMINAL LAW AND JUSTICE WEEKLY 175 JPN 237.

⁶⁶Emphasis in the original text. David Ormerod, *Smith and Hogan: Criminal Law* (12th Ed, OUP, 2008) 543. Cited in this chapter as Ormerod (n66).

⁶⁷Corporate Manslaughter and Corporate Homicide Act 2007. S8.

corporation engages in activities such as the supply of goods, construction or maintenance, organising any business activities, or the keeping of a thing.

These choices must be exercised by the senior management. S1(4)(c) provides the legal definition of the body that can make that choice. The senior management must make the decisions or manage or organise substantial parts or the whole of the corporate activity in order for the corporation to owe a duty of care to the deceased. Any corporate activity which is not decided by or managed by the senior management falls outside their exercise of choice. However, there is an alternative argument that individuals may attribute their activities to the company.⁶⁸ Although s1(4)(c) does not mention this doctrine of attribution, this argument is based on a court's judgment. The first half of the guidance control principle for this legal test in any case is present.

The senior management engages in practical reasoning when it upholds a standard of care. The standard of care which is then observed is measured by the jury's assessment of whether there has been a gross breach of duty. It seems theoretically consistent to have a collective mind (i.e. the jury) assess the practical reasoning of another collective mind (i.e. the senior management). However, establishing the practical reasoning that links the minds of the senior management with the death is the theoretical obstacle.

Chapter Four below explores this obstacle.⁶⁹ This Act seems to overcome this difficulty by focusing on the seriousness of the corporation's operational failure, as well as the risk of death it posed. Although this corporation's operational failure mostly stemmed from its employees, the practical reason traces the 'mind' of the organisation to its senior

⁶⁸ See *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 3 All ER 918. See also Sullivan G. R., 'The Attribution of Culpability to Limited Companies' [1996] 33(3) CAMBRIDGE LAW JOURNAL 515

⁶⁹In Chapter Four, a corporate criminal responsibility is argued to be theoretically non-reducible to the responsibility of its senior management. See pages 186-8 below.

management. The employees concerned may not be part of the senior management. Hence, if the operational failure which led to the death was not the product of the exercise of practical reason by the senior management, then this element is not established. The second half of guidance control principle for this legal test in any case is also present.

In summary, the duty of care owed by the senior management of the organisation to the deceased arises when it exercises its choice by engaging in the activities listed in s2(1). This element of corporate criminal responsibility is taken as the first component of the guidance control principle. The death caused by the gross breach of this duty of care is assessed according to whether the senior management was exercising its practical reason when it fell below the requisite standard of care. This element of corporate criminal responsibility is taken as the second component of the guidance control principle.

(iv)(e) An Evaluation of the Guidance Control Principle behind the Law's Imposition of Corporate Criminal Responsibility

So far, I have shown that a corporation can be held responsible for acts of its individuals who can exercise guidance control over the corporate activities. For example, a corporation is vicariously liable for the negligent employee who exercises guidance control over activities which amount to the commission of a tort. In the law's imposition of corporate criminal responsibility, a corporation is held to be responsible for its senior management's exercise of guidance control over corporate activities which caused the death. This is a different application of the principle from the previous discussion on employers' liability. The Act fuses the choice made by the senior management where the duty of care arose, and the practical reason which resulted in the gross breach of that duty, into the overall guidance control exercised by the organisation.

In other words, there is no one identified human agent (nor several identified human agents) who exercises the two elements of guidance control. DeliverThat's example illustrates this argument. Sam's personal criminal responsibility for his actions and the imposition of the tort of negligence on his employers by way of vicarious liability⁷⁰ lead to the imposition of corporate criminal responsibility through the combination of Sam's action and the 'mind' of the senior management. Thus, a corporation's exercise of guidance control comes from two parts – (1) the action committed by one or several human agents (i.e. the actors), which led to death of a person and (2) the practical reason exercised by the senior management who may not be the actors.

The success of the guidance control principle in the imposition of responsibility is depended of having both the elements of choice and of practical reasoning exercised by a human agent. Since the Act came into force on 6th April 2008, there has been one successful conviction of a corporation. In February 2011, Cotswold Geotechnical (Holdings) Ltd. was found guilty under the Act. McCluskey argues that the conviction of Cotswold Geotechnical is significant not so much for the successful prosecution of the corporation, but for the sentencing guide that the case provides.⁷¹ Cotswold Geotechnical is a small organisation composed of only eight employees.⁷² The application of the old identification principle sufficed to find the corporation responsible for causing the death. Therefore, the successful prosecution of Cotswold Geotechnical is an exception due to its small size.

A prosecution of a corporation under this Act still remains a challenge. Since large organisations such as multinational corporations can outsource their activities, the components of guidance control will be broken up between the outsourcing and the

⁷⁰In those two instances, Sam possesses the two elements of guidance control.

⁷¹David McCluskey, 'In Practice: Legal Update: Corporate Manslaughter' (2011) 16: 2 LAW SOCIETY GAZETTE.

⁷²ibid.

outsourced corporation. The Act based principally on control guidance can neither find one of these corporations individually responsible nor find both of them collectively responsible. This might be because an individual corporation and perhaps collectively two or more corporations cannot assert guidance control over their corporate activities as they are not human agents.⁷³ In conclusion, Part A has shown that the human agent is the basis for the law's imposition of responsibility for both an individual's action (as discussed in sections (i) and (ii) of Part A) and corporate actions, which caused damage to others (as discussed in sections (iii) and (iv) of Part A).

In Part B, I move away from the legal context and explore the imposition of responsibility on individuals and social groups like corporations through a social mechanism. I also show that the imposition of responsibility through a social mechanism is based on the guidance control principle.

⁷³See pages 154-60.

PART B

THE IMPOSITION OF RESPONSIBILITY ON A HUMAN AGENT FOR THE CORPORATION'S ACTIVITIES IN A SOCIAL CONTEXT

In the social context, the interests of stakeholders do have significance in the process of imposing responsibility for the harm caused by corporate activities. The social interactions of the corporation's activities with their consumers (i.e. the stakeholders) are the impetuses to impose social responsibility on the human agent who is in charge of the corporation. I use two examples to illustrate the imposition of responsibility through a social mechanism – (1) the *Mexican Gulf Explosion Incident* in April 2010 and (2) the *Signal Flaw on the Apple iPhone4* in July 2010. In both of these examples distinctive corporate agents in the corporation had accepted responsibility on behalf of their corporations. Thus, the imposition of responsibility also rests on individuals.

I introduce these two case studies in section (i). In section (ii), I explore the theoretical issues underlying these case studies. In section (iii), I show that the guidance control principle forms the basis for the theoretical discussion. Finally in section (iv), I evaluate Part B's discussion.

(i) The Two Observational Studies

(i)(a) The BP Mexican Gulf Explosion

On 20th April 2010, there were explosions and fire on the Deepwater Horizon rig.⁷⁴

The fire caused the rig to sink. This caused the hydrocarbons to flow from the reservoir through the blowout preventer and that caused the oil spill. The incident resulted in eleven deaths and seventeen people injured. It took BP (the owner of the rig) five months to permanently seal the well.⁷⁵ During that period an estimated 780 million litres of oil was spilt in the Mexican Gulf.⁷⁶ BP was under heavy media scrutiny when fixing the oil spill. This resulted in the resignation of its Chief Executive, Tony Hayward.

In his statement made in July 2010, Hayward expressed his responsibility as the ‘man in charge’ of BP at the time the explosion happened.⁷⁷ Thereby Hayward accepted responsibility for the collective action of BP with respect to the rig explosion. He accepted a £1 million ‘golden handshake’.⁷⁸

⁷⁴BP, ‘Deepwater Horizon Accident Investigation Report’ (BP 2010)

<http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf> accessed 14 August 2011

⁷⁵Agencies, ‘BP’S Deepwater Horizon Leak Ready to be Permanently Sealed’ *The Guardian* (London, 17 September 2010) <<http://www.guardian.co.uk/environment/2010/sep/17/bp-deepwater-leak-seal-oil>> accessed 14 August 2011

⁷⁶ibid.

⁷⁷‘BP’s Tony Haywood: Resignation Statement’ *The Guardian* (London, 27 July 2010)

<<http://www.guardian.co.uk/business/2010/jul/27/bp-tony-hayward-statement>> accessed 14 August 2011

⁷⁸Richard Wray, ‘BP Makes Record Loss as Tony Hayward Quits’ *The Guardian* (London, 27 July 2010)

<<http://www.guardian.co.uk/business/2010/jul/27/tony-hayward-leaves-bp-1m-payoff?showallcomments=true>> accessed 14 August 2011

(i)(b) *The Signal Flaw on the Apple iPhone4*

On 24th July 2010, Apple Inc. launched its iPhone4 to its customers in the UK and the US.⁷⁹ Soon after the launch, some of its users complained of a signal failure when holding the phone in their left hand.⁸⁰ This triggered high media attention directed at Apple Inc. as these users began making complaints via blogs, social networks and on YouTube. This media attention led Apple's senior vice-president of devices hardware engineering, Mark Papermaster, to leave the company.⁸¹ He was the leader of the hardware engineering team which designed iPhones and iPods.⁸² As a result it was speculated that Papermaster had left the company to take the responsibility for the flawed iPhone4 design. If that speculation were true,⁸³ Papermaster can be observed to have accepted responsibility for the collective action of Apple in producing the flawed product design.

There is no report by the media that Papermaster received a 'golden handshake' from Apple. Owing to the controversial nature of his departure from the corporation and the lack of information by him or any other agents at Apple, he could be concluded to have received a 'golden handshake' subject to conditions which prevent him from disclosing any information about this to the media.⁸⁴

⁷⁹Daniel Emery, 'Apple Fans Queue for New iPhone4' *BBC News* (London, 24 June 2010) <<http://news.bbc.co.uk/1/hi/8756919.stm>> accessed 14 August 2011

⁸⁰'Users Report 'Fault' on iPhone4' *BBC News* (London, 24 June 2010) <<http://news.bbc.co.uk/1/hi/8759590.stm>> accessed 14 August 2011

⁸¹Graeme Wearden, 'Apple iPhone in Shock Exist' *The Guardian* (London, 8 August 2010) <<http://www.guardian.co.uk/technology/2010/aug/08/apple-iphone-4-mark-papermaster-shock-exit>> accessed 14 August 2011

⁸²ibid.

⁸³Miguel Helft, 'Executive Leaves After iPhone Trouble' *The New York Times* (New York, 7 August 2010) <http://www.nytimes.com/2010/08/08/technology/08apple.html?_r=2> accessed 14 August 2011

⁸⁴Tony Fadell's 'golden handshake' given by Apple was tied with conditions. See Katie Scott, 'Former iPod Boss gets \$300,000: But has to Promise not to go talking to the Enemy' *Pocket-Lint* (Berkshire, 7 November 2007) <<http://www.pocket-lint.com/news/19025/apple-pays-ipod-boss-300000>> accessed 14 August 2011

(ii) The Theory Underlying the Two Examples

These two examples have shown that the stakeholders' social responses towards the corporate activities may have resulted in the corporate agents accepting responsibility for the corporation's activities. They show that corporations are not immune to social responses. The corporate activities do interact with society. I argue that this interaction is similar to the everyday social interactions of people amongst themselves.

In the context of an everyday social interaction, Peter F. Strawson suggests that individuals do mind about others' attitudes and actions, which affect them.⁸⁵ There are two levels of social interaction, the interpersonal level and the commonplace level.⁸⁶ Strawson's social observation starts at the interpersonal level. This is the level where an individual is communicating with another, who is not a stranger. Strawson's study of social interactions at the interpersonal level gives a simplified account of social norms, and helps the understanding of social reactions to the displayed attitudes of others by those affected by those attitudes. This is where it is considered that responsibility in the social context is imposed on a human agent's personal action. He explains:-

'These simplifications are of use to me only if they help to emphasize how much we actually mind, how much it matters to us, whether the actions of other people – and particularly of *some* other people – reflect attitudes towards us of goodwill, affection, or esteem on the one hand or contempt, indifference, or malevolence on the other'.⁸⁷

Strawson shows further that what one individual thinks about another individual's actions does shape the way that individual acts and behaves. The reaction of others towards one's actions and attitudes do have a profound impact on one's behaviour. These reactions

⁸⁵Strawson (n1) 5.

⁸⁶ibid.

⁸⁷ibid 5-6.

can either create a flourishing relationship or can sever relationships. A human agent is socially responsible for maintaining or severing a relationship from the way he or she behaves. For example, if an individual acts with good will towards another, this act of good will reflects back onto that individual by the other's reaction of affection or gratitude. Here, the relationship flourishes. In contrast, if an individual acts with ill will towards another, this act of ill will reflects back onto that individual by the other's reaction of malevolence or contempt. Here, the relationship is severed.

Strawson suggests that the interactions between individuals at the interpersonal level give opportunities for them to quarrel and reason with one another. For example, when a person is offended by another and the offended person confronts the offender, the offended person may engage with the offender in terms of reason. This shows that human interaction at the interpersonal level can be relatively deep. Strawson suggests that individuals interacting at the commonplace level, like a society, are different. These individuals adopt the objective attitude.⁸⁸ He explains:-

‘To adopt the objective attitude to another human being is to see him [or her], perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained; perhaps simply to be avoided, though *this* gerundive is not peculiar to cases of objectivity of attitude’.⁸⁹

At the interpersonal level, Strawson suggests that the range of reactive attitudes which can be felt by the recipient are ‘resentment, gratitude, forgiveness, anger, or the sort of love which two adults can sometimes be said to feel reciprocally, for each other’.⁹⁰ By contrast at

⁸⁸ibid 9.

⁸⁹ibid.

⁹⁰Strawson (n1) 10.

the commonplace level, he suggests that individuals treat each other as ‘an object of social policy’. Therefore, interactions at commonplace level do not include the emotions of ‘resentment, gratitude, forgiveness, anger’. Although interactions of these sorts between individuals may involve these emotions, they are still objective, and so devoid of normative meanings. He explains ‘[i]f your attitude towards someone is wholly objective, then though you may talk to him, even negotiate with him, you cannot reason with him. You can at most pretend to quarrel, or to reason, with him’.⁹¹ Thus, I take the view that these objective attitudes between interacting individuals do not shape their behaviour. For example, a bully at school may be aware that he or she will face detention if he or she targets the victims during school hours. That, unfortunately, does not eliminate the probability of this bully targeting the victims outside school hours. An offender who is confronted by the offended at the commonplace level can at most negotiate with the offended. Thus, the bully may refrain from targeting the victims at school because he or she had received a warning from the headmaster. However, the efficacy of the headmaster’s warning in shaping the bully’s behaviour outside of school hours is (at least to the victims) not satisfactory. Therefore, I would argue that this does not compel a change in the offender’s behaviour to prevent further acts in the future that may provoke the offended.

Nevertheless, Strawson suggests that the social reactive attitudes at the commonplace level generate momentum as they are shared amongst strangers in a collectivity. He suggests that reactive responses at the commonplace level can take on an ‘impersonal or vicarious character’.⁹² He explains, ‘[t]he reactive attitudes... [are] described as sympathetic or vicarious or impersonal or disinterested or generalised analogues of reactive attitudes ... They

⁹¹ Strawson (n1) 10.

⁹²ibid 15.

are reactions to the qualities of others' wills, not towards ourselves, but towards others'.⁹³ In other words, this impersonal or vicarious character of social response is an objective reaction which one feels regarding an offended other as a result of the offender's action. Here, I consider this vicarious character of social responses by the public against a corporate activity imposes responsibility on a corporation in the social context.

In the case of the BP example, BP did not resolve the oil spill promptly. Therefore, it is the offender. The offended others are the individuals who are directly affected by the incident – such as the fishermen who cannot fish in the contaminated Mexican Gulf. These offended individuals may express their objective reactive attitude towards BP for having interfered with their personal interests – i.e. with the fishermen's livelihood. In addition to these direct objective reactive attitudes on the part of the offended individuals, parties who are sympathetic to them (such as environmental activists) may also express their vicarious or impersonal reactive attitude towards BP.

Therefore, BP's action in its creation of the oil spill in the Mexican Gulf entailed two types of social responses at the commonplace level – (1) the direct response of objective attitude by the offended individuals and (2) the vicarious or impersonal response of objective attitudes by parties who sympathise with the offended individuals. The combination of these two types of objective social responses made the chief executive of BP resign.

In the case of the Apple iPhone4, Apple sold a flawed product. Therefore, it is the offender. The offended others are the customers who purchased the iPhone4. These customers expressed their social objective reaction by generating a vicarious or impersonal response of objective attitudes by parties who sympathised with them. The Apple customers

⁹³ibid. In a sense, impersonal or vicarious social responses by participants in society against actions of others enable those participants to determine permissible and impermissible actions. See TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (HUP, 2008) 99.

posted complaints on social media sites such as Youtube, Web Blogs and Facebook. These social objective responses generated a wave of vicarious or impersonal objective responses by parties who sympathised with the customers (i.e. possible future Apple customers). The combination of these two types of objective social responses made the senior vice-president resign.

I have demonstrated in these two examples that Strawson's objective vicarious or impersonal social response imposes responsibility on the human agents who are the persons in charge of the corporate activities. I therefore take the view that the objective vicarious or impersonal social response used by a collectivity of (offended) individuals can be a powerful force to make corporate agents accept responsibility. Therefore, I conclude that these agents can be said to be perceived by the society to have exercised guidance control over these corporate activities.

(iii) The Imposition of Responsibility in the Social Context is based on the Guidance Control Principle

Social reactions at both interpersonal and impersonal (commonplace) levels create a culture of who-is-to-be-blamed for the wrongful or flawed action. The imposition of responsibility at the interpersonal level is perhaps the most effective way to hold a single actor responsible. As discussed in the bully's example above, I find that the imposition of responsibility between individuals at the impersonal level or commonplace level is not effective. Although it is possible to negotiate with the offender, his or her behaviour remains unaltered. I also find that is not an effective way to impose responsibility on a corporation for its collective actions. The individuals who – on behalf of the corporation accept responsibility in response to the social reaction to the corporate activity are the ones who are perceived by

the public to have exercised guidance control over corporate action. These responsible individuals react by resignation.

In these cases, I find that the offender-corporation does not internalise its offending behaviour. Thus its behaviour does not change. Furthermore, it treats the offended public as a ‘subject of social policy’. The solutions provided by the offender-corporation to the offended public are short-term. In the case of the BP example, the chief executive had the role of managing that situation. Therefore, the public took the view that Tony Hayward had both the components of guidance control. The public can argue that he had exercised the element of choice when he made the decisions on how to deal with the explosion and that he had also engaged in practical reasoning when looking for the solutions to stop the oil spill. He would have also been blamed for failure to implement preventative measures to avoid an explosion in the first place. In the case of the Apple example, the senior vice-president had the role of ensuring that the product was fit for purpose. The public took the view that Mark Papermaster had both the components of guidance control. They can argue that he had exercised the element of choice when he made the decision that the product was fit for purpose and that he had engaged in practical reasoning when he was involved in making the design of the product.

(iv) An Evaluation of the Discussion in Part B

The critical argument on the imposition of responsibility in the social context is that the intensity of the collective objective social responses (directly and vicariously) does not render the corporation responsible for its actions. An imposition of responsibility results in a human agent accepting responsibility on behalf of the corporation for its actions. I argue here that this provides another route by which a corporation can externalise its responsibilities.

The human agent who accepts responsibility on behalf of the corporation's activities generally resigns. By doing this, that human agent takes the responsibility away from the corporation by leaving it. This responsibility imposed by social responses is not internalised in the corporation. There is an underlying guidance control principle where the corporate agents who accept responsibility are the persons in charge of corporate activities. These corporate agents are perceived to exercise guidance control over corporate activities. Thus, these responsible corporate agents leave the corporation and they take their corporate responsibilities with them. Although the objective social response (e.g. the responses by the fishermen against BP and the iPhone4 consumers against Apple) may still hold these corporations responsible, the vicarious social response (e.g. by the media or non-profit organisations) against these corporations may lose strength as the blamed individuals who are identified react to this response by leaving the corporation. Once the blamed individual is identified and is cast away from the corporation, the social responses from individuals directly and indirectly affected by the corporate wrongdoing cease to have effect on the behaviour of those corporations.

Furthermore, the components of guidance control cannot be shared between corporations. For example, outsourcing involves an outsourcing partner and an outsourced partner. In the *Wal-Mart* case, Wal-Mart is the outsourcing partner who exhibits the first guidance control component – i.e. the choice to either outsource or to look for cheaper means to secure its supplies – and the overseas business partners are the outsourced partners who exhibit the second guidance control component – i.e. the practical reason either in arranging to outsource the outsourced activity or in conducting it.

Society and charities such as Oxfam may express their social responses of disapproval against the outsourced partners for the socio-economic harm caused to their employees.⁹⁴ These partners might argue that responsibility is shared with Wal-Mart. This argument, however, would be mistaken as Wal-Mart did not play any participating role in the outsourced activity. In other words, Wal-Mart (or rather, its corporate agents) has no guidance control over the outsourced activities. There is no strong ground for society and the charities to argue that an objective social response holds Wal-Mart vicariously liable. An objective social response renders a corporation responsible only if society and the charities can identify those responsible corporate agents who exercised guidance control over corporate activities. An inconsistent social response by society and the charities (especially the campaign for promoting animal rights) entails a lack of responsibility in corporations conducting disapproved of corporate activities.

A corporation which is perceived by society to have guidance control over its harmful activities cannot spread its responsibility to others. For example, BP's report on the Mexican Gulf Explosion tries to spread blame to its partners, Transocean and Halliburton.⁹⁵ BP subcontracted its activities on the rig to these two corporations. However, BP's attempt to spread the blame was unsuccessful as it still played the main role in managing operations on the rig. It was perceived by society to have guidance control over the event which caused the explosion and it was expected by society to rectify the problem. The objective social responses of society still held BP vicariously liable. As a result, its Chief Executive resigned.

The theory of responsibility in both the social and the legal contexts holds that responsibility cannot be shared unless each of the participants exercises guidance control over

⁹⁴See Kate Raworth, 'Trading Away our Rights: Women Working in Global Supply Chain' (Oxfam 2004) <http://www.oxfam.org.uk/resources/policy/trade/downloads/trading_rights.pdf> accessed 14 August 2011

⁹⁵'BP spreads Blame over Oil Spill' BBC News (London, 8 September 2010) <<http://www.bbc.co.uk/news/world-us-canada-11225623>> accessed 14 August 2011

the activity. In this chapter I have highlighted the fact that only human agents exercise guidance control over their actions. Although a corporation is composed of many human agents, responsibility for the harm created by corporate activities is not imposed on every one of its human agents. Responsibility in both the legal and social contexts is only imposed on the one or several agents who are perceived to have had guidance control over the corporate activities. Furthermore, this individual is difficult to determine. Without that identified human agent, the guidance control principle cannot be applied. As a result, these corporate activities do not result in a holding of accountability for the harms caused.

A corporation can nevertheless be subject to strict liability for the harm caused by its activities. This liability however does not transcend jurisdiction. I show this limitation in the example of Hatem Yavus's companies⁹⁶ which are situated in Turkey, Namibia and Australia. The ones operating in Turkey and Namibia are outside the Australian jurisdiction. The seal culling operations are legal in Turkey and Namibia. This activity is illegal in Australia. Yavus's Australian company does not engage in seal culling in Australia, and the Australian authorities cannot hold that company liable for illegal acts done when it is operating outside its jurisdiction.

Furthermore, a corporation can externalise its responsibility in both the legal and social contexts. It does so by externalising - (1) its human agents in the form of dismissals or inducing resignations and (2) its activities in the form of outsourcing contracts.

⁹⁶See pages 130-1 below for the example of Yavus's company.

(v) A Conclusion of Chapter Two

I have shown that the solution to the global problem addressed in the context of outsourcing activities by corporations should not be based on the guidance control principle. I have also proposed that Kutz's theory can provide an alternative solution to this global problem. I firstly pointed out in this chapter that this principle is not compatible with Kutz's theory. Kutz advances the argument that individuals who are complicit by participation in an activity are each individually responsible for the harm created by the activity. He argues that the mere participation of individuals by way of the overlapping of intentions in a joint activity (such as collective wrongdoing) is sufficient to impose complicit responsibility (or, as he puts it, accountability) on them for the harm done by the joint activity.

The guidance control principle on which the imposition of responsibility is based has a higher threshold than Kutz's theory of mere participation in complicity. The guidance control principle requires a human agent to exhibit both of its components—(1) the exercise of the element of choice and (2) the engagement in practical reason. This higher threshold of the guidance control principle shows that not all human agents in a corporation can be responsible for harm caused by corporate activity. It is only those who have exercised guidance control who can be held responsible.

Consequently in law, employers are only vicariously liable when an employee has exercised guidance control over a negligent act. Senior managers are responsible for committing corporate manslaughter or corporate homicide only when they have exercised guidance control over corporate activities which have caused the death of a person. In the social context, the corporate agents who are perceived by society to have exercised guidance control over corporate activities are the ones to accept responsibility as a result of the objective and vicarious social responses of individuals.

These two components are crucial for the imposition of responsibility. Corporations use the process of outsourcing to separate the two components. They exhibit the first component – the element of choice to outsource or to look for cheaper means to outsource – and externalise the second component – the practical reason either in looking for means to outsource the outsourced activity or in conducting it. Thus, the imposition of responsibility by the guidance control principle is not possible. The *Wal-Mart* case is an example of this lack of responsibility.

Kutz's theory of complicity may appear to be the solution to the non-imposition of responsibility on a corporation for its harmful corporate activities. The theory of complicity suggests every participant in the collective activity is accountable for the harm caused. The application of this theory to the context of outsourcing suggests that the collective activity of outsourcing aims to produce goods to the consumer cheaply in return for maximised profits. All individuals of the outsourcing and the outsourced corporations are participants in this collective activity. Therefore, each participant is accountable for the socio-economic harm caused by this collective activity.

Kutz's theory would be plausible if every participant in the collective action exercised guidance control over it. Section (i) of Part A mentioned that a human agent is responsible for his or her individual action. Shared responsibility can occur in a group only when each participant exercises guidance control over a particular goal or part of goal. In the next chapter, I show that it is plausible to impose shared responsibility on individuals as human agents who cannot externalise their personal activities. Nor can they shield their personal participation through any 'veil'.

In which case, Kutz's theory might have difficulty in establishing shared responsibility between corporations. The *Wal-Mart* case demonstrates that Wal-Mart and its

outsourced partners are participants in their collective activity. However, there is no shared responsibility between Wal-Mart and its partners. Wal-Mart (or any corporation) externalises its activities (and the exercise of guidance control over them) to others and thus it excludes responsibility for these outsourced activities. Therefore, Kutz's theory of complicity which holds Wal-Mart accountable alongside its outsourced partners does not give a convincing ground for suggesting that Wal-Mart is responsible (or that it has shared responsibility) for the collective wrongdoing.

I conclude with four points. First, the law's imposition of responsibility on an individual and a corporation adheres to the guidance control principle. Second, responsibility must be attached to a human agent. I have demonstrated the importance of the human agent for the imposition of responsibility. Third, I have found that responsibility can be shared only if each human agent has exercised guidance control over the activity. Responsibility cannot be imposed on a human agent who has not exhibited the two components of guidance control. A corporation can circumvent responsibility in law by externalising one of the two elements of guidance control of an activity or the whole activity. Fourth, the imposition of responsibility on a corporation in the social context results in the expulsion of the member who is socially responsible. A corporation externalises the socially responsible member (or any of its members who is perceived by the public to be responsible) to exclude responsibility.

CHAPTER THREE: THE ORIGIN OF THE GUIDANCE CONTROL PRINCIPLE

In the previous chapter, I introduced the guidance control principle in practice by conducting a study on the imposition of responsibility on a human agent for a singular (or personal) action and also for a corporate activity, in the legal and social contexts. I mentioned that Kutz's theory of complicity is – in both the legal and the social contexts – incompatible with the imposition in practice of responsibility. Here, I advance an argument to show that Kutz's theory of complicity is also incompatible with the imposition of responsibility in theory. In the previous chapter, I have shown that the human agent is an essential basis of responsibility. The human agent is also seen as the basis of responsibility in this chapter.

As mentioned, this guidance control principle originates from a theory of moral responsibility in which the moral agent is a human agent.¹ Fischer and Ravizza coined this term 'guidance control'. They suggest that a human agent can be responsible for his or her actions only when he or she is the appropriate candidate to receive the reactive attitudes of others in response to its behaviour.² Fischer and Ravizza suggest that an 'appropriate candidate' is a human agent who has exercised guidance control over his or her action.³

I explore the theory of guidance control by unpacking the two components - (1) the exercise of the element of choice and (2) the engagement in practical reason.⁴ Here, I discuss as follows. In section (i), I unpack the first component of guidance control. I unpack the second component of guidance control in section (ii). I then assess Kutz's theory of complicity in section (iii). I argue that his theory is non-compatible with the guidance control principle. As mentioned, this principle forms the basis for the imposition of responsibility in

¹John Martin Fischer and Mark Ravizza, S. J., *Responsibility and Control: A Theory of Moral Responsibility*, (Paperback, CUP, 2000) 241. Cited in this chapter as Fischer (n1).

²ibid 6.

³ibid 20.

⁴ibid 34.

the legal, social and moral contexts. Therefore, I conclude that it will be difficult to incorporate Kutz's theory into the imposition of responsibility in practice on individuals, social groups and corporations contributing to collective wrongdoing. It will be difficult to incorporate it into the imposition of responsibility in theory because it does not meet the criteria set by the guidance control principle. It will be also difficult to incorporate it into the imposition of responsibility in the social context because the agent who is to be blamed by society must (or he or she must be perceived to) exercise guidance control over the corporate activity. These findings give the reason for the development of an alternative theory of collective obligations.

I here briefly outline the following chapters to aid the idea of this development. In the preceding chapters, I have attempted to place Kutz's theory where there can be successful and compatible application. As mentioned in Chapter One, the notion of responsibility traverses national boundaries. I maintain this argument in this thesis, but I advance the argument in Chapter Four that the imposition of responsibility is limited in its capacity to hold individuals responsible for collective and joint actions. In addition, I also advance the argument in Chapter Four that the imposition of responsibility on responsible individuals on behalf of a corporation is found to be theoretically unsupported and implausible and thus the imposition of responsibility in practice is difficult (as in the case of the doctrine of vicarious liability of corporate employers) and when provided for is rarely done (as with the application of the Corporate Manslaughter and Corporate Homicide Act).

I later advance in Chapter Five the argument that Kutz's theory of complicity is a foundation for the imposition of collective obligations on individuals, social groups and corporations, as opposed to the imposition of responsibility on them. Collective obligations may be contained in multilateral contractual agreements as opposed to bilateral contractual

agreements. I advance in Chapter Six the argument that the theory of collective obligations should be grounded on the kind of normative good which participants can enforce against one another at the interpersonal level.

I now turn to explore in detail a discussion of how the legal tests determine a human agent's responsibility in theory.

(i) Component One: The Element of Choice

Fischer and Ravizza define the human agent's exercise of choice as a person's ability to assert a 'certain kind of *control*' over his or her behaviour.⁵ They suggest that when a person is making a choice to act, this person is able to choose one path amongst the several paths which are available to him or her.⁶ A 'certain kind of *control*' exercised by the person is explained by Fischer and Ravizza thus – '[i]n this kind of circumstance, a person has the sort of control that involves alternative possibilities: he follows one path, and yet he *can* ("is able to," "has it in his power to") follow another path'.⁷ In other words, the exercise of the element of choice is a person's 'freedom to do (or choose) otherwise'.⁸

The element of choice is triggered by a 'mechanism (*K*)' which 'issues in an action'.⁹ This is the actual sequence which can lead to the human agent's action.¹⁰ This mechanism which issues in the action 'must be one's own'.¹¹ Suppose a mechanism issues in an action when the human agent is in an automated state – like when acting as an automaton or when hypnotised – they argue that this issuing of an action is not by the human agent. He or she did

⁵Emphasis in the original text. *ibid* 20.

⁶*ibid.*

⁷*ibid.*

⁸*ibid.*

⁹*ibid* 63.

¹⁰*ibid* 30.

¹¹ *ibid* 89.

not exercise choice in taking the actual sequence which led to his or her action. Fischer and Ravizza agree that this element of choice is vulnerable to the theory of determinism. If the theory of determinism is true then a critic can argue that Fischer and Ravizza's theory of exercised choice is false. This is because the theory of determinism suggests that all actions undertaken by human agents are determined.

Nevertheless, Fischer and Ravizza contend that this element of choice is compatible with causal determinism.¹² The example they use illustrates two scenarios in this argument.¹³ Scenario one consists of a human agent's mechanism (K) which issues in an action where this agent can choose between two paths – the actual sequence (when K leads to an action) and the alternative sequence (when the actor could have chosen to act otherwise). Scenario two consists of another human agent's mechanism which issues in an action where it is impossible for this agent to choose a different path. These two scenarios will be explored in turn.

(i)(a) Scenario One

Consider an example given by Fischer and Ravizza:-¹⁴

Sam and Jack had a conversation. Sam wants to kill the mayor and intends to assassinate him on Tuesday. Jack knows Sam's plan, and also wants the mayor to be killed, but fears that Sam might change his mind on that day, in which case he may decide not to kill the mayor. Therefore, unbeknown to Sam, Jack installs a device in Sam's brain. If Sam decides not to kill him on the Tuesday, Jack can trigger the device which will ensure that Sam will nevertheless kill the mayor.

¹²This thesis makes slight modifications in the following example. ibid 34.

¹³ibid 29.

¹⁴This example is slightly modified here. See (n1) 34.

Sam's decision to kill the mayor entails two paths – (1) the actual sequence and (2) the alternative sequence.¹⁵ The human agent's action is triggered by the mechanism in the actual sequence. An 'actual-sequence' approach is 'an approach to moral responsibility that does not require alternative possibilities'.¹⁶ In Sam's case, *K* issues in an action to kill the mayor. The alternative sequence is where the human agent chooses to act otherwise. But then the alternative sequence to Sam's actual sequence is that Sam decides not to kill the mayor in which case Jack will activate the device to make Sam kill the mayor. The outcome in both sequences is the same – the mayor dies.

Sam kills the mayor by his own decision in the actual sequence. Sam kills the mayor because Jack activates the device in the alternative sequence. The alternative sequence has a responsibility-undermining factor.¹⁷ Sam would not have killed the mayor by his own decision. It would have been the device activated by Jack, who made Sam do it. Therefore, if Sam kills the mayor because of Jack's intervening act, Jack's act is the responsibility-undermining factor. Sam will in this case not be responsible for the killing.

Fischer and Ravizza suggest that Sam is responsible for the assassination of the mayor when he chooses the actual sequence leading to his actions. The fact that the responsibility-undermining factor appears in the alternative sequence does not in this case free Sam from responsibility.¹⁸ They explain '[i]n cases in which a responsibility-undermining factor operates in the alternative sequence but not in the actual sequence, an agent can be held [...] responsible for an action, although he could not have done otherwise'.¹⁹

¹⁵Fischer (n1) 30.

¹⁶ibid 37.

¹⁷See (n15).

¹⁸ibid.

¹⁹ibid.

In conclusion, an individual exercises the element of choice when he or she performs an actual sequence which is free from a responsibility-undermining factor. The mere fact that this responsibility-undermining factor is present in the alternative sequence does not exonerate the individual from responsibility.

(i)(b) *Scenario Two*

Consider this scenario given by Fischer and Ravizza:-²⁰

The neurophysiologists of the future have installed devices in Jones's brain. When they turn these devices on, they emit signals which electronically stimulate Jones's brain causing him to act out good deeds. In one instance, Jones prevents a person from being mugged.

They do not believe that when these devices are switched on in Jones's head, Jones has guidance control over his actions.²¹ Therefore, there is a responsibility-undermining factor in his actual sequence. Jones had acted to perform good deeds. However, since he does not have 'some kind of *control*' over this doing of a good deed, Jones cannot take credit for acting that way.²² The argument goes similarly for individuals doing bad or harmful deeds. Fischer and Ravizza believe that a human agent 'being hypnotised, being brainwashed, or suffering from a mental disorder such as an extreme phobia or under the influence of a potent drug cannot legitimately be held [...] responsible for what he [or she] does'.²³

In conclusion, individuals - whose actual sequences with responsibility-undermining factors led to their actions - have not exercised their choice to act in these ways. Therefore

²⁰ This thesis makes slight modifications of this example. Fischer (n1) 35.

²¹ibid.

²²ibid.

²³ibid.

they are not responsible for their blameworthy or praiseworthy actions. Fischer and Ravizza's element of choice is compatible with the theory of determinism. Causal determinism requires a human agent to act without choice. This can happen when a human agent performs the actual sequence with a responsibility-undermining factor. They believe that kind of actual sequence results in a human agent not being responsible for the action. The theory of determinism agrees with that result.

Next, I show how Fischer and Ravizza's element of choice corresponds to the legal tests, which were explored in the previous chapter.

(i)(c) The Legal Tests Concerning the Element of Choice

Here, I show how the element of choice for guidance control ties in with the analysis of the examples in the previous chapter. In all of the examples and scenarios of Chapter Two, human agents engaged in their actual sequences without responsibility-undermining factors. Therefore, they all exercised the element of choice.

The legal tests do take account of those human agents who have not acted in the exercise of the element of choice. For example, an automaton cannot be made responsible for his or her actions. Sane automatism is an absolute defense to criminal responsibility.²⁴ In Adam's example in Part A's section (i)(a) of Chapter Two, if he can prove that his stealing of Brenda's umbrella was caused by an external factor,²⁵ he can argue that he did not have guidance control over his actions as he had not chosen to act on them. Therefore, he cannot be responsible for stealing Brenda's umbrella.

²⁴David Ormerod, *Smith and Hogan: Criminal Law* (12th Ed, OUP, 2008) 280. Cited in this chapter as Ormerod (24).

²⁵Such as by a prescribed drug *as per R v Quick* [1973] QB 910. Or, by a physical defect of the body like an arteriosclerosis *as per R v Kemp* [1957] 1 QB 407.

In the examples of Sally and the senior management of a corporation, I find it difficult to argue that their elements of choice exercised in their actions are affected by a responsibility-undermining factor. Had Sally or the members of senior management been in the state of automatism, they would not have engaged in their respective activities. Sally would not have the capacity to engage in a dangerous sport. However, she could have been hypnotised. Her actual mechanism in that case has led to her actions, but her hypnotic state shows that she has not exercised her choice. Sally cannot be held responsible. If the members of the senior management were in a hypnotic state, they would not have the capacity to hold their posts.

In the case of Sam, the legal tests can accommodate situations in which an actor performs an actual sequence with a responsibility-undermining factor. Consider the following example:—

Sam drives a delivery van. He falls into a hypoglycaemic state and loses control of the van. The van crashes into Carla's vehicle causing her to suffer a whiplash.

The issue in this example is whether Sam had exercised the element of choice to engage in an actual sequence with a responsibility-undermining factor. I find that there are two possibilities in Sam's situation – it is either he was (1) aware of his poor physiological condition prior to falling into the hypoglycaemic state or (2) not aware of his poor physiological condition prior to falling into this state. Each possibility brings up a different outcome.

In the moral context, if Sam was aware of his poor physiological state at the time he was driving the van - for example, he had felt dizzy or he had made a couple of clumsy errors

prior to falling into a hypoglycaemic²⁶ an observer may assess Fischer and Ravizza's element of choice in the following. An observer can argue that Sam is aware of an alternative sequence where there is a possibility he can lose control of the van. In other words, Sam's responsibility-undermining factor lies in the alternative sequence of his action. Since Sam nevertheless had chosen to drive the delivery van, his choice of the actual sequence shows that he will be responsible.

In the legal context, the legal test to hold Sam responsible corresponds to this moral finding. Sam's awareness of his physiological state prior to his onset shows that his behaviour is measured by the objective standard of care in driving.²⁷ The high standard of care in driving expects every driver to be competent in driving. Sam falls below the standard of care when he has his onset. Therefore, he breached his duty as a competent driver and is held responsible.²⁸

In the moral context, if Sam was not aware of his poor physiological condition at the time he was driving the van, an observer can argue that his hypoglycaemic state was a sudden occurrence. Thus, he was not aware of the possibility of the onset. An observer can argue that Sam was not aware that there was an alternative sequence where he could have lost the control of the van. Therefore, the responsibility-undermining factor lies in his actual sequence. During his hypoglycaemic state, Sam was an automaton. He could not have been responsible.

In the legal context, the legal test not to hold Sam responsible for his action corresponds to this moral finding. The objective standard of care is not applied to this

²⁶As per the facts in the case of *Roberts v Ramsbottom* [1980] 1 ALL ER 7 where the defendant had made errors of judgement in his driving prior to the causing of personal injury to the claimant. It was reported that the defendant struck a parked van and knocked a boy off his bike before falling into a hypoglycaemic state. In evidence provided to the police, the defendant had reported he felt a bit queer before the accidents. The view is taken that the defendant was aware of his unfit state to drive.

²⁷*Roberts* (n26) applied the objective standard of care in *Nettleship v Weston* [1971] 2 QB 691. This principle is applied to every driver.

²⁸ibid.

situation. The legal test does not hold Sam responsible if he is not aware of his onset. This is because it is considered in law that the reasonable person who is aware of the onset would have appreciated the dangers in driving and thus stopped driving altogether,²⁹ but the reasonable person who was not aware of the onset would not have stopped driving. The failure of a human agent to engage in this legally recognised reason proves an unawareness of the driver's physiological state and thus not responsible.

(i)(d) A Summary of Section (i)

I have shown the underlying theory of Fischer and Ravizza's argument on the element of choice in section (i). The legal tests which are explored in Chapter Two do consider the possibilities of a responsibility-undermining factor. If an individual is an automaton, it is concluded in law that that particular individual cannot be legally responsible for his or her actions. The total defence of automatism in criminal law relieves an automaton of criminal responsibility. An automaton in tort law (in particular in negligent driving) is an individual who is not aware of his or her physiological state at the time of onset. This automaton is not responsible for the tortious harm caused to others.

There is a correlation between these legal tests and Fischer and Ravizza's first component of guidance control. Therefore, the discussion in this section ties in with the explorations made in the examples of Chapter Two. Next, I explore the second component of guidance control.

²⁹ *Mansfield v Weetabix* [1998] 1 WLR 1263.

(ii) Component Two: The Engagement in Practical Reasoning

Fischer and Ravizza's definition of a human agent's engagement in practical reasoning is the human agent's ability to engage in a process they call reason-responsiveness.³⁰ They believe that for a person to behave in response to reason in the context of their discussion 'requires not merely responsiveness to prudential reasons, but to (at least some) moral reasons as well'.³¹ The context in which they based their guidance control principle is the theory of moral responsibility. Thus, the bare minimum threshold of moral responsibility is the human agent's responsiveness to moral reasons.

Similarly, the bare minimum threshold of responsibility in law is the human agent's responsiveness to legally recognised reasons. In Chapter Two, I showed that the legal tests of the human agent's engagement in practical reasoning are to ascertain the agent's responsiveness to legally recognised reasons. For example, a human agent is responsible when he or she either acts on the *mens rea* element of a criminal conduct or has fallen below the standard of care which determines whether an act is negligent.

In Adam's theft example, he is considered by the law to commit theft because the *mens rea* elements are present, and this means that he has been responsive to the legally recognised reasons for acting. In Sally's negligence example, she was negligent because she fell below the standard of care and there was no break in the legal chain of causation which links her action with the damage. These two elements showed that Sally was responsive to the legally recognised reasons in acting negligently. On the topic of corporate manslaughter, the senior management is responsible for the cause of death when they have - in causing death - grossly breached their standard of care to conduct corporate activities. Therefore, the

³⁰Fischer (n1) 41.

³¹ibid 77.

legal test of the corporation's responsibility is the corporation's senior management's responsiveness to the legal reasons to act as such.

Two stages of practical reason are required for a human agent's choice of one path out of the available paths. He or she is both – (1) receptive to the reason to choose³² and (2) reactive to that reason to choose.³³ The level of reasons-responsiveness may differ. Fischer and Ravizza suggest that the reasons-responsiveness to moral reasons ought to be moderate,³⁴ as opposed to strong³⁵ or weak.³⁶ I explore the different levels of reasons-responsiveness from strong to weak and then to moderate. I introduce Fischer and Ravizza's analysis of the levels of reasons-responsiveness in each subsection. I then examine whether their criticisms also apply to the possible reasons-responsiveness of legal reasons. I conclude that the moderate reasons-responsive model of a human agent's practical reason is adopted in the legal context. I also conclude that this level accommodates the legal tests explored in Chapter One satisfactorily, which the strong and the weak levels cannot.

The analysis of each subsection is based on this example:–

Billy is penniless and starving. He is at the market stalls. The hawker, who sells bread, is momentarily busy with customers. Billy sees that he has the opportunity to grab a loaf of bread from the market stall without the hawker noticing. What does Billy do? Will he be responsible for his action if he decides to steal the loaf of bread?

Billy's choice in this example means that to steal the loaf of bread is his actual sequence. The matter of whether his action attracts responsibility depends on his practical reasoning. Next, I explore Billy's practical reasoning at a strong reasons-responsiveness level.

³²ibid 69.

³³ibid 73.

³⁴See (n 32).

³⁵Fischer (n1) 63.

³⁶ibid.

(ii)(a) *Practical Reasoning: The Strong Reasons-Responsiveness Model*

Fischer and Ravizza define a strong reasons-responsiveness as follows:-

'Suppose that a certain kind K of mechanism actually issues in an action. Strong reasons-responsiveness obtains under the following conditions: if K were to operate and there were sufficient reason to do otherwise, the agent would *recognize* the sufficient reason to do otherwise and thus *choose* to do otherwise and *do* otherwise.'³⁷

There are three steps in which a human agent is strongly responsive to a reason to act otherwise instead of the issued action – the human agent must (1) be receptive to the reason to act otherwise,³⁸ (2) must choose an act which goes in accordance with that reason³⁹ and (3) be reactive to that reason.⁴⁰ In Billy's case, his starvation triggers K in search for food. In addition, he is penniless. This adds gravity to his task. This situation enables Billy to engage his practical reason fully. K issues an action to steal loaf of bread. This is Billy's actual sequence. There are two possible ways in which Billy can react. He can either decide not to steal the bread or he can decide to steal it.

Suppose if Billy chose not to steal the loaf of bread, then he had not acted on the actual sequence, but rather on the alternative sequence. This choice is the product of Billy's strong reasons-responsiveness. The strong reasons-responsiveness works in this way. Billy has found himself in a situation where he can steal to sustain himself. K is supposed to operate. However, Billy had chosen an alternative path to act otherwise. Billy is strongly responsive to the reason which is that he knows and believes that stealing is illegal and

³⁷ibid. Emphasis in the original text.

³⁸ibid 41.

³⁹ibid.

⁴⁰ibid.

wrong. This is a sufficient reason for him to choose the alternative sequence and also to act on it.

A strong reasons-responsiveness entails that any sufficient reason given by an actor not to undertake the actual sequence determines that this actor will chose the alternative sequence and react to it. In this instance, Billy's practical reasoning is not flawed. Billy has followed his sufficient reason to choose his alternative sequence and has acted on it. In other words, Billy was strongly receptive to his reason and he was also strongly reactive to that reason. Suppose Billy chose to act on the actual sequence; Fischer and Ravizza suggest that he will have performed one of the three 'alternative-sequence' failures.⁴¹ These are 'failures [(1)] in the connection between what reasons there are and what reasons the agent recognizes, [(2)] in the connection between the agent's reasons and his choice, and [(3)] in the connection between choice and action'.⁴²

They suggest the first kind of failure is 'a failure to be receptive to reasons'.⁴³ A human agent is found to be in a state which is 'associated with delusional psychosis', due to his or her inability to recognise reasons.⁴⁴ The second kind of failure is 'a failure of reactivity'.⁴⁵ In other words, it is a human agent's failure 'to be appropriately affected by beliefs'.⁴⁶ Fischer and Ravizza suggest that such a human agent is in a state which 'afflicts certain compulsive or phobic neurotics' or it may have resulted from the human agent's 'weakness of will'.⁴⁷ The third kind of failure is a 'failure successfully to translate one's

⁴¹ibid.

⁴²ibid. See also TM Scanlon, 'Reasons: A Puzzling Duality?' in Wallace *et al*, 'Reason and Value' (OUP, 2004) 232.

⁴³ibid.

⁴⁴ibid.

⁴⁵ibid.

⁴⁶ibid.

⁴⁷ibid 42.

choice into action,⁴⁸ which may be triggered by ‘various kinds of physical incapacities’ or the human agent’s ‘weakness of the will’.⁴⁹

I analyse Billy’s case in the moral context thus. His choice to steal the loaf of bread shows that he has performed all kinds of ‘alternative-sequence’ failures. Suppose Billy does not recognise that what he does is stealing. This is the first ‘alternative-sequence’ failure which suggests that Billy must have acted in the state of psychosis. He acts as an automaton in this state. Suppose he knows that stealing is illegal and wrong. He is receptive to this reason. He is however not reactive to that reason. This is the second kind of ‘alternative-sequence’ failure which suggests that Billy acted upon his compulsions or that he displayed a weakness of will. Billy acts in this state because he cannot help it.

Suppose however Billy knows stealing is illegal, but he could not translate this reason into action. Say, he has motor neuron disease and operates a wheelchair. The hawker places the loaf of bread in his bag which is attached to the wheelchair. Billy knows he has to pay for the bread and does that by an envelope containing the payment in the bag, which the hawker collects. This time the hawker forgets to collect his payment, so Billy takes off without paying. His act of stealing is the third kind of ‘alternative-sequence’ failure where there is no connection between the choice and the action. He is incapable of communicating to the hawker who forgets to collect his payment and therefore he is physically and verbally incapable of preventing the theft. This is as close to an individual in a state of automatism as Billy can get.

I find that Billy is not responsible for the first and third kinds of ‘alternative-sequence’ failures. However, he is responsible for the second kind of ‘alternative-failure’. Billy has performed out of weakness of will. Therefore, he was neither an automaton nor he

⁴⁸ibid.

⁴⁹ibid.

was incapacitated when he decided to steal the loaf of bread. In conclusion, he will be responsible for his actions. None of three kinds of ‘alternative-sequence’ failures can free Billy from moral responsibility unless he acts in an automated (first kind) or a close to automated state (third kind) way. Fischer and Ravizza suggest that strong reasons-responsiveness cannot be required as a condition for him to be responsible for his actions. This is because this strong reasons-responsiveness model is too strong.⁵⁰

In the legal context, Billy’s act of theft is determined by the *actus reus* and *mens rea* elements. The element of *actus reus* must be accompanied by the *mens rea* element of dishonesty to permanently deprive the hawker of the loaf of bread. Billy cannot be responsible if he steals the bread as an automaton. Suppose he is hypnotised and he does not recognise his behaviour as stealing, there is no *mens rea* element. He may not be found responsible in the example where he has motor neuron disease where he is physically or verbally incapable of preventing theft. There is no legal element of dishonesty.

Billy can be responsible if he displays a weakness of will and acts on the actual sequence. Therefore, he can be responsible if he steals because of his compulsion to. In addition, he can be responsible if he acts out of mistake. Suppose Billy has mistakenly thought that he had paid for the bread and walks off with it. He is obliged to either return the unpaid bread or pay for it at a later time or date.⁵¹ In the moral context however, strong reasons-responsiveness cannot deal with an individual who has acted out of mistake. This act is neither a state of automation nor is the actor physically incapable of connecting the actor’s choice to reason. It is also not a display of an actor’s weakness of will.

⁵⁰Fischer (n1).

⁵¹Theft Act 1968, S5(4).

In conclusion, the strong reasons-responsiveness seems too strong since it does not take account of instances like mistake. I find that this strong reasons-responsive model does not tie in well with the legal tests which are explored in Chapter Two. I show this next.

(ii)(a)(a) Law and the Strong Reasons-Responsiveness Model

Fischer and Ravizza suggest that a human agent who performs an act out of weakness of will by rejecting his or her reason is still responsible. They show that the strong reasons-responsiveness model does not justify holding a person to be or not to be responsible in given circumstances. In the legal context, I would contend that the strong reasons-responsiveness model cannot adequately justify holding a human agent responsible for the kind of ‘alternative-sequence’ failure which does not involve an automated or a close to automated state.

I have illustrated this argument in the foregoing pages with the examples of Adam and Sally. In Adam’s example, suppose that he had a compulsive disorder to steal.⁵² His act of theft is a sign of his weakness of will and thus he can be classified as either the second or third kinds of ‘alternative-sequence’ failures. These circumstances, however, do not negate responsibility unless Adam can prove that he has not been dishonest. Therefore, these ‘alternative-sequence’ failures cannot free Adam from responsibility for committing theft due to his weakness of will.

In Sally’s example, her negligent act of power-kiting in the park can also be classified as either the second or third kinds of ‘alternative sequence’ failures. Sally may have acted from weakness of the will. Perhaps she is addicted to power-kiting and she must engage in

⁵² Fischer (n1) 41. See also Katie Law, ‘Why do People Steal Birds’ Eggs?’ *BBC News* (London, 2 April 2008) <<http://news.bbc.co.uk/1/hi/magazine/7325311.stm>> accessed 15 August 2011

the sport even when she knows that the park is not the appropriate site to perform the activity of power-kiting. These facts do not provide a valid exemption in law. According to the principles of the tort of negligence Sally has not upheld the standard of care, and the chain of legal causation linking her action and the harm caused is not broken. Therefore, she is held legally responsible for the injury caused to John.

Perhaps a successful argument for holding Adam and Sally not responsible in both these instances is to show a first kind of ‘alternative-sequence’ failure. Therefore, Adam and Sally must prove that they failed to recognise the reason to act otherwise. In the moral context, they have to prove that they were automatons when they were performing their actions. This argument does not help Adam and Sally’s legal case. In conclusion, the strong reasons-responsiveness model is too strong because it distinguishes between responsible and non-responsible human agents on the grounds of whether they are agents or automatons.

Some legal instances however - in which the legal principle does draw a sharp distinction between a human agent’s states of consciousness and automatism – do support the strong reasons-responsiveness model. I may elaborate this by Sam’s negligent driving example. In subsection (i)(c), I have shown that the function of the responsibility-undermining factor depends on whether Sam had awareness of his physiological state prior to his onset. Sam’s awareness of his physiological condition also affects the assessment of his practical reasoning. I have indicated in subsection (i)(c) that if Sam had been aware of his physiological condition prior to his hypoglycaemic state, he would have been aware of a possible world (i.e. an alternative sequence) - alongside his actual sequence - where he could have been an automaton. Therefore, Sam’s responsibility-undermining factor lies in the alternative sequence. The factor does not lie in the actual sequence.

When K issues in an action which makes Sam drive the van and this actual sequence leads on to this action, Sam can be said to have rejected his reason to act otherwise. In essence, he rejects the reasoning which concludes that he ought not to drive the van in his physiological state. This cannot be the first kind of ‘alternative-sequence’ failure because Sam’s awareness of his physiological state means that he engages in the actual sequence not as automaton, but through a weakness of will.

In the moral context, he ought to stop driving. But, if he cannot make that decision out of weakness of will and he does not decide to stop, this rejection of reason entails the failures of the ‘alternative-sequence’ of the second kind. Therefore, he is responsible for causing harm to Carla. In the legal context, the legal test showed that Sam still exercised his element of choice. Furthermore, an observer can argue that Sam has also chosen to run the risk of driving the vehicle as an automaton.

The legal standard of care applied to Sam’s behaviour is the objective standard in which he ought to drive as a competent and skilled driver.⁵³ In conclusion, Sam’s practical reasoning is measured by the way he exercised his element of choice. He chose in this case to drive the van with an awareness of his physiological state and therefore in accordance with the objective standard of care he ought to be held responsible. The strong reasons-responsive model is successful only when Sam is aware of his physiological state and is strongly responsive to his reason not to drive and reacts to that. This is the human agent’s measure to prevent harm to oneself and others.

I have shown in subsection (i)(c) that if Sam had not been aware of his physiological state prior to his hypoglycaemic onset, then he would not have been aware of a possible world (i.e. an alternative sequence) where he can be an automaton. If he engages in driving

⁵³ Roberts (n26).

the van, Sam's hypoglycaemic onset is in his actual sequence. His lack of awareness is his responsibility-undermining factor. Sam did not recognise any reason not to drive. Therefore, this is a first 'alternative-sequence' failure, where the human agent acts as an automaton. I can conclude that Sam did not choose to drive the van as an automaton. In the absence of the element of exercised choice, the standard of care applied to Sam is a modified subjective test.⁵⁴ Sam's behaviour is measured by the standard of a driver with the same physiological condition.⁵⁵ According to this standard a driver with the same physiological condition who is unaware of his or her onset is not responsible for the harm caused by the onset.⁵⁶

In conclusion, if Sam was not aware of his physiological onset, then he has not exercised his element of choice. The subjective standard of care shows that his practical reasoning cannot be measured because he acted as an automaton and that absolves him from responsibility. The strong reasons-responsive model ties in with the principles of negligent driving when the driver is not aware of his state which renders him or her an automaton. However, this does not suggest it is a suitable model for a human agent's response to legal reasons.

(ii)(a)(b) A Conclusion of (ii)(a)

The strong reasons-responsive model is too strong. A human agent is not free of responsibility for his or her actions only when acting as an automaton. The context of negligent driving supports the strong reasons-responsive model when the human agent is not aware of his or her physiological onset prior to being an automaton. However, the strong reasons-responsive model cannot deal with a human agent who is aware of his or her

⁵⁴ *Mansfield* (n29).

⁵⁵ *ibid.*

⁵⁶ *ibid.*

physiological condition and who rejects the reason not to engage in driving. This model also encounters similar difficulties with the establishment of responsibility in Adam and Sally.

Therefore, this level of response to reason is not adopted for a human agent's response to legal reason. Next, I explore the weak reasons-responsiveness model.

(ii)(b) Practical Reasoning: The Weak Reasons-Responsiveness Model

Fischer and Ravizza define the weak reasons-responsiveness model thus:-

'we hold fixed the operation of the actual kind of mechanism, and we then simply require that there exist *some* possible scenario (or possible world) in which there is a sufficient reason to do otherwise, the agent recognizes this reason, and the agent does otherwise *for that reason*'.⁵⁷

The weak reasons-responsive model gives minimal room for an 'alternative-sequence' failure. This model allows the human agent the choice to engage with K , and thus a human agent can reject a reason to act otherwise and persist to engage with the actual sequence. The analysis of this human agent's behaviour requires an observer to hypothesise in '*some* possible scenario' or some possible world there is sufficient reason to do otherwise. This human agent recognises this reason and does otherwise. Thus, this model can accommodate human agents who acted against a reason to act otherwise in weakness of their wills. Responsibility is imposed when the hypothesised human agent would have acted otherwise, as opposed to the actual human agent acting on the actual sequence.

Suppose in Billy's case that he acts on K and steals the loaf of bread from the hawker, which is therefore his actual sequence. The rejection of his reason to act otherwise (i.e. to not

⁵⁷Emphasis in the original text. Fischer (n1) 64.

steal) does not entail an ‘alternative-sequence’ failure. It is only a sign that he was weakly responsive to that reason.⁵⁸ Thus, he is not acting as an automaton. An observer can still hold him responsible when it is a hypothesised that there is a sufficient reason for him to act otherwise. In other words, an observer hypothesises that there is sufficient reason for Billy to act otherwise in a possible world. For example, there is a sufficient reason for him not to steal because stealing is illegal. In that possible world, if the observer hypothesises that he recognises this reason and thus chooses to act otherwise, then the conclusion is that Billy’s practical reasoning to reject the reason to act otherwise is flawed. Thus, he can be held responsible for performing his actual sequence.

(ii)(b)(a) Law and the Weak Reasons-Responsiveness Model

This model can accommodate the acts of Adam, Sally and Sam better than the strong reasons-responsiveness model. In all of these examples, the human agents engaged in their actions because they were weakly responsive to the reason to act otherwise. Adam ought not to have acted on K to steal Brenda’s umbrella. However, his response to that reason to act otherwise was weak. Sally ought not to have acted on K to power-kite in the park. Her response to that reason to act otherwise was also weak. There are two ways to interpret Sam’s case. If Sam was aware of his hypoglycaemic onset, then he ought not to have acted on K to drive the van. His response to that reason to act otherwise was weak. If Sam was not aware of his hypoglycaemic onset, then there is no alternative sequence to choose to act otherwise. Sam in that case did not respond to any reason not to drive.

In all of these cases, the legal tests play the role of the bystander. The legal tests hypothesise how Adam, Sally and Sam may have acted in a possible world. Under s2 of the

⁵⁸ibid 45.

Theft Act, there are legally recognised reasons to appropriate property belonging to another without being dishonest. No theft is committed if these reasons are followed. Under the tort of negligence, the standard of care provides the legal reasons not to act in a careless manner. No act of negligence is committed if the standard of care is upheld. In these possible worlds, the law assesses the acts of Adam, Sally and Sam on the basis that they ought to have recognised these reasons and to have acted on them. The failure of Adam, Sally and Sam to have done so entailed that they were weakly responsive to these legal reasons. Thus, they performed their actions with flawed practical reasoning. Therefore, they should be responsible.

(ii)(b)(b) A Conclusion of (ii)(b)

The weak reasons-responsiveness model does accommodate the law's imposition of responsibility better than the strong reasons-responsiveness model. This is because, as Fischer and Ravizza find, this model has a 'loose fit between reasons and action'.⁵⁹ However, they also find that this 'fit is, unfortunately, too loose'.⁶⁰ In other words, the weak reasons-responsiveness model may not ground itself in reality. There is a limitless hypothesis on a certain possible world. Therefore, they criticise this model, saying that it 'needs to incorporate the idea that an agent's doing otherwise must be *appropriately connected* to the reason to do otherwise'.⁶¹ The weak reasons-responsiveness model does not have any perimeters to ensure that this is the case.

In Billy's case, for example, his situation opens up possibilities for an observer to hypothesise a possible world where K triggers Billy to steal the loaf of bread. Suppose that in

⁵⁹ibid 65.

⁶⁰ibid.

⁶¹ibid.

a possible world, one can hypothesise that, by the trigger of K , there is sufficient reason for Billy to massacre all the people at the market. He recognises this reason and acts on it. The hunger for a loaf of bread may entail the massacre of people at the market. This shows that his probability of doing otherwise in the actual world is not appropriately connected (i.e. connected to the reality or the practical world) to the reason to do otherwise in a possible world. Therefore, there are instances where the weak reasons-responsiveness model is not grounded in reality. In these instances, the model cannot support a human agent's response to a moral or legal reason.

In conclusion, the strong reasons-responsiveness model does not accommodate the imposition of responsibility when the human agent falls short of being an automaton. The weak reasons-responsiveness model can accommodate the imposition of responsibility, but lacks the parameters to ground the hypothesising of possible worlds in reality. Therefore, I will not adopt either of these levels of responsiveness to reason for the imposition of responsibility on a human agent. I adopt Fischer and Ravizza's moderate reasons-responsiveness model which is explored next.

(ii)(c) Practical Reasoning: The Moderate Reasons-Responsiveness Model

I adopt this model as the human agent's response to legal reason. It can accommodate the legal tests of a human agent's response to legally recognised reasons satisfactorily. Here, I explain how the model works. Fischer and Ravizza suggest that moderate reasons-responsiveness is composed of two elements – (1) receptivity to a reason⁶² and (2) reactivity

⁶²ibid 69.

to that reason.⁶³ My analysis focuses on the actual sequence performed by the human agent. I do not consider any alternative sequence.

A human agent engages in the first half of the practical reasoning when he or she is receptive to a reason to act. They suggest that ‘for an agent to be morally responsible for an action... the actual mechanism that issues in his [or her] action must be at least “regularly” receptive to reasons’.⁶⁴ This requirement of ‘regularly’ receptive to reasons ‘involves an *understandable pattern* of (actual and hypothetical) reason-receptivity’.⁶⁵ Furthermore, the human agent must have the ‘capacity to recognize the reasons that exist’.⁶⁶

A human agent engages in the second half of practical reasoning when he or she is reactive to that reason. In other words the human agent must have the ‘capacity to translate reasons into choices’.⁶⁷ Fischer and Ravizza suggest that the human agent only needs to be weakly reactive to reason.⁶⁸ Therefore, if a human agent is regularly receptive to a reason to act and is weakly reactive to that reason, this human agent is responsible for the performance of that action. This model is an improvement of both the strong and weak reasons-responsive models.

First, the strong reasons-responsive model takes the view that the human agent recognises the reason to act and then chooses to act on it. Therefore, human agents are strongly receptive to a reason. This model however only requires the human agent to have the capacity to recognise a reason to act and that the human agent can decide whether to translate this reason into action. Therefore, a human agent is only regularly receptive, as opposed to

⁶³ibid 73.

⁶⁴ibid 71. Emphasis in the original text.

⁶⁵ibid. Emphasis in the original text.

⁶⁶ibid 69.

⁶⁷ibid.

⁶⁸ibid 76.

being strongly receptive, to a reason.⁶⁹ In addition, a human agent needs only to be weakly reactive to that reason to ground responsibility. Second, Fischer and Ravizza set the parameters of this model to ground it in reality.⁷⁰ A human agent's behaviour is assessed by an 'understandable pattern' of behaviours. This model takes into account general human behaviours and also 'the subjectivity of the agent'.⁷¹ Any reason which is not of an understandable pattern is not grounded in reality. A human agent who is receptive to such a reason is acting as an automaton.

An elaboration of the element of the moderate reasons-responsive model goes thus. Fischer and Ravizza give the example of a non-addictive drug user.⁷² She shall be named Amy:-

Amy's drug use is recreational. The element of practical reasoning shows she is regularly receptive to the reason to take the drug. The drug makes her feel good; therefore the reason to take it is to feel good. Her habit is her subjective character, but it is nevertheless an understandable behavioural pattern. Suppose she decides to refrain from taking the non-addictive drug because it costs £1,000 per consumption. She has finished her supplies and thinks she ought to stop this habit.

In the event of refraining from taking the drug, Amy is being regularly receptive to the reason of consumption and also is non-reactive to that reason. However, in the event where she has a moment of weakness when she is tempted to purchase and take the drug, she only has to be weakly reactive to that reason to be responsible for her actions. So, if Amy takes the drug out of weakness of will in which she is merely weakly reactive to her reason, she will be responsible for her action in this model. For example, if she decides to spend £1,000 to purchase the drug, this is a sign of her being regularly receptive to the reason for

⁶⁹ibid 73.

⁷⁰ibid.

⁷¹ibid.

⁷²ibid.

consumption. If she eventually takes the drug, Fischer and Ravizza suggest that the threshold of her engaging in this act only needs her to be weakly reactive to that reason. She only has to display a weakness of will to engage in her reason to act. If she does, Amy has exercised guidance control and she is responsible for taking the drug.

The second half of the practical reasoning – i.e. the reactivity to reason - is ‘all of a piece’⁷³ with the first half of practical reason. In other words, the human agent’s reaction, which translates reason into action, is ‘all of a piece’, and this ‘helps ground [] responsibility’.⁷⁴ In Billy’s case, *K* issues an action to steal the loaf of bread. Therefore, Billy is regularly receptive to the reason to steal. This is a patterned behaviour, which is understandable and it is grounded in reality. He is penniless and starving. Therefore, if Billy appears to be weakly reactive to the reason to steal the loaf of bread, and thus steals the bread, his reaction to the reason is ‘all of a piece’ of the practical reason to translate this into action. In conclusion, he is responsible for his action.

This moderate reasons-responsiveness model can accommodate a human agent’s compulsive behaviour (which the strong model cannot. As mentioned above, the strong model also cannot accommodate individuals who had acted out of mistake).⁷⁵ Suppose that *K* issues an action to steal because engaging in stealing results from Billy’s weakness of will. He is receptive to this compulsive reason to steal. His subjective characteristic is an understandable pattern, which is grounded in reality. Society does recognise the abnormal behaviour of obsessive-compulsive disorder. If Billy steals the loaf of bread, the threshold for him to do so only requires him to be weakly reactive to that compulsive reason. Therefore, his display of his weakness of will suffice. His reaction to his reason is ‘all of a piece’ which translates his compulsive reason into action. Therefore, Billy is responsible.

⁷³ibid.

⁷⁴ibid.

⁷⁵See pages 111-5 above.

The moderate reasons-responsiveness model is the better tool to determine whether a human agent behaves as an automaton. This model's outcome can be compared with the strong model's result. The strong reasons-responsiveness model shows that a human agent acts as an automaton when he or she does not recognise that there is sufficient reason to act otherwise. Suppose it turns out that Billy's compulsive act of stealing is driven by him being weakly receptive to the reason to steal. The strong reasons-responsive model treats this as falling below the requirement of being strongly receptive to a reason to act on the alternative-sequence (i.e. not to steal). Therefore, Billy had not sufficiently recognised the reason not to steal.

In conclusion, this is the first kind of 'alternative-sequence' failure where the view is taken in the strong reasons-responsive model that Billy acts as an automaton. I showed in the previous discussion that this conclusion is not correct.⁷⁶ Thus, this comparison between the outcomes of the strong and moderate reasons-responsive model shows that the strong model is too harsh and the moderate model is more accurate.

This moderate model can also accommodate the problem addressed above and encountered by the weak reasons-responsive model. Suppose Billy's hunger triggers K which issues an action to massacre everyone at the market. His receptivity to this reason (whatever it is) is not understandable. This indicates that the first half of his practical reasoning is one that no other human agents can engage in or understand. Therefore, I conclude that Billy is acting as an automaton. His reaction to this reason does not constitute an 'all of a piece' practical reasoning which can be translated into that action. In conclusion, he does not have guidance control and is not responsible for his actions.

⁷⁶See pages 115-8 above.

I showed that the moderate reasons-responsive model is the component which completes the demonstration of the guidance control principle. In summary, Fischer and Ravizza's guidance control principle requires human agents to have some control over their choice of action as well as being moderately responsive to their reasons to act as such.

(ii)(d) Law and the Moderate Reasons-Responsiveness Model

Here, I show that this model ties in with the analysis of the legal imposition of responsibility in Chapter Two. A human agent's reaction to his or her reason which in turn is manifest in that human agent's behaviour is 'all of a piece' of the practical reason grounding his or her moral responsibility. Thus a human agent's behaviour is the key to ground responsibility (legal or moral) on him or her. This is provided if and only if that human agent's behaviour has an understandable pattern. Here, I analyse Fischer and Ravizza's moderate reasons-responsive model in the legal context.

In Scenario Four in Adam's case where he steals Brenda's signed umbrella,⁷⁷ I showed that he is regularly receptive to the reason to gain a profit. Adam plans to steal the signed umbrella and sell it for gain. This reason has an understandable pattern. It is shown in law that this reason is dishonest, i.e. that there is also a reason (a legal reason) not to steal the umbrella. If he were to be weakly responsive to the reason for stealing and to act on it, he will have exercised guidance control and therefore will be responsible. In Sally's case, she is receptive to the reason to power-kite in the park. This reason has an understandable pattern. Power-kiting is classified as a hobby. The legal assessments have shown that power-kiting in the park is a careless activity because Sally puts others at risk of injury.⁷⁸ If she was weakly

⁷⁷See page 41 above.

⁷⁸See pages 52-4 above.

reactive to that reason and acted as she did despite it, she exercised guidance control and is responsible for the injury caused.

In Sam's case, he is receptive to the reason to drive the van. There are two ways to interpret this situation. If Sam is aware that he may have a hypoglycaemic onset,⁷⁹ his receptivity to the reason to drive is receptivity to an understandable reason. It is shown in law⁸⁰ that a prudent human agent would have chosen to be non-reactive to such a reason. Therefore, his reactivity to the reason is unreasonable. So if he is weakly reactive to that reason, he exercised guidance control over his action and he is responsible. If he is not aware of his hypoglycaemic onset, he cannot be receptive to the reason to drive as an automaton. This is because this reason does not have an understandable pattern. Thus, Sam cannot make the choice to drive as an automaton. Furthermore, the standard of care is made subjective to accommodate drivers with these kinds of physiological deficiencies. However, that legal test cannot measure a driver's competence when he or she is an automaton. Therefore, Sam cannot be in guidance control over his reactivity to that action and he is not responsible.⁸¹

(ii)(e) A Summary of Section (ii)

I have explored Fischer and Ravizza's element of practical reasoning in this section. Their theory of the moderate reasons-responsiveness model is understood by the introduction of the strong and the weak reasons-responsiveness models. A strong reasons-responsiveness model is that according to which a human agent must choose an alternative action if there is sufficient reason to do so. This is unfavourably deterministic. I have shown in the examples of Adam, Sally and Sam that human agents do not reason that way. A weak reasons-

⁷⁹As per the case of *Roberts* (n26).

⁸⁰As per the case of *Mansfield* (n29).

⁸¹ibid.

responsiveness model showed that a human agent is responsible for performing an actual sequence when in a possible world he or she has sufficient reason to act otherwise. This model is less deterministic, but it does not have parameters to ground a possible world hypothesising in reality.

Finally, the moderate reasons-responsiveness model suggests two things. First, the model eliminates the need to envisage an alternative sequence. This model only focuses on the actual sequence. Second, the model is grounded in reality. A human agent is required to be receptive to a reason which has an understandable pattern. The analysis in subsection (ii)(c) has shown that this model does accommodate the way human agents reason when executing an activity. In conclusion, Fischer and Ravizza's guidance control principle underlies how the law imposes responsibility on human agents. Next, I give a summary of the coexistence of the discussions in Chapters Two and Three.

(iii) The Guidance Control Principle and the Human Agent

I have presented a full discussion of the guidance control principle. Responsibility in both the legal and moral contexts is imposed when a human agent has exercised guidance control over his or her action. In other words, a human agent is responsible if and only if he or she has (1) some kind of control over choosing an actual sequence and (2) been reactive to an understandable reason to act in that way.

In Chapter Two, I highlighted the importance of the human agent in the imposition of responsibility in the following – (1) an individual who has exercised guidance control over his or her action is responsible. (2) An individual who has exercised guidance control over corporate actions is responsible on behalf of the corporation. And (3) an individual who has

exercised guidance control over his or her actions, which formed integral parts of the corporate action, is responsible. This imposition of responsibility on the human agent renders the corporation vicariously liable. The success of the doctrine of vicarious liability is heavily based on the guidance control exercised by a human agent.

In this chapter, I have shown the reason why the human agent is the basis of responsibility. Human agents exercise guidance control over actions. I shall argue that the imposition of responsibility on a collectivity like a corporation follows the method of methodological individualist reduction (hereafter, ‘MI Reduction)⁸² on which the guidance control principle is based. I discuss this method in detail in Chapter Four. Here, I introduce MI reduction in brief as a method which reduces the responsibility of the collectivity to that of the one or few responsible human agents who are its members and who have guidance control over the corporate activity. By this definition of MI reduction, the components of guidance control cannot be broken up and spread across a number of human agents.

The two components of guidance control can only be performed by one single human agent.⁸³ No legal responsibility is placed on a person if he or she exhibits only one of the two elements. I have shown that in a corporation or an organisational group, these components can be divided between different individuals. I illustrated this argument by the seal fur trade. Hatem Yavus Deri is the dominant seal fur company which hunts, skins and styles seal furs into finished products.⁸⁴ This company is based in Australia where the hunting and processing of seal fur is banned. But the company operates in Turkey, Namibia and Russia where it is legal to hunt for the materials and manufacture the products.

⁸² Peter A French *Collective and Corporate Responsibility* (Hardback, CUP, 1984) 4. Cited in this chapter as French (n82).

⁸³ This thesis excludes the criminal law’s theory of conspiracy. This is because the main focus is on the violations of the socio-economic rights of individuals by corporations. Corporations are no human agents. The principle of guidance control, which criminal responsibility of a human agent is based, does not apply to corporations.

⁸⁴ ‘Hatem Yavus Deri’ <<http://www.yavuzgrup.com/furproducts.htm>> accessed 15 August 2011

The employees of Hatem Yavus conducted the seal cull and the manufacture of their fur. Yavus is the brain of this operation.⁸⁵ However, he can deny responsibility for the seal cull. He can argue that he does not exercise guidance control over this brutal activity. He only exercised the element of choice of how many seals to cull for his products. The employees of the seal trade can also deny responsibility for seal culling. They can argue that they only followed orders. The market (and Yavus) which demands fur products issues in action to have these seals culled. These employees only engaged in the practical reasoning of culling. Therefore they can argue that they are not responsible in law and perhaps also not responsible in the social context for the seal cull. They however can be responsible in moral theory, though they might not feel or appreciate moral guilt. The problem is that there is no mechanism (international or transnational) to hold them responsible in law.

Kutz's theory of complicity offers a different approach. His theory is based on the participation of individuals. When a joint activity leads to the infliction of harm on others, Kutz argues that the inclusive or exclusive participation of these individuals entails them being collectively accountable for causing the harm.⁸⁶ For example, Yavus and his employees across the countries are participants in the seal culling. Therefore, they are complicit in the commission of the joint activity in the seal fur trade. In conclusion, Kutz's theory suggests that all participants are accountable, and hence responsible, for the harm created by their joint activities.

⁸⁵The information of Yavus's business is taken from two online sources. It is interesting to note that Strawson's principle of objective social response (see (n158)) underpins these two sources. The view is taken that the authors of the two blogs aim to generate vicarious or impersonal objective responses from their readers against Yavus's conduct. See Anthony Marr, 'Know Thy Enemy HATEM YAVUS – the 'King of Seal Killers' (Canada, 5 July 2011) <<http://homosapienssavyouearth.blogspot.com/2011/07/seal-killing-tycoon-hatem-yavuz-king-of.html>> accessed 15 August 2011, see also Bare Naked Islam, 'Australian-Turk is proud to be King of Baby Seal Killers' (30 March 2011) <<http://barenakedislam.wordpress.com/2011/03/30/australian-turk-is-proud-to-be-the-king-of-the-baby-seal-killers/>> accessed 15 August 2011

⁸⁶See pages 204-14 below.

Kutz's theory contradicts the guidance control principle. The guidance control principle shows that responsibility cannot be shared between individuals unless each of them possesses both the components. Kutz's theory suggests that responsibility ought to be shared. However, the basis on which his theory is grounded cannot be supported by the guidance control principle. Since Chapters Two and Three have argued that the guidance control principle is the core basis for the imposition of responsibility on the individual, it is difficult to incorporate Kutz's suggestion of a theory of complicity into the imposition of responsibility.

In conclusion, I have shown in Chapter Two that Kutz's theory is not compatible with the guidance control principle in practice. In this chapter, I have shown that his theory is not compatible with the guidance control principle in theory. I therefore attempt to place Kutz's theory on a plane where it is compatible with the guidance control principle. My attempt is set out in the following two chapters. In Chapter Four, I argue that it is necessary to depart from the attempt to impose responsibility on social groups and collectivities. Therefore, I advance an argument to depart from the MI reduction principle on which the guidance control principle is based. In Chapter Five, I suggest that Kutz's theory is meant not for the theory of responsibility but for the development of a theory of obligations for collective entities like corporations and other social groups.

CHAPTER FOUR: THE LIMITATION OF THE IMPOSITION OF RESPONSIBILITY AND THE ARGUMENTS FOR DEPARTING FROM THIS IMPOSITION OF ACCOUNTABILITY

In this chapter, I progress to depart from the imposition of responsibility as holding individuals, social groups and corporations accountable for collective wrongdoing. I target ‘the corporation’ as the main outsourcing participant. Here, I illustrate that corporations and other social groups cannot be effectively held responsible for their participations in collective wrongdoing. My arguments for this suggestion are as follows.

In Part A, I argue that corporations are not agents. The definition of agents goes as thus. I take the view that responsibility is grounded in agents. Agents who exercised guidance control over their wrongdoing are therefore held responsible. In the previous chapters, I have demonstrated that responsibility cannot be grounded in corporations which have broken up these components of guidance control by way of externalisation. Although corporations have legal personhoods which are separate legal identities from their owners and the corporate agents (i.e. directors and employees),¹ I attempt to illustrate that corporations are not agents. Therefore, responsibility cannot be imposed on them for their wrongdoing. Furthermore, I take the view that corporations are externalising or outsourcing things (I argue later in Part A that agents cannot outsource their personal responsibilities). As mentioned in the previous chapter, the application of the guidance control principle is not adequate and it cannot cope with outsourcing or externalising activities. In conclusion, a corporation is not an agent. In Part B, I take the view that the guidance control principle is based on the methodological individualist reduction of responsibility,² which reduces a collective responsibility to the

¹*Continental Tyre & Rubber Co (Great Briton Ltd.) v Daimler Co Ltd* [1915] 1 KB 813.

²Peter A French *Collective and Corporate Responsibility* (Hardback, CUP, 1984) 4. Cited in this chapter as French (n2).

individual responsibilities of the participants in a collective action. I argue that the compositions of collectivities such as social groups and corporations do not allow for this method of reduction of responsibility.

This chapter concludes as follows. (1) Since corporations are not agents, the guidance control principle should not be directly applied to them. Thus, I found that the Corporate Manslaughter and Corporate Homicide Act 2007³ which is based on the guidance control principle effectively hold corporations responsible for death caused. (2) Since collectivities such as social groups and corporations are not easily subjected to the methodological individualist reduction, the holding of these entities accountable by imposing responsibility on them is not the effective route. Therefore, the doctrine of vicarious liability is not an effective legal tool to regulate corporate outsourced activities.

These two arguments provide the justifications to depart from holding individuals, social groups and corporations responsible for collective wrongdoing. The accountability of these participants should not be in the form of responsibility. The argument advanced is that the accountability of these participants should rather be in the form of collective obligations.

³ Ch 19.

PART A

THE DIRECT APPLICATION OF THE GUIDANCE CONTROL PRINCIPLE TO CORPORATIONS IS EXCLUDED BECAUSE CORPORATIONS DO NOT HAVE AGENCY

As shown in the previous chapter, the guidance control principle can be directly applied to human agents. Human agents have agency. This implies that a direct application of the guidance control principle to corporations requires corporations to have agency. I begin this discussion with two viewpoints that corporations are agents. These two viewpoints are then later analysed. I am not convinced by the two view points and conclude that corporations are not agents, but they are externalising entities.

I discuss as follows. I analyse the suggestions put forward by Peter A. French⁴ in subsection (i)(a) and Philip Pettit⁵ in subsection (i)(b). The core argument of section (i) is to suggest that corporations are not agents. Thus, in subsection (i)(c), I analyse the plausibility of French's and Pettit's suggestions regarding corporate agency. I find that these scholars' arguments are convincing up to a certain point. The elements of a corporation which they advance correspond to the elements required by the guidance control principle. Therefore, both scholars suggest that corporations have agency *because* they exercise guidance control.

However, the attraction of French's and Pettit's suggestions stops here. If it is true that corporations do have agency, then the guidance control principle should be directly and robustly applied to them. Corporations should also be legally responsible for their actions. In Chapter Two, I have already highlighted the lack of mechanisms to hold corporations legally responsible for their activities which they have outsourced and also the inadequacy of mechanisms to hold them socially responsible.

⁴French (n2).

⁵Philip Pettit, 'Responsibility Incorporated' [2007] 117 ETHICS 171. Cited in this chapter as Pettit (n3).

The discussion in section (ii) therefore moves on to unpack the two scholars' suggestions with Stephan Fuchs's theory. I believe that these scholars have presupposed that a corporation already exhibits the three essential characteristics of agency - (1) consciousness, (2) free will and (3) reflexivity.⁶ Therefore, I believe that Pettit and French took a corporation's agency for granted, and it was on this basis that they concluded that corporations have guidance control over their activity and therefore they can be held responsible for wrongdoing. Here, I show that corporations do not exhibit these three characteristics so they have no agency. Therefore, I conclude that they cannot have guidance control over their wrongdoing and cannot be held responsible.

In section (iii) I summarise my arguments in which I take the view that corporations do not have agency. More precisely, I argue that corporations lack the qualities of agency as they can externalise their activities to others. The externalisation of corporate activities and the exclusion therefore of responsibility is a process which agents (i.e. individuals) cannot perform. These are the reasons for stating that the guidance control principle cannot be directly applied to corporations, since they are not agents.

(i) The Two Viewpoints which suggest that Corporations are Agents

(i)(a) The First Viewpoint: A Corporation has Intentionality and therefore it is an Agent

French suggests that in order to 'provide the foundation of a theory that allows treatment of corporations as full-fledged members of the [] community, of equal standing with the traditionally acknowledged residents: human beings',⁷ the imposition of

⁶Stephan Fuchs, 'Beyond Agency' [2001] 19:1 SOCIOLOGICAL THEORY 24. Cited in this chapter as Fuchs (n6).

⁷French (n2) 32.

responsibility must move beyond metaphysical agency.⁸ Human agents are the metaphysical agents and corporations are – according to French – machines.⁹ But French believes corporations are machines that ‘have certain affinities to the invented contractual states of Hobbes and Locke [and other] products of human ingenuity’.¹⁰ He believes corporations have intentionality.¹¹

French believes that the ‘predication of corporate intentionality’ is the ‘requisite device’ licensed by the Corporation’s Internal Decision Structure (hereafter, ‘CID Structure’).¹² He believes that this structure adheres to the Principle of Responsive Adjustment (hereafter, ‘PRA’).¹³ The CID Structure and the PRA, which together form what he believes is the corporate intentionality, are introduced one after the other. French believes that every corporation has a CID Structure.¹⁴ This Structure ‘provides the requisite redescription device that licenses the predication of corporate intentionality’.¹⁵ Simply put, a corporation is an entity, which intends to act the way it does independently of its members.

French explains thus:–

‘Certainly a corporation’s doing something involves or includes human beings doing things, and the human beings who occupy various positions in a corporation usually can be described as having reasons for *their* behaviour. In fact, in virtue of those descriptions, they may be properly held responsible for their behaviour, *ceteris paribus*. What needs to be shown if there is to be corporate responsibility is that there is sense in saying that corporations and not just people who work in them have reasons for doing what they do’.¹⁶

⁸ibid 33.

⁹ibid 101.

¹⁰ibid.

¹¹ibid 39.

¹²ibid.

¹³ibid.

¹⁴ibid 41.

¹⁵See (n11).

¹⁶ibid 40.

The CID Structure gives the corporation the metaphysical personhood which can ground responsibility. This metaphysical personhood is the corporate personality (the ‘soul of the company’),¹⁷ which is the image of a corporation. French believes that the ‘corporate personality is a key factor in corporate success’.¹⁸ However, it is also the representation of the corporate intentionality. Thus, French argues that the corporation is an entity which is not a composition of its members, but rather is independent from them. Therefore, he argues that a corporation can exercise guidance control over its activities. French highlights two elements of the CID Structure. He suggests that this is not an exhaustive list:–

‘(1) an organizational or responsibility flowchart that delineates stations and levels within the corporate power structure and (2) corporate-decision recognition rules(s) (usually embedded in something called corporate policy)’.¹⁹

I take the view that these two elements are the basic structures of a corporation. Corporations ranging from the smallest such as Cotswold Geotechnical to the largest such as Wal-Mart have CID features. An organisation creates roles for its members to fill. These roles are hierarchical and the CID Structure’s ‘primary function is to draw experience from various levels of the corporation into a decision-making and ratification process’.²⁰

French’s idea is different from the law’s approach. The legal imposition of responsibility on a corporation follows from the legal identification of corporate agents who are declared to have guidance control over corporate activities. For example, legal responsibility is imposed on the senior management (under s1(4)(c) Corporate Manslaughter and Corporate Homicide Act 2007).

¹⁷ibid 103.

¹⁸ibid 102.

¹⁹ibid 41.

²⁰ibid.

In law, these are the identified individuals who have the intentionality which gives rise to these corporate activities. French's CID structure differs from the legal approach because it 'incorporates acts of biological persons'²¹ into the corporate activity. French explains: '[w]hen operative and properly activated, the CID Structure accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision'.²²

French quotes J. K. Galbraith as stating that '[f]rom [the] interpersonal exercise of power, the interaction... of the participants, comes the *personality* of the corporation'.²³ Thus French's concept of corporate intentionality involves a holistic approach whereby every corporate participant contributes to create the corporate intentionality. This approach is in contrast to the law's approach (which is a perhaps a reductionist one) which identifies the few individuals who represent the corporate intentionality in bringing about corporate activity.

French's idea of interpersonal participation is similar to Kutz's theory of complicity. The participation of corporate members in a corporate activity shows that they are complicit in it. Moreover, French's CID Structure is an added feature which Kutz's theory lacks. Kutz's theory suggests that mere participation by an individual in a joint activity suffices for them to be complicit. I take the view (and I explore this in detail in Chapter Five) that his theory is too loose. French's CID Structure adds parameters to Kutz's theory by codifying various forms of participation of members as roles within the corporate activities. These roles create the 'personality' of the corporation which is independent of its members.

In summary, French suggests that the corporate personality gives the corporation independence. It does not rely on the contribution of its members' activities. The CID Structure has an effect that a corporation can intend to act as an entity. In essence, French

²¹ibid 42.

²²See (n19).

²³ibid 42. Endnotes omitted. Emphasis in the original text.

advances the idea that a corporation can exercise the first component of guidance control – choice. For example, suppose the directors of Wal-Mart decide they want to outsource one of Wal-Mart's activities. I take the view that the element of choice is exercised at two levels – (1) the directors (as a collective) have each respectively exercised their choices to outsource and (2) Wal-Mart (by virtue of the CID Structure) has also exercised its choice to outsource. In the light of French's argument, the entity 'Wal-Mart' has the first component of guidance control.

I find that the second component of guidance control – practical reason – is in French's PRA. As mentioned above, French takes the view that corporations are machines. However, they are also responsive to their environment, to which they can adjust. The PRA prevents a corporation from repeating activities which cause harm.²⁴ French does not specify whether the PRA deals with harms caused to the corporation or to others. I find that the PRA nevertheless adjusts the corporate activities to avoid causing harm in the future. It is possible for a corporation to refuse to make these adjustments by the PRA if it so wishes. When this refusal to adapt happens, French explains:–

‘when the expected adjustments are not made, and in the absence of convincing evidence supporting an exculpatory excuse for nonadjustment, the party in question can be held [] responsible for the earlier event’.²⁵

I understand by this that the PRA issues adjustments which the corporation is expected to make. If it refuses these adjustments, a corporation can be held responsible for its activity. French suggests that a corporation is responsive to reasons to act or act otherwise. An elaboration in Fischer and Ravizza's terminology goes thus: the mechanism (*K*) of a corporation issues in an action. For example, the corporation must maximise its wealth. *K*

²⁴ibid 156.

²⁵ibid. Emphasis in the original text.

leads the CID Structure to act that way. Suppose wealth is maximised when activities are outsourced to countries where products are cheaply manufactured. This choice causes socio-economic harm to others. Overseas labour is exploited.

I believe that the PRA detects this harm caused by the corporate decision to outsource activities and suggests that the corporation has to make adjustments to avoid further harm being caused in the future. Therefore, the PRA provides a reason for the corporation to act otherwise. The corporation has to make the decision to either act otherwise or not. If the corporation chooses to act on the PRA, its adjustments show that it upholds its responsibility. If it chooses not to act otherwise, this means the corporation is receptive to the reason to stop exploiting labour (as it detects the socio-economic harm caused to others), but it is not reactive to that reason (i.e. it ignores the PRA). The PRA can hold it responsible for the labour exploitation it created.

Furthermore, French elaborates that:–

‘PRA does *not*, however, assume that a failure to mend one’s ways after being confronted with a harmful outcome of one’s actions is strong presumptive evidence that one had intended that earlier event’.²⁶

I interpret French’s theory as meaning that the PRA, taking the CID Structure to exist, results in the corporation being responsible for its ‘nonadjustment’ of its activities. The principle of guidance control is adhered to. The first component – choice – which exists because of the CID Structure has to be accompanied by the second component – practical reason – which exists because of the PRA.

²⁶ibid.

French's CID Structure and PRA can lead to the conclusion that Wal-Mart is responsible for its decision to outsource to its overseas partners. Wal-Mart's CID Structure made the choice to outsource. The first component is fulfilled. This decision creates socio-economic harm to the employees of the overseas partners. In the prevention of harm caused to others in the future, the PRA entails that Wal-Mart has the choice either to make adjustments or carry on its business. If Wal-Mart chooses to follow the PRA, it internalises its responsibility. This internalisation of responsibility shows that French's idea embeds agency in a corporation.

If Wal-Mart however chooses to ignore the PRA, its responsibility remains excluded for it has externalised its activities. Since the CID Structure and the PRA ignorance of Wal-Mart suggest it has guidance control over the decision to outsource its matters, French suggests that it should be held responsible for two activities – (1) ignoring the PRA and (2) its past actions of making outsourcing decisions which caused harm to others. French's theory shows that Wal-Mart has agency and thus it can be held responsible.

The *Wal-Mart* case, however, drew a different conclusion. It held that Wal-Mart could legitimately decide to outsource its activities. The Californian Court ruled and then the US Court of Appeals later affirmed the decision that Wal-Mart had no responsibility for the infliction of socio-economic harm on the employees of its overseas partners. In other examples of corporate activities, PRA has importance when there is law to enforce it. For example, the Health and Safety etc. Act 1974²⁷ holds employers responsible for providing workplace health, safety and welfare.²⁸ A corporation that chooses not to follow the PRA to observe this legislation will be liable in law if it is caught.

²⁷ Ch 37.

²⁸ Health and Safety etc. Act 1974, s 2(1).

In the absence of law to govern a corporate activity, I find that the PRA will not in practice shape the corporation's behaviour. Outsourcing is not governed by law (statutory or otherwise). Therefore, a corporation can choose not to implement the PRA when making outsourcing agreements with partners. The outsourced corporate activities continue to inflict harm on others. Although French's PRA may hold the corporation responsible for its act of outsourcing, there is no legal mechanism to make this corporation indeed responsible. Therefore, the problem of French's suggestion is in the enforcement stage when the corporation chooses not to implement the PRA.

Nevertheless, French's CID Structure and PRA provide a persuasive argument (although I am not fully convinced) to show that a corporation has intentionality in specific instances. French believes that in a specific instance where the CID Structure does not necessarily follow a rigid formulation, a corporation can make decisions beyond its main purpose. French believes 'only those corporations that have CID Structures that facilitate nonprogrammed decision-making can meet the conditions of moral personhood'.²⁹ I interpret French's 'nonprogrammed decision-making' of a corporation as meaning they are activities commissioned by a corporation, which are not generic to all of that corporation's activities such as non-wealth maximising or non-exploitative corporate activities.

For example, Unilever conducts philanthropic programmes worldwide.³⁰ These kinds of corporate activities are outside the corporation's programmed decision-making (i.e. to maximise wealth for its shareholders). Therefore, a corporation displays full volition if it chooses to conduct such a nonprogrammed activity. I believe that the PRA underlying this CID Structure is more akin to the practical reasoning of a human being. In summary, I take the view that French's argument for the agency of a corporation is true only for its practice of

²⁹ French (n2) 168.

³⁰ A list of case studies across a range of areas is found in 'Unilever's Case Studies' website.
<http://www.unilever.com/sustainability/casestudies/?WT.LHNAV=Case_studies> accessed 15 August 2011

voluntary philanthropic actions. A corporation does not exhibit agency when it practices its programmed activity.

In the present subsection I show that French's CID Structure and PRA follow the guidance control principle. French's arguments also show that a corporation must exercise choice and engage with practical reasoning to be responsible for its actions. Since there is no enforcement mechanism to make corporations behave responsibly, corporations can choose to ignore the PRA. When a corporation chooses to implement the programmed decision-making CID Structure to maximise wealth, it ignores the PRA which in theory would lead that corporation to be responsible.

The implementation of the programmed decision-making CID Structure may appear to show that a corporation exercises choice. However, I take the view – to which French might agree – that the running of this formulated structure entails that a corporation does not make choices. In other words, it simply follows instructions as a machine would. Therefore, I argue that a corporation is not acting in the capacity of an agent. Rather, it acts as a programmed machine. This discussion leads me to take the view that corporations which are conducting philanthropic activities voluntarily are defying their programmed purposes as generic corporations. Therefore the philanthropic choices they exhibit are almost akin to human agent choices. It is therefore suggested that although philanthropic corporations are not quite agents they are nevertheless recipients of praise.

I take the view that philanthropic corporations engage in the nonprogrammed decision-making CID Structure and therefore they *make* decisions when running philanthropic activities instead of *following* instructions. This is – French might agree – corporate intentionality. There is however no mechanism to encourage or ensure that all corporations act in that way. It is only those corporations which choose to conduct

philanthropic activities and only in these specific instances that they are perceived as agents. Thus it is only in these instances that they are praiseworthy. Therefore, corporations which are not acting in a socially responsible manner are not agents. They have a CID Structure which is programmed, so they do not exercise choice. Furthermore, they ignore the PRA, so they are nonresponsive to practical reason. Thus, they are perceived as machines without intentionality. These corporations cannot be morally blamed or praised.

Philip Pettit's suggestion is introduced in section (i)(b).

(i)(b) The Second Viewpoint: A Corporation is 'Fit' to be an Agent

Pettit³¹ highlights similarities between the human agent and the corporation. Both of them show three conditions – (1) value relevance, (2) value judgment and (3) value sensitivity.³² In Chapter Three, I made a detailed discussion of the moral agency of a human agent. The analysis of this discussion is directed to Pettit's suggestion of a corporation's 'fitness' to be held responsible, which he bases on three characteristics. Pettit's three characteristics are discussed in the order in which they are introduced.

Pettit's first condition is that a corporation has 'value relevance'. He explains that the 'group is an autonomous agent that faces a significant choice between doing something good or bad or right or wrong'.³³ Pettit's first condition has two parts, the assumption that – (1) the group is an autonomous agent and that (2) it faces 'value-relevant' choices.³⁴ The first part of

³¹Pettit (n5) 171.

³²ibid 177.

³³ibid.

³⁴ibid.

the condition is further reduced to two theses – (a) groups can qualify as agents³⁵ and (b) groups can qualify as autonomous agents.³⁶

In Pettit's thesis (a), a group qualifies as an agent when 'it forms and reforms action-suited desires for how its environment should be and action-suited beliefs as to how its environment is and if it then acts in such a way that those desires are satisfied according to those beliefs'.³⁷ For example, a swarm of bees,³⁸ a flock of birds and a pack of wolves can be a collective of things, but they cannot be a group agent. I take the view that these group collectives do not act on desires or beliefs and so they do not have intention. Rather they act on the instinct to survive. Their actions are instinctive and are not planned or organised. Their notion of doing things together is different to that of a corporation. Therefore, group collectives cannot be agents.

I take the view that the members of group agents such as corporations are working together towards a goal. This goal requires the members to conduct activities which are more than instinctive. It requires a robust network of communication amongst the members, planning, and reasons for actions which are grounded in core values or beliefs to keep the notion of togetherness in the group. I believe a corporation does have action-suited beliefs. For example, Wal-Mart's action-suited belief is its method of profit maximisation. It fulfils its motto – 'Save money. Live better'³⁹ – to its customers by engaging in mass production and retailing its products at low prices. Its action-suited desire is profit maximisation where it ensures that it sets tasks and targets to its employees. Its employees must work together to achieve these set goals. The action-suited desire and belief form the shared intention which

³⁵ibid 178.

³⁶ibid 180.

³⁷See (n35).

³⁸Pettit (n5) 189.

³⁹'Walmart: Save Money. Live Better.' <<http://www.walmart.com/>> accessed 15 August 2011

the members of the corporations have. A shared intention keeps the group together.⁴⁰ In summary, Pettit argues that a corporation is not a group collective. It is a group agent.

In Pettit's thesis (b), a group qualifies as an autonomous agent under a certain condition. He elaborates this condition by giving an example:-

'Assume, for example, that a group of individuals has to find a procedure for deriving a set of judgments on certain logically connected propositions. Take any procedure that makes the judgments of the corporate body depend on the judgments of more than one individual, thereby ruling out dictatorship of any kind. Let this procedure work for any consistent sets of input judgments, enabling the group to produce complete and consistent judgments; in other words, let it robustly guarantee the rationality of the group. No procedure that satisfies conditions of these kinds will identify a rule or function – majoritarian or nonmajoritarian – whereby the corporate judgment on every issue automatically derives from the votes and judgments of members on that issue'.⁴¹

I take the view that a group agent has autonomy when its decision-making accurately reflects neither solely the judgement of the majoritarian nor solely those of the nonmajoritarian members. In other words, its choices are made independently of the choices of its members. For example, Wal-Mart's fulfilment of its motto is the shared intention of all employees and shareholders. Thus the motto neither solely reflects the majoritarian decision – e.g. the decision of the shareholders' to maximise profits and dominate the market, nor does it solely reflect the nonmajoritarian decision – e.g. the employees' decision to ensure job security and better pay. Pettit explains:-

'Autonomy is intuitively guaranteed by the fact that on one or more issues the judgment of the group will have to be functionally independent of the corresponding member judgments, so that its intentional attitudes as a

⁴⁰Pettit (n5) 179.

⁴¹ibid 183-84.

whole are most saliently unified by being, precisely, the attitudes of the group'.⁴²

Thus, the attitude of Wal-Mart as a group agent is summarised by its goal. This is independent of the members who compose Wal-Mart. So, when Wal-Mart conducts its corporate activities, it does so in its corporate capacity. Pettit suggests that Wal-Mart can display intentional attitudes when conducting its activities. By Pettit's definition, a corporation is not just an agent, but rather theses (a) and (b) prove that it is also an autonomous group agent.

The second part of the first condition is that a corporation faces value-relevant choices. Pettit suggests that these are the kind of choices in making which a corporation is aware (or its members are aware) that its actions are right or wrong, or good or bad. The outsourcing corporation for example – in the process of cost cutting – has done something right in so far as the outsourced activity saves the corporation money. I take the view that outsourcing is also good as it keeps other corporations in business and people employed. My contrary argument goes as follows. The outsourcing corporation – in the act of exploiting labour and resources – has done something wrong in so far as the outsourced activity creates socio-economic harm to others. Outsourcing in this case is bad because it violates the socio-economic rights of others. Thus, I agree with Pettit that the choice whether to outsource is value-relevant.

In conclusion, Pettit's first condition shows that corporations are autonomous agents and can make value-relevant choices on what is right and good for their interests. In the terminology of Fischer and Ravizza, Pettit's first condition is the first element of guidance control – choice. Pettit's second condition is a corporation's understanding and knowledge

⁴²ibid 184.

which are necessary for ‘value judgments’. Pettit points out that since each member of a group agent is capable of making his or her own value judgment in his or her individual life,⁴³ these individuals ‘will certainly be able to do it [i.e. make value judgments] when acting within the group’.⁴⁴ So the group agent – with the value judgments of its members – can ‘form value judgments about the options [it] face[s] in any choice and that the second condition for group responsibility is bound to be fulfilled’.⁴⁵

However, Pettit suggests that the group does not require to engage deeply in its value judgments. Although human agents – in their personal activities – do deeply and fully engage in their personal value judgments, he suggests that it follows from his argument only that ‘group agents must have the remote ability to form judgments about the relative value of options they face; it does not mean that they have the proximate ability to do so’.⁴⁶ For example, Wal-Mart’s incorporation of standards of conduct in its outsourcing contracts with its overseas partners is an instance of a corporation making a value judgment. I take the view that Wal-Mart might do any of the following – (1) form value judgements (e.g. appreciate that labour standards ought to be maintained overseas), (2) choose to act on the value judgements to a limited degree (e.g. to incorporate the standards of conduct in the outsourcing contracts) or, (3) choose to act on the value judgements by enforcing these standards in the outsourcing contracts.

However, Pettit believes that Wal-Mart does not need to fully engage in this value judgment. Therefore, I interpret Pettit’s theory as meaning Wal-Mart can appreciate and incorporate the codes of standards in the outsourcing contracts, but it does not need to enforce these on the overseas partners. Pettit points out that it need only be remotely able to form

⁴³ibid 187.

⁴⁴ibid.

⁴⁵ibid.

⁴⁶ibid.

judgments. So, I believe that the incorporation of standards of conduct in the outsourcing contracts by Wal-Mart without its enforcement of these contractual terms suffices. In the terminology of Fischer and Ravizza, Pettit's value judgment is one half of the second component of guidance control – receptivity to practical reason.

Pettit's third condition is a corporation's 'value sensitivity'. A group agent – if proven true - could be taken to 'make choices in response to those judgments'.⁴⁷ Pettit encounters a problem in this condition. When conducting a corporate activity, both the group agent (i.e. the corporation) and human agents (i.e. its members) are making value judgments. However, he finds that not all of the members of the group agent are truly making value judgments. Rather the individuals at high level positions in the corporation who 'act in its name' exercise full control over what it does.⁴⁸ So, these individuals are personally responsible for the corporate actions as human agents.⁴⁹ The problem Pettit faces is whether this same sort of control which is 'ascribe[d] to the group agent' is also exercised by those individual members who made the value judgements.⁵⁰

Pettit suggests that this problem can be solved by taking the view that the group agent can 'share in that control, so far as it relates as a programming factor to the implementing factor represented by the active individual'.⁵¹ In other words, the individuals who exercised value judgements on behalf of the group agent can share value judgements with the group agent if the decisions they made (i.e. the implementing factor) are the programming factor of the group agent's activities. For example, Wal-Mart outsources its activities because its directors instructed it to cost save. Therefore, I take the view that the directors' instructions are the implementing factors on which Wal-Mart's programming factor is to cost save. Pettit

⁴⁷ibid 188.

⁴⁸ibid.

⁴⁹ibid.

⁵⁰ibid 190.

⁵¹ibid 191.

suggests that the directors' control can only be shared with the corporation's control if Wal-Mart's programming factor to cost save (i.e. to outsource) relates to the directors implementing factor to cost save (i.e. to maximise profit). Suppose Wal-Mart opts for outsourcing. This task saves the corporation on costs and expenses but it also creates socio-economic harm.

I interpret the application of Pettit's theory as meaning the directors can argue that they have control over the activities leading to cost saving. However, they are not responsible as they can argue that they have no control over the outsourced activities which cause socio-economic harm. The programming factor of outsourcing, and hence the shared control, gives the corporation 'group level control'.⁵² Thus, the corporation which 'enact[s] the required performance [i.e. the decision to outsource] will also control, in a reason-sensitive way for what is done; [it] will control for the fact that it is [the corporation] and not [the directors] who actually carry it out'.⁵³ As a result, I take the view that the corporation has control over the decision to outsource. It is reason-sensitive to the fact that the decision to outsource saves on costs. It is also reason-sensitive to the fact that – and Pettit might agree – that decision also causes socio-economic harm. In conclusion, Wal-Mart is responsible in theory for these two outcomes.

Furthermore, suppose in a given scenario the directors' instructions are to exploit overseas labour and resources. I therefore can argue that the directors *and* the corporation engaged in practical reasoning to perform activities leading to socio-economic harm. In this case, I argue that the directors and the corporation are both responsible for causing socio-economic harm. In the terminology of Fischer and Ravizza, Pettit's value sensitivity is the second half of the second component of guidance control – reactivity to practical reason. In

⁵²ibid 192.

⁵³ibid.

summary, Pettit's argument about the agency of corporations ties in with Fischer and Ravizza's guidance control principle. A corporation is responsible for its activity because it is an autonomous agent. It can independently choose its activities. It is receptive to reasons for choosing and it is also reactive to the shared reasons for acting on those reasons. Therefore, Pettit's arguments show that a corporation is 'fit' to be an autonomous group agent.

So far, I have presented a discussion in subsections (i)(a) and (i)(b) as follows. I showed in subsection (i)(a) that French suggests that corporations which are acting with intentions can receive praise for good deeds. I showed in subsection (i)(b) that Pettit suggests that corporations as autonomous agents which are acting on the shared value judgments of their human agent composers can be criticised for bad deeds. Pettit's and French's suggestions are persuasive. They suggest that corporations can be held responsible for good and bad deeds. Their arguments align with the elements required for an agent to have guidance control over its actions. Thus, Pettit and French have demonstrated that corporations can exercise guidance control over their actions and so they conclude that they can be held responsible as agents.

I indicated at the start of this chapter that the purpose of this discussion is to present an analysis that a corporation is not an agent. In doing so, I evaluate French's and Pettit's suggestions in relation to the problems of the guidance control principle in holding corporations responsible. My argument on this is given in subsection (i)(c).

(i)(c) An Evaluation of a Corporation as an Agent

The problem of imposing responsibility on a corporation for its good and bad deeds is the lack of enforcement mechanisms. I take the view that a corporation doing good deeds like philanthropy is praiseworthy. It receives praise through good media press. Praise in this way can encourage this philanthropic corporation to increase its engagements in more philanthropy. However, corporate good deeds are not mandatory. There is no principle or law to make every corporation philanthropic. Furthermore, a corporation can only voluntarily engage in philanthropy. Therefore, corporations can choose in their interest whether they want to be or not to be worthy of praise. This is why philanthropic corporations are a minority.

I am not convinced however that a corporation doing bad deeds is blameworthy. Nevertheless the combination of French's corporate intentionality and Pettit's corporate guidance control over activities lead to the conclusion that a corporation can be blameworthy for harm caused to others (i.e. bad deeds). Thus, they suggest that it can be punished for deplorable activities. However, my criticism is that there is no mechanism to impose this punishment. There is also no mechanism to enforce responsibility on these corporations. The *Wal-Mart* case as shown in Chapter One states that there is no legal principle to impose punishment on Wal-Mart for the harm caused to others by its outsourcing contracts. Therefore, I concluded that Wal-Mart cannot be responsible in theory and it cannot be liable in practice.

Furthermore, the social responses of societies to acts of corporations shown in Part B of Chapter Two demonstrate that society does not perceive the corporation as an autonomous group agent. These social responses hold these individuals who have (or are perceived to have) guidance control over corporate activities to be socially responsible. Therefore, the

corporation – as an entity - is not blameworthy. Its human agents (i.e. the chief executive, the director or some other member or members) are the blameworthy agents.

In conclusion I argue in this subsection that responsibility cannot be enforced on a corporation. Therefore there is no enforcement mechanism to directly apply the guidance control principle to corporations. This raises the question of whether a corporation truly has agency. French and Pettit have put forward plausible suggestions that a corporation can be an agent. In section (ii), I unpack their suggestions further and investigate why corporations cannot truly have agency.

(ii) An Argument against a Corporation as an Agent

As mentioned in subsection (i)(a), a corporation functions like a machine with intentionality. A corporation which voluntarily engages in philanthropy can receive praise. In subsection (i)(b) I considered that a corporation is an autonomous group agent with guidance control, and so there is a possibility that a corporation can be held responsible for its corporate activity. However, as mentioned in subsection (i)(c), there are no enforcement mechanisms to hold a corporation responsible (though corporations can, however, be held strictly or vicariously liable).

In this present subsection, I attempt to unpack the position of French and Pettit a little more. I showed in section (i) that the position of French and Pettit corresponds to Fischer and Ravizza's theory. I believe that French and Pettit started from the premise that a corporation exhibits guidance control *because* it has agency. Thus, the issue of agency is not questioned. Fischer and Ravizza started from the same premise. They suggest that an individual exhibits guidance control *because* he or she has agency. For Fischer and Ravizza, I take the view that

the issue of agency is clear. An individual is an agent. However, I take the view that the issue of agency in French and Pettit's position has to be addressed and analysed.

To ascertain whether a corporation is an agent, I think a corporation must exhibit the qualities of a human agent. Stephan Fuchs⁵⁴ suggests that human beings have agency because they have three things – (1) free will, (2) consciousness and (3) reflexivity.⁵⁵ Fuchs's first point about human agency is dealt with extensively in Chapter Three in the discussion of the first component of guidance control – choice.

Fuchs's second point about human agency is concerned with the proposition that consciousness 'allows humans to think about what they are going to do, to compare various alternatives, and to anticipate possible outcomes'.⁵⁶ Human beings can plan their activities and, unlike animals which act instinctively, human beings act with planned reasons. Fuchs says that '[h]uman action is driven by reasons, animal behaviour by causes'.⁵⁷ Fuchs's third point about human agency is reflexivity. Human beings can reflect on their actions. Reflections enable humans to adapt, adjust and be flexible with their planning and actions.

Fuchs's three points determine the conditions for human agency. I take the view that French and Pettit hold a corporation responsible because they have presupposed that it already has agency. Therefore, the scholars presupposed that a corporation does have Fuchs's three points. According to my analysis these three points are not present in a corporation. Thus, I argue here that although the suggestions of French and Pettit show that corporations exhibit the elements of guidance control over their actions, corporations do not have agency to ground these responsibilities.

⁵⁴Fuchs (n6) 24.

⁵⁵ibid 26.

⁵⁶ibid.

⁵⁷ibid.

Fuchs's first point is that agency requires the exercise of free will or choice. If French's CID Structure and Pettit's value relevance are followed, a corporation might be taken to have this feature. In the present subsection, I conclude the contrary. As mentioned in subsection (i)(a), French's CID Structure includes a synthetic corporate intention which incorporates its members' intentions into one collective intention. I take the view that his suggestion may be plausible if every member's intention is the replication of the corporate intention. However, as I mentioned above, the CID Structure incorporates the acts of the members and not each member's intention.

Therefore I argue that although directors exercise choice when making the decision to conduct a corporate activity, the running of this corporate activity does not exhibit the corporation's choice. Suppose in the event that the directors instruct that the corporation should cost save. These directors exhibit choice. The corporation's solution to cost-save however, does not exhibit that corporation's choice. Suppose a corporation's cost saving solution is either the sociably responsible or the exploitative method of outsourcing, I take the view that these outcomes are not the corporation's choice. Rather, these are the corporation's programmed reactions.

Furthermore, the corporation's CID Structure is hierarchical and thus its decision-making processes are also programmed. Employees who participate in corporate activities are acting in their organisational roles. Corporate codes of conduct are not enough to transcribe to the corporate intention. There is, however, the exercise of collective role-playing by employees. This collective role-playing of employees is not enough to transcribe into the corporation's intentional action either. The display of intention stems from the display of choice. If a corporate activity is programmed, a corporation does not exhibit choice. In summary, I conclude that although each member of the corporation makes a choice to play

their given corporate role, the member's contribution to the corporate role-playing does not entail that a corporation exhibits free will or choice when it conducts its activities.

I move on to test the plausibility of Pettit's value relevance, which is based on action-suited desires and beliefs. Human agents do have action-suited desires and beliefs which give human behaviour room for spontaneity. As mentioned above, corporate activities derive from role-playing employees. Employees act in relation to their job descriptions which are given by the CID Structure in the form of codes of conduct. These employees implement the corporate instructions and perform formulated corporate solutions.

I argue that the synthetic action-suited desires and beliefs of a corporation leave no room for spontaneity in the corporate activity. I find that although the employees display their individual action-suited desires and beliefs, these individual factors of value relevance do not contribute to the corporate activities. Therefore, I conclude that the corporate activities do not display corporate choice. In summary, my criticisms of French's CID Structure and Pettit's value relevance show that a corporation does not satisfy Fuchs's first point.

Fuchs's second point is that agency requires the exhibiting of consciousness. If French's PRA and Pettit's value judgment ideas are followed, a corporation can be taken to have consciousness. In this present subsection, I conclude the contrary. Acceptance of the PRA is the corporate response in relation to its environment. As shown in subsection (i)(a), a corporation can choose to ignore the PRA. Perhaps the corporation's decision to ignore the PRA is its display of choice. However, I find that its persistence in ignoring the PRA (as in the behaviour of outsourcing corporations) suggests that this corporate behaviour is not a reflection of a 'conscious mind' of an entity.

The human consciousness is the tool for adaption to the environment. For example, Tom's job security prevents him from falling into financial hardship. If Tom is made

redundant, he would probably have to look for another job to avoid falling into this situation. This may be one of his ways of adapting to his environment. Consciousness enables human agents to participate in ethical relations with others. For example, Tom may refrain from robbing people or banks because he is receptive to the reason that robbing is wrong and reacts to this reason. Suppose, he robs his first victim, he breaks his ethical relationship with this victim. He consciously makes that choice and thus the law holds him responsible for his action. This is also the case even if he persists to rob every person he sees.⁵⁸ The law treats Tom as a conscious being who understands what his motives are and the consequences of his actions.

I argue that the case is different for a corporation. If a corporation persists in choosing to ignore the PRA (i.e. persists in exploiting overseas resources and labour), it violates ethical relations with others. It however cannot be held responsible for these violations. The law legitimately allows outsourcing. Furthermore, the exhibition of social responses either directly (by employees of overseas business partners in interpersonal relationships) or vicariously (by charities such as Oxfam in impersonal relationships) do not change the harmful activities of outsourcing corporations. The corporation's non-responsiveness to social responses by others against its acts and the absence of law to regulate its activities suggest that a corporation is not a conscious entity. In summary, I conclude that the persistence in non-adaptation to the environment demonstrates that a corporation can function like a machine. A machine does not have to be responsive to social circumstances and so it cannot be held responsible (although it can be held strictly and vicariously liable).

Pettit's value judgment of a corporation stems from the shared value judgment of its members. As mentioned above, the members' value judgments are restricted by their codes of

⁵⁸ See *R v Daniel Junior Mykoo* [2010] EWCA Crim 989. The defendant committed 104 offences.

conduct which are provided by the CID Structure. Employees who are role-playing as corporate agents do not fully engage in free will or choice. Therefore, the value judgements produced by them are pre-determined and formulated (i.e. they are based on the market, economics and financial models). So, I find that the value judgements shared by these employees with the corporation are also pre-determined and formulated.

By contrast, human beings make unscripted value judgements. Although they do have routines and habits, these patterns can be broken. An organisational culture cannot be broken, unless a corporation decentralises its structure. Thus, although the employees do have consciousness, their corporation with a centralised structure does not. In summary, a corporation's engagement in the shared value judgements (born out of economics and financial models) to its employees and shareholders does not show that it has consciousness.

My criticisms of French's PRA and Pettit's arguments concerning value judgements show that the corporation does not have consciousness. Fuchs however suggests that a corporation may have 'collective consciousness'.⁵⁹ He takes the view that 'collective consciousness'⁶⁰ implies 'some conscious content is actually "shared"'.⁶¹ But he says in criticism of those who hold this view that this idea of shared minds is 'vastly overrated. They [(i.e. the shared minds regarding which I take the view that this also includes the minds of the members of corporations)] may intend, plan, rehearse, and reflect on this or that, but the actual difference this makes to society and culture [or in corporations] is rather small and likely gets smaller still when longer time periods are being considered'.⁶²

I conclude that I agree with Fuchs's criticism regarding shared consciousness and the conclusion drawn from it that a corporation does not have consciousness. Since I argue that a

⁵⁹Fuchs (n6) 28.

⁶⁰ibid.

⁶¹ibid.

⁶²ibid.

corporation does not have free will or consciousness, I conclude in effect that a corporation cannot display reflexivity. It is not flexible to adapt to or adjust in its environment. Many corporations dissolve due to poor adaptation to the business environment. Those which survive do not necessarily adjust according to the PRA. On the contrary, outsourcing corporations survive by externalising the activities which adhere to the PRA to others to maximise their wealth.

By unpacking the position of French and Pettit, I have shown that they have presupposed a corporation's agency. Although French and Pettit have convincingly suggested that a corporation can exercise guidance control over its action, they have taken the corporate agency for granted. With this finding, I have analysed Fuchs's (human) agency requirements against the features of a corporation put forward by French and Pettit. My analysis concludes that French and Pettit's features cannot satisfy Fuchs's agency requirements and therefore I conclude that a corporation has no agency. I summarise Part A in the next section.

(iii) A Summary of Part A

The two viewpoints of corporations as agents are introduced in section (i). I addressed the problem of holding corporations responsible as agents which, as I argued, lies in the absence of enforcement mechanisms. As a result, the guidance control principle cannot be directly applied to corporations. An analysis of the two viewpoints showed that the absence of enforcement is due to the corporation's lack of agency. Without agency, a corporation (as an entity independent of its members) cannot be responsible for the exercise of guidance control over its activities. Furthermore, without agency, I conclude with taking Fuchs's point of view of animals above that a corporation's action (similar to an animal) is not initiated by reasons, but by causes.

In addition, a corporation is capable of outsourcing activities to others (and thus excluding its responsibilities). One of the purposes of outsourcing is to achieve the corporate goal to maximise wealth (i.e. to be a progressively successful business). A corporate goal is analogous to the self-improvement goal (e.g. to be smart, to be better or to be prosperous) of a human agent. The achievement of this goal by a human agent is mostly that individual's responsibility. It is therefore impossible and also implausible for a human agent to outsource his or her individual responsibilities in achieving self-improvement goals.

For example, Jenny is overweight and desires to look thinner. She sets her self-improvement goal which is to lose weight. Thus, she attains personal responsibility as setting her goal requires her to exercise and go on a diet. Jenny unfortunately thinks these activities are burdens. However, unlike a corporation, she cannot outsource these activities to, say, Tom. Thus Tom cannot exercise or go on a diet for the benefit of Jenny's weight loss programme. In summary, a human agent cannot externalise his or her personal responsibilities for him or herself. A human agent can nevertheless externalise personal responsibilities for others. A mother can give up her child to the orphanage, for example. By doing so, she casts off her personal responsibilities to the child.

The fact that corporations can externalise the cost and burdens of many of their activities and thus also exclude responsibilities shows that corporations might not have agency over their actions. They are just entities acting as machines. In the absence of agency, corporations do not exercise guidance control over their actions. Therefore, the guidance control principle cannot be directly applied to them. Perhaps this discussion provides an explanation for the poor prosecution rate under the Corporate Homicide and Corporate Manslaughter Act. It is an extremely difficult task to prove a death was caused by the exercised choice and practical reasoning of a corporation when in principle a corporation has

none. In Part B, I show that the composition of these machine-like entities places a limitation on the indirect application of the guidance control principle.

PART B

COLLECTIVITIES AND THE INDIRECT APPLICATION OF THE GUIDANCE CONTROL PRINCIPLE TO CORPORATIONS

In Part A of this chapter, I demonstrated that a corporation is not an agent. Therefore, the guidance control principle cannot be directly applied to it. Thus, a corporation cannot be directly responsible for harm caused to others. In this section, I explore the indirect application of the guidance control principle to a corporation. The doctrine of vicarious liability is the method of indirect application of the principle to an employer corporation. As I mentioned in section (iii) of Part A of Chapter Two, an employer corporation can be held vicariously liable for harm committed by its employees who are conducting corporate activities. The doctrine of vicarious liability applied is as follows – (1) responsibility is directly imposed on an identified employee (or several identified employees) and then (2) liability is indirectly imposed on the employer corporation.

The application of this doctrine shares the individual responsibility of the employee (e.g. for Sam's negligent driving which caused harm to Carla) with the vicarious liability of the employer collectivity (e.g. DeliverThat is liable for harm caused to Carla). The applicability of this doctrine to the employer corporation hinges on the human agency of its employee (e.g. of Sam, the negligent driver). In this section, I question the validity of the application of this doctrine to the employer corporation. Therefore, I do not contest the validity of the application of this doctrine to a sole employer. The application of this doctrine to a sole employer entails the sharing of individual responsibility of his or her employee(s)

with the vicarious liability of the employer. Therefore, a human agent is vicariously liable for the acts of another human agent(s). I take the view that the sharing of individual responsibility and vicarious liability between human agents does not pose a problem. The sharing of responsibility and vicarious liability between individuals is compatible and theoretically sound.

Rather, I take the view that the sharing of individual responsibility with the vicarious liability of a collectivity raises a theoretical problem. In Part B of this chapter, I investigate the validity of the application of this doctrine to a corporation. The outcome of vicarious liability is that a corporation is liable for the harm caused by the responsible employee(s). This implies that a statement ascribing responsibility to the corporation (e.g. ‘DeliverThat is vicariously liable for harm caused to Carla’) is the same as a statement ascribing responsibility to its employee(s) (e.g. ‘Sam is responsible for harm caused to Carla’).

Thus, the application of the doctrine of vicarious liability to corporations follows MI reduction. French suggests that MI reduction is a process which takes ‘what is predicable of [a] collectivity is reducible to the assignment of like predication (allowing for some verbal leeway) to collectivity members’.⁶³ Here I examine the possibility that a certain collectivity is MI reducible (i.e. where the collectivity is an aggregate) and the other is not (i.e. where the collectivity is a conglomerate). I find that the composition of a corporation is not MI reducible. Thus, it is implied that the application of the doctrine of vicarious liability is based on an invalid MI reduction.

⁶³French (n2) 5.

(i) The Composition of a Collectivity and MI Reduction

In this section, my discussion proceeds as follows. In subsection (i)(a), I introduce the aggregate collectivity which is MI reducible. I investigate how a statement ascribing responsibility to this collectivity is reducible to statements ascribing responsibility to its individuals. Thus the examples given are to illustrate MI reduction. If MI reduction can be applied, the participants in this collectivity can be responsible for their collective actions or omissions. Therefore, this finding implies that the individuals of this collectivity can be responsible for collective actions or omissions which cause harm to others. They are directly exposed to praise or blame, that is, they are praiseworthy or blameworthy. In subsection (i)(b), I introduce the conglomerate collectivity like a corporation which is MI non-reducible. The guidance control principle cannot be either directly or indirectly applied to this collectivity. The corporation has a ‘corporate veil’ which makes the members who exercised guidance control over the corporate activity unidentifiable. In essence, no member of the conglomerate is directly exposed to praise or blame, and none is praiseworthy or blameworthy.

In subsection (i)(c), I compare these two kinds of compositions and I show that the indirect application of the guidance control principle is limited. Owing to the composition of a conglomerate collectivity the process of MI is non-reducible. In the case of a corporation, its legal personality creates a veil behind which its members can shield themselves from responsibility. This veil prevents members from being directly exposed to praise and blame. A comparison between the members of the aggregate’s direct exposure to praise and blame and the members of the conglomerate shows the following. The conglomerate cannot be held responsible for its collective actions. Its members (if not identifiable) cannot be held

responsible for the collective actions. I therefore propose in the summary of section (i) to depart from the application of the theory of responsibility based on guidance control to the corporation.

(i)(a) An Aggregate Collectivity and MI Reduction

Aggregate collectivities consist of two kinds – (1) a random collection of individuals⁶⁴ such as commuters sharing a train carriage or residents in a block of flats and (2) an organised group of people⁶⁵ such as a string quartet or a group of friends watching a musical together. I investigate the MI reducibility of statements ascribing responsibility to the collectivity to statements ascribing responsibility to the individuals who constitute it. The issue is therefore not whether statements ascribing responsibility are formulated to prevent harm to others. These two aggregate collectivities have two distinguishing features. First, the former group does not engage in planning to do an activity together and the latter group does. Second, the former group does not have a collective image, but the latter group to some extent does. The following subsections introduce the compositions of the two aggregate groups.

⁶⁴Virginia Held, ‘Can a Random Collection of Individuals be Morally Responsible?’ [1970] 67 14 JOURNAL OF PHILOSOPHY 471. Cited in this chapter as Held (n64).

⁶⁵French (n6) 5.

(i)(a)(a) A Random Collection of Individuals

Virginia Held defines a random set of individuals:–

‘a set of persons distinguishable by some characteristics from the set of all persons, but lacking a decision method for taking action that is distinguishable from such decision methods, if there are any, as are possessed by all persons’.⁶⁶

The individuals who are part of this aggregate collectivity do not have membership. No participation is required. They just have to conduct their personal activities at the right place in the right time to form this group. Consider this typical example of a random collection of individuals:–

Aiden, Bert, Cathy and Daniel are commuters sitting in the same train carriage at Birmingham Moor Street station. Each agent is commuting to the same destination - say, all four are bound for London Marylebone station.

The fact that all are commuting to the same destination does not entail that they are travelling together. There is no membership requirement. In other words, there is no agreement amongst the four to alight at London Marylebone Station. In the absence of an agreement to travel together, each individual - in this random collective – commits a singular act. So, when all four disembark upon reaching their destination, each passenger commits a singular act. A random collective acting in sync is compatible with MI reduction. The act of the random collective can be reducible to the acts of its composites.

The description of the act of this aggregate collective is thus: ‘passengers disembarked at London Marylebone Station’. This group description can be reduced to the description of

⁶⁶See (n64).

the act of every individual of the group. ‘Aiden disembarked at London Marylebone Station’. ‘Bert disembarked at London Marylebone Station’. ‘Cathy disembarked at London Marylebone Station’. ‘Daniel disembarked at London Marylebone Station’. The commission of acts by the random collective is the commission of separate singular actions by its actors. The disembarking of passengers is a collective action (i.e. a collection of actions) as opposed to the commission of a joint activity (i.e. the act of acting together). Consider this example:–

Suppose the train stalls on its tracks for three hours in the middle of the journey. Bert gets bored by this delay and starts scratching graffiti on his side of the train windows. Daniel sees Bert’s behaviour and decides to copy him and so he also starts scratching graffiti on his own side of the train windows. The train official intervenes and stops them.

Although Daniel and Bert are part of the random collective of individuals as passengers in the same train carriage, they have conducted singular actions which differed from the acts of Aiden and Cathy. Furthermore, the acts of Daniel and Bert are also different from one another – Daniel scratched graffiti on a window on one side of the train and Bert has done so on a window on the other side. As a result, Bert and Daniel are individually responsible for their separate actions of committing criminal damage to property.

In summary, an aggregate random collection of individuals cannot conduct a joint activity. A random collection’s action is the collection of the singular acts of each author. The actor is responsible for his or her action, not the group. Thus, the guidance control principle is directly applied to the actor who acts. Since this kind of aggregate collectivity cannot conduct a joint activity, it can have no collective responsibility. Held however suggests that this kind of aggregate collectivity can be responsible for a collective omission. Consider this example:–

Suppose Cathy chokes on her lunch in the middle of the train journey. She struggles to breathe and panics. The other three passengers are aware of Cathy's distress; but none of them seeks to help her or tries to alert the train staff. Cathy then suffocates and dies. Is this statement – 'the passengers in Cathy's carriage are responsible for her death' – correct?

All three omitted to prevent Cathy's death. The statement ascribing responsibility to this collectivity is – 'the passengers in Cathy's carriage are responsible for her death'. This statement is MI reducible to the statement ascribing responsibility to each of the random collection of individuals in Cathy's carriage. Thus, Aiden is responsible for the failure to prevent Cathy's death, so is Bert and so is Daniel. Therefore, the statement above is correct. The act of one person would have been sufficient to prevent Cathy's death. In a different given event it may be required for a random collection of people to band together and form an organised group, but they fail to do so. Held suggests that the random collection of individuals is then collectively responsible for omitting to take action to form an organised group.

Consider this second scenario of the same example:–

A man walks into the carriage of the four commuters and repeatedly stabs Cathy. The strength of Aiden, Bret and Daniel combined could overpower this man and perhaps minimise the damage to Cathy. However, the three do nothing. Cathy dies from her wounds. Is this statement – 'the passengers in Cathy's carriage are responsible for Cathy's death' – correct?

Held believes that in the given situation where the action of an organised group is called for, a failure to form an organised group entails collective responsibility. She explains:-

“Random collection R [i.e. in the example given, Aiden, Bert and Daniel] is [] responsible for not constituting itself into a group capable of deciding

upon an action” is sometimes valid when it is obvious to the reasonable person that action rather than inaction by the collection is called for’.⁶⁷

The passengers in Cathy’s carriage are collectively responsible for two instances – (1) the failure to band together to form an organised group to rescue Cathy from the man and (2) their collective omission to act in saving her. These statements ascribing responsibility to the random collection of individuals – as noted above – are MI reducible to the statements ascribing responsibility to each passenger (Aiden, Bert and Daniel). Therefore the statement above in the second scenario is correct.

The two scenarios of the commuters’ example are random collections of individuals who are present in physical closeness to each other (i.e. sharing the same carriage). Random collections of individuals can occur without being at the same place, nor is it necessary for the individuals to be proximate to each other. Consider another well-known example:–

The Kitty Genovese case is the murder of the named individual on 13 March 1964. It was reported that Kitty had not far to walk to her home when she was stabbed by the perpetrator. She screamed in distress, which led one of the neighbours to shout at the perpetrator and that managed to scare him off. Kitty staggered to her apartment entrance where the perpetrator returned again to assault her the second time and that killed her. The report estimated that about 38 neighbours could have heard Kitty’s cries of distress during these attacks.⁶⁸ However, none called the police. Is the statement – ‘the neighbours are responsible for Genovese’s death’ – correct?

These 38 neighbours are a random collection of individuals. They do not have to be at the place where the attack happens. There is no need for close proximity between the victim

⁶⁷ Held (n64) 479.

⁶⁸See Rachel Manning et al, The Kitty Genovese Murder and the Social Psychology of Helping: The Parable of the 38 Witnesses [2007] AMERICAN PSYCHOLOGIST 558. Although this article suggests that the story of Kitty Genovese was not supported by evidence, the story may nevertheless be used to illustrate MI reduction.

and the neighbours. Thus, it is the locality which determines whether they are part of a random collection or not. These individuals do not have to participate in a joint activity. Any act performed by any one of the 38 neighbours is a singular act by that individual alone. The neighbour who shouted at the perpetrator performed a singular action. The remaining 37 neighbours omitted to act on this particular incident. In hindsight, an observer might suggest that a reasonable person in this situation ought to call the police. Thus, 38 neighbours all fail to perform what is reasonably expected of them. The statement ascribing responsibility to this random collection of neighbours (R) is – ‘the neighbours are responsible for Genovese’s death’. The MI reduction is as follows:–

‘If a random collection R can be represented as a set equivalent, say, to M & N & Q then, if R is [...] responsible, we would seem to be able to conclude that M is [...] responsible & N is [...] responsible & Q is [] responsible’.⁶⁹

Therefore the statements ascribing responsibility are equally imposed on every neighbour in their failure to act. In conclusion, this kind of aggregate group is compatible with MI reduction. The description of the group’s omission to act is accurately reducible to every individual who failed to act. Thus the statement given above in Genovese’s example is correct. The MI reduction applied to an aggregate collectivity composed of a random collection of individuals entails that every individual who omits to act can be held responsible for the collective omission. The guidance control principle is applied directly to each of the individuals who omitted to act.

I now turn to the second kind of aggregate collectivity – an organised aggregate group. I find that a statement ascribing responsibility to the collectivity is not reducible to ascriptions

⁶⁹ Held (n68) 480.

of responsibility to all of its members. I therefore find that only the members who exercised guidance control over the collective omission or action are responsible.

(i)(a)(b) An Organised Aggregate Collectivity

The two examples above are omissions by a random collection of individuals. The example considered for an organised group also is an omission.

A group of friends – Ed, Fiona and George – planned to watch ‘Hairspray the Musical’ together. This task required all three to agree on a joint activity. By this agreement, they are members of this aggregate collectivity which forms an organised aggregate group. Fiona offers to book the tickets for the show. On the night of the show, Fiona realises that she has forgotten to book the tickets. Nevertheless, all three decide to go to the theatre together, but they are disappointed as the show is sold out. Is this statement – ‘we (i.e. as a group) failed to book the tickets and thus we are responsible for our disappointment’ – correct?

The failure to book the tickets in advance results in the collective disappointment of the group. So, the question is whether the statement ascribing responsibility to the group for this omission and the collective disappointment is reducible to statements ascribing responsibility to its members. Held argues that ‘if organized group G is [] responsible for the failure to do A it does not follow that member M of G is [] responsible for the failure to do A .⁷⁰’ So if group G , the organised aggregate group composed of Ed, Fiona and George is responsible for the failure to do A , to book the tickets, Held argues that it does not follow that every particular member of the group is responsible for the failure to book the tickets. In the example Held’s argument is true for the case of Ed and George. From the group failure to act it does not follow that Ed and George are responsible for their failures. In both cases the

⁷⁰ibid.

failure is not MI reducible to these two members. This is because all three have agreed to give this role to Fiona.

In the case of Fiona, the statement describing the group's failure to act matches the statement of Fiona's failure to act. It is MI reducible in her case because she was assigned a role by the other members of the group and she is also expected to exercise guidance control over her role. The failure to perform her role leads to the ascription of responsibility to the group being reducible to the ascription of responsibility to Fiona. In summary, the guidance control principle can be directly applied to Fiona. As a result, Fiona is responsible for the failure of the group to engage in its collective action (i.e. to watch the musical together).

The MI reduction in this example is only applicable to the member who ought to exercise guidance control to ensure the group's collective action is performed. Thus, I demonstrate that not every member of the organised aggregate group can be held responsible for the collective omission. Therefore, the statement ascribing responsibility to the collectivity for this example is incorrect. The next example considers an organised aggregate group conducting a joint activity. A statement ascribing responsibility to this group is also not reducible to statements ascribing responsibility to every one of its members. It is, again, the individual who exercises guidance control over the collective action to whom the statement ascribing responsibility to the collectivity is reducible.

The members of a string quartet composed of Alan, Brenda, Celine and Duncan are all accomplished musicians. They are also known to put on an excellent performance. They participate in a joint activity when they perform. Each member's playing of an instrument is incorporated into the joint action. This joint activity (i.e. a recital) heavily depends on its members acting together as a quartet.

The organised aggregate group's joint activity is not the only feature which relied heavily on its members. The group's identity is also heavily reliant on its members. French explains thus:-

'A change in an aggregate's membership will always entail a change in the identity of the collection. In brief, a group or aggregate's existence as that particular aggregate is not compatible with a varying or frequently changing membership. The meaning of a sentence about an aggregate would be different if one of the individuals actually belonging to the aggregate had not, in fact, been a member of it'.⁷¹

This string quartet has an identity which is composed of Alan, Brenda, Celine and Duncan. The responsibility of delivering an excellent performance (as this is the group's reputation) is owed by the members of this group to its audience. The MI reduction is applied thus. The string quartet is responsible for putting on an excellent performance. This responsibility is reducible to the following – Alan is responsible for putting on an excellent performance, Brenda is responsible for putting on an excellent performance, Celine is responsible for putting on an excellent performance and Duncan is responsible for putting on an excellent performance. Now consider this scenario of the string quartet:–

The string quartet is at a recital. In the middle of a piece, Celine mistakenly plays the wrong keys to a piece. This sends the quartet into disharmony. In confusion, all four stop playing and so the piece is not played to the end. Due to the abrupt interruption, the audience cannot enjoy the whole piece. Overall, this is a bad performance. Is the statement – 'the quartet is responsible for the bad performance' – correct?

The joint activity of the string quartet delivers the bad performance. Held's investigation shows that the MI reduction of the group's moral responsibility does not

⁷¹ French (n2) 5.

establish that each member is responsible for the joint activity. Thus, MI reduction cannot be applied to produce a correct analysis in the cases of Alan, Brenda and Duncan. The case of Celine is different. The source of the group's bad performance stemmed from her mistake. Therefore, the fact of the group delivering a bad performance matches the fact of Celine giving a bad performance. The statement ascribing responsibility to the group is reducible to a statement ascribing responsibility to Celine. Celine exercised guidance control over the mistake. Although she may not intentionally make the mistake, the other members of the group may perceive nevertheless that she had been careless. Therefore, Celine may not be responsible for the bad performance (i.e. the collective action), but she can perhaps be blameworthy for it.

In conclusion, I find that the string quartet's responsibility for delivering a bad performance can only be placed on Celine. Therefore, the above statement ascribing responsibility to the string quartet is incorrect. French suggests that when the composition of the aggregate changes, its identity also changes. This also affects the group's responsibility. Consider the next scenario:—

Suppose Celine falls ill on a performance date. She is replaced by Carlos. Alan, Brenda, Carlos and Duncan perform at the recital. This performance is not to the excellent standard which is the reason for the reputation of the string quartet composed of Alan, Brenda, Celine and Duncan. In fact, their performance is average. As a result, the audience is let down. Is this statement – ‘the quartet is responsible for the failure to exceed the average standard’ – correct?

French suggests that the new string quartet has a completely different identity from that of the old one. Thus, the new string quartet owes a new set of responsibilities to its audience. The responsibility owed by the old identity is replaced by that owed by the new. Therefore, I find that the members of the new string quartet are not required to perform up to

the standard of excellence that was expected from the old group. So, if the audience demanded that the new string quartet perform to the standard of the old, the members of the new string quartet can simply state that they are a new aggregate and thus they do not owe the audience the same responsibility as the old. There is no continuity of responsibility between the old aggregate group and the new.

Here, I show two interesting points in the two examples of an organised aggregate collectivity. First, a statement ascribing responsibility to the collectivity for its omission and action is only MI reducible to statements ascribing responsibility to those of its members who either ought to have exercised guidance control over the omission or who have exercised guidance control over the action. The guidance control principle is directly applicable to these individuals. Second, there is no continuity in collective responsibility between the differently composed old and new aggregates. Aggregate collectivities can therefore change their compositions to avoid long-term responsibilities. Sports teams are aggregate collectivities. Their ever changing compositions of team players and also their managers (especially for football) eliminates the continuity of team responsibility. The changing of the composition of the group also eradicates a consistency of team performance and standard.

I find that the non-continuity of responsibility between the old and new compositions does not exonerate individuals of their responsibilities. Members of an aggregate collectivity are prone to attract praise and blame from others. For example, the totality of the players of a sports team and members of a popular band do directly receive praise and blame for their joint activities. Individuals of an organised aggregate group can also be singled out for praise (e.g. if a footballer scores a goal for the team) or blame (e.g. if a goalkeeper fails to save a goal).

In conclusion, I showed in subsection (ii)(a) that MI reduction entails two outcomes. In the case of a random collection of individuals, all individuals who omit to act when they are reasonably expected to in a given situation are equally responsible as statements of responsibility about them are ascribable to the statement of responsibility of the collectivity. In the case of an organised group, it is only the individuals who have exercised guidance control over a collective action or omission who are responsible on behalf of the collectivity as only statements of responsibility about them are ascribable to the statement of responsibility of the collectivity. The findings of this subsection imply that individuals as human agents are responsible for the collective actions of their aggregate collectivities. The aggregate collectivity cannot be held responsible for its collective actions. Only its participants can.

In the following examples, I illustrate this further. A random collection of drivers along the congested motorway cannot be responsible for its collective action of CFC emission because those using electric cars are not causing CFC emissions. However, a statement ascribing responsibility to the collectivity (drivers using the motorway) is reducible to statements ascribing responsibility to every driver along the motorway who is not using an electric car. This year's newly appointed student committee cannot be responsible for last year's old committee's overspending, for example. Although the treasurer at that time can be responsible for the collective actions of last year school committee, the school committee as an entity holds no responsibility.

I find that aggregate collectivities are not entities. The guidance control principle cannot be applied directly to them. Therefore, they cannot be held responsible. It is those of their participants who have guidance control over the collective actions who can be responsible. Thus, the guidance control principle is applied directly to the participants in the actions of the aggregate collectivity. In subsection (i)(b), I introduce the conglomerate

collectivity. A conglomerate collectivity (e.g. a corporation) is an incorporation of an aggregate collectivity formed by an organised group. It is an entity. The guidance control principle is applied to the conglomerate indirectly by the doctrine of vicarious liability. In the next section, I investigate whether this doctrine is MI valid.

(i)(b) A Conglomerate Collectivity and MI Reduction

In subsection (i)(a), I demonstrated that the MI reduction applied to aggregate collectivities. A statement ascribing responsibility to an aggregate collectivity is reducible to statements ascribing responsibility to those individuals who exercise guidance control over the (or part of the) collective action. MI reduction is applied to a conglomerate collectivity by the doctrine of vicarious liability. This doctrine is applied to an employer-corporation. In essence, the employer-corporation is held vicariously liable for the harm caused by corporate activities which are conducted by its employees. The application of the guidance control principle is as follows – (1) direct guidance control principle is applied to an employee who has committed the harm and only then (2) the corporation is held vicariously liable on the ground of its employee's responsibility.

The doctrine of vicarious liability follows MI reduction. An employer corporation is vicariously liable only when its employee is or its employees are found responsible for the harm causing corporate activity. In the DeliverThat example, the courier company is liable for the harm caused to Carla only when its employee, Sam is found negligent during his course of employment. Thus, the statement ascribing responsibility to DeliverThat ('DeliverThat is liable for harm caused to Carla') is reducible to the statement ascribing responsibility to Sam ('Sam is responsible for harm caused to Carla').

My investigation is to test the validity of this doctrine which suggests that Sam's responsibility (i.e. an individual responsibility) can reasonably be ascribed to DeliverThat's responsibility (i.e. a collective responsibility). Since I argued in Part A of this Chapter that a corporation (as a conglomerate) is not an agent, this doctrine is simply a tool of convenience for compensating victims of corporate activities. There are two hurdles to overcome for a successful application of this doctrine. First, the composition of a corporation can enable its members to be unidentifiable. But, if a victim of a corporate activity cannot identify the individual wrongdoer, this doctrine is inapplicable. Second, the employer-corporation is not vicariously liable for harm caused by its subcontractors (unless it is found to be negligent in appointing incompetent subcontractors).

The analysis of the first hurdle questions the validity of the application of this doctrine to a conglomerate collectivity. The analysis of the second hurdle contests the effectiveness of this doctrine. As I argued in the previous subsection, a conglomerate collectivity is an incorporation of an aggregate collectivity formed by an organised group. This incorporation gives the conglomerate a legal personality which separates its identity from the identities of the individuals who compose it. This separation of these identities creates a 'corporate veil'. The corporate veil protects the assets of its members and protects these members from liability for debts of the corporation.⁷² It also shields its members from being held liable for activities which may cause harm to others by preventing these members from being easily identified.

As a result, members cannot receive praise and blame as directly as the members of an aggregate. In the examples in the previous subsection, I demonstrated that every participant in an aggregate collectivity is subject to praise or blame as a result of MI

⁷²Stephen Girvin et al, *Charlesworth's Company Law* (18th Ed, Sweet and Maxwell, 2010) 31. Cited in this chapter as Girvin (n72).

reduction. By contrast, I find that not every individual participation in a conglomerate collectivity is subject to praise or blame through MI reduction. The doctrine of vicarious liability does not include, for example, shareholders in the process of MI reduction. Thus if the shareholders of a corporation decide to maximise profits by outsourcing activities overseas, no responsibility rests on either the corporation, its members or its shareholders for the consequences of this decision. The shareholders fall outside MI reduction.

The exclusion of shareholders' responsibility for their decision-making seems to be the *lacuna* in the law which this current legal principle has not removed. To fill this *lacuna* and solve this exclusion of shareholders' responsibility, it is important to understand the composition of the conglomerate collectivity. French defines a conglomerate collectivity as:-

'an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organisation. The existence of a conglomerate is compatible with a varying membership. A change in the specific persons associated in a conglomerate does not entail a corresponding change in the identity of the conglomerate'.⁷³

A conglomerate collectivity has an identity which remains constant regardless of changes in its membership. The identity of the collectivity remains the same when a corporation hires and fires its agents or when its agents leave the corporation (as was the cases with Hayward at BP and Papermaster at Apple). French suggests that '[s]tatements ascribing responsibility to a conglomerate are not reducible to a conjunction of statements ascribing responsibility to the individuals associated with the conglomerate'.⁷⁴ Therefore, MI reduction cannot be applied to a corporation as its structure is not compatible with this process. French explains:-

⁷³French (n2) 13.

⁷⁴ibid.

‘(1) conglomerates have internal organizations and/or decision procedures by which courses of concerted actions can be, though not necessarily are, chosen; (2) generally, the enforced standards of conduct for individuals associated in a conglomerate are different and more stringent than those usually thought to apply in the larger community of individuals; (3) members of a conglomerate fill differing defined roles or stations by virtue of which they exercise certain powers over other members, and it is important that a change in the identity of the persons filling those roles does not necessarily entail a change in the conglomerate’s identity’.⁷⁵

The internal organisation – which I referred to above as the CID Structure – of the conglomerate integrates all the members’ decision-making and activities into the corporate activity. I find that the CID structure is the barrier to MI reduction. The difficulty lies in identifying the members who exercise guidance control over the corporate activities. French suggests that if a conglomerate is responsible for something, it is incorrect to draw either of two conclusions – (1) one cannot automatically conclude that some of the members of the conglomerate are responsible for it and (2) one also cannot accurately conclude that this responsibility is reducible to every member of the conglomerate.⁷⁶

Two statements ascribing responsibility to conglomerates illustrate this. I analyse the statements ‘BP is responsible for causing the Mexican Gulf explosion’ and ‘Apple is responsible for producing the faulty iPhone4’. French argues that it is incorrect to assume that these statements ascribing responsibility to these conglomerates can be respectively reducible to the following statements – ‘a member or some members of BP is responsible for the Mexican Gulf explosion’ and ‘a member or some members of Apple is responsible for the production of the faulty iPhone4’. The CID structure does not ensure that statements of responsibility of any one singular human agent or group of human agents of a conglomerate can be certain to be ascribable to a statement of responsibility of the conglomerate. However,

⁷⁵ibid 13-14.

⁷⁶ibid 14.

I find it plausible that a statement ascribing responsibility to a conglomerate is reducible to statements ascribing responsibility to its members if and only if the CID structure (as the corporate intentionality) reflects every member's intentionality.

If this is true, then there is not a problem in the automatic assumption that the statement ascribing responsibility to a conglomerate is reducible to the statement ascribing responsibility to some (or perhaps all) of its members. The CID Structure unfortunately does not integrate these members' decision-making and activities robustly enough to suggest that each member's action is attributable to the conglomerate's activities. Thus French argues that a statement ascribing responsibility to a conglomerate is only predicated by those statements of its members who have exercised or are perceived to have exercised corporate activities.

Thus the statement – ‘BP is responsible for causing the Mexican Gulf explosion’ – is predicated on the statement ‘a member or some members of BP who were working on site at the Mexican Gulf oil rig did a number of things which caused the rig to explode’. The statement - ‘Apple is responsible for producing the faulty iPhone4’ is predicated by ‘a member or some members of Apple designed and approved the iPhone4 without realising it was faulty’. These statements ascribing responsibility to a conglomerate is not MI reducible to statements ascribing responsibility to its members. Furthermore, the corporate veil protects these members by making them unidentifiable. The doctrine of vicarious liability is applied to exceptional situations where harm is caused by an employee during the course of employment.

This is only when the statement ascribing responsibility to the employee is derived from to the statement ascribing responsibility to the employer-conglomerate. Therefore the employer-conglomerate's responsibility is MI reducible to its employee's responsibility. However, I find that the application of MI reduction in this case is invalid. This doctrine does

not include all members of the conglomerate in the process of reduction. Furthermore, in complex situations such as the Mexican Gulf explosion involving BP where the harm is caused by conglomerate members who are working together, MI reduction encounters a problem. The corporation's legal personality makes it difficult to identify those members involved in the harm-causing corporate activity. If the members of the conglomerate are not identifiable, the ascription of responsibility to human agents is not possible. The MI reduction cannot be applied.

In addition, corporations can avoid being vicariously liable for the harm caused by corporate acts carried out by their employees. As mentioned earlier, the doctrine is not applicable to harm caused by subcontractors. Thus the outsourcing of corporate activities from one corporation to another facilitates a corporation's exclusion of liabilities (as well as the socio-economic responsibilities discussed in earlier chapters). In summary, the doctrine of vicarious liability follows possibilities of MI reduction. However, I have demonstrated here that a statement ascribing responsibility to the conglomerate is MI non-reducible to statements ascribing responsibility to its members. Thus, I argue that the doctrine of vicarious liability is based on invalid attempts at MI reduction. My argument does not suggest that the doctrine is wrong. My argument is only to show that the guidance control principle should not be indirectly applied to corporations. In the next section, I evaluate of the impact of MI reducibility and non-reducibility.

(i)(c) The Impact of the Reducibility and Non-Reducibility of MI Reduction

In subsection (i)(a), I showed that an aggregate collectivity's activities and responsibilities are MI reducible to those of its participants. The MI reduction of a statement ascribing responsibility to a random collection of individuals for a collective omission results in statements ascribing responsibility to every individual who was reasonably expected to, but omitted to act. The guidance control principle can be directly applied to each member's omission. The MI reduction of a statement ascribing responsibility to an organised aggregate group for a joint action results in the ascription of responsibility to a member or some members who exercised guidance control over some or all parts of the collective activity. It is only these members who are directly exposed to praise or blame. The guidance control principle is directly applied to these members.

In subsection (i)(b), I showed that a conglomerate collectivity's activities and responsibilities are not MI reducible to those of its members. The MI reduction of a statement ascribing responsibility to a conglomerate collectivity for a joint action results in the ascription of responsibility to the identified member or members who exercised guidance control over some or all part of the collective activity. The guidance control is directly applied to the identified members. The conglomerate's liability is indirect. I found that MI reduction of activities and responsibility of a conglomerate encounters difficulties.

First, the conglomerate legal personality separates the identity of the entity from its members. Owing to the corporate veil none of its individuals is exposed to direct praise or blame. Therefore these individuals are protected from the imposition of responsibility. Second, its CID Structure enables it to function as a single entity. However, this collectivity does not have intentionality nor an intention shared between its members. Therefore, the actions of its members are not contributions to the corporate activities. Third, the

conglomerate does not include all of its members in the process of reduction. Shareholders' responsibilities are excluded. These difficulties in MI reduction show that the doctrine of vicarious liability applied to an employer corporation is invalid. Thus, a conglomerate collectivity is MI non-reducible. Therefore, I argued that the guidance control principle should not be indirectly applied to corporations.

In the following subsections, I show that the reducibility and non-reducibility of group activities affect the member's exposure to praise or blame. Aggregates are MI reducible and thus their participants are directly exposed to praise and blame. Conglomerates are MI non-reducible and thus their participants are not directly exposed to praise and blame. This implies that members of conglomerates are not necessarily responsible for their joint actions. The difference between MI reducible and MI non-reducible groups is shown in the following examples of an aggregate and a conglomerate collectivity.

(i)(c)(a) MI Reducible Groups

The English squad at the 2010 World Cup is the example of an aggregate collectivity formed as an organised group:–

The match between England and the United States of America on 12th June 2010 started at 19 30 hrs. At 38mins into the game, the English goalkeeper, Rob Green, failed to save a goal against America's Clint Dempsey's strike.⁷⁷ This resulted in a draw.

Barry Glendenning, giving the commentator's reaction to Green's performance said:–

⁷⁷Barry Glendenning, 'World Cup 2010: England vs. USA – as it happened' *The Guardian* (London, 12 June 2010) <<http://www.guardian.co.uk/football/2010/jun/12/world-cup-2010-england-usa-live>> accessed 15 August 2011

‘Oh my God, that’s a *horror* show from England goalkeeper Rob Green, who spills a soft Clint Dempsey strike from distance over his own line. That’s as bad a goalkeeping gaffe as you’ll see in this tournament’.⁷⁸

The statement of the organised aggregate collectivity’s joint action – ‘England team drew with America’ - is predicated on a statement of Green’s action – ‘Green made England draw with America’. Thus, England’s responsibility for not winning the match is reducible to Green’s responsibility. Furthermore, the quote above demonstrates that he was directly exposed to blame. Glendenning expressed his reaction towards his performance on the field. Glendenning also touched upon the topic of whether other England team players had expressed their reaction towards him as quoted below. He discusses with Peter Cederblad at 57mins into the game:–

“Was there any English player who offered any support to Green after the goal or at halftime?” asks Peter Cederblad. “I didn’t see any. All left him to swallow it. I thought it was still a team sport?” [Glendenning comments -] Now that you mention it, nobody had a word of comfort or criticism for him immediately after the goal or on the way off the pitch at half-time. Of course a good PR man could spin that positively by saying that nobody hit him either”.⁷⁹

The statement ascribing responsibility to the England team is reducible to the statement ascribing responsibility to Green. This exposes Green directly to reactions expressed by the commentator and perhaps also by his team players. Thus, Green has to be answerable to his team players, his coach and also to England supporters. Green is in a position to own up to his responsibility and perhaps also to apologise for his bad performance. These kinds of gestures are perhaps sufficient in relation to the mistake he made. In this

⁷⁸Emphasis in the original text. *ibid.*
⁷⁹*ibid.*

example I demonstrate that members of an aggregate can accept responsibility on behalf of their group's joint actions. Steps in reparation by the responsible member are also sufficient and justified.

(i)(c)(b) MI Non-Reducible Groups

The next example is a conglomerate collectivity. This discussion revisits the BP Mexican Gulf explosion:-

On 20th April 2010, there were explosions and a fire on the Deepwater Horizon rig,⁸⁰ which caused the oil spill. The incident resulted in eleven deaths and seventeen people injured. It took BP (the owner of the rig) five months to permanently seal the well.⁸¹

The heavy media scrutiny of this incident made Hayward resign. Here, I examine whether Hayward's resignation was sufficient and justified in relation to BP's joint action. The statement ascribing responsibility to BP is – 'BP is responsible for the Mexican Gulf explosion'. MI reduction may lead to the conclusion that the statement ascribing responsibility to a member which is predictable to the collectivity's statement is – 'a member or some members of BP are responsible for the Mexican Gulf explosion'.

Hayward who accepted responsibility is not in the position which fits this predictable statement. Rather, Hayward was the person in charge of BP's operation on the rig. This implies that Hayward may have made decisions for the operations which were conducted on

⁸⁰See BP, 'Deepwater Horizon Accident Investigation Report' (BP 2010) <http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf> accessed 14 August 2011

⁸¹See Agencies, 'BP'S Deepwater Horizon Leak Ready to be Permanently Sealed' *The Guardian* (London, 17 September 2010) <<http://www.guardian.co.uk/environment/2010/sep/17/bp-deepwater-leak-seal-oil>> accessed 14 August 2011

the rig running up to the explosion. Therefore, Hayward is one of the many participants whose actions could have led to the explosion. These other members were shielded behind the corporate veil and thus they are unidentifiable. Since MI reduction demonstrates BP's responsibility, none of the members are exposed to direct praise or blame. However, Hayward's acceptance of responsibility can be criticised as a reaction to the warranted responses of the media during its coverage of the operation post explosion. The operation to repair the oil leak was not efficient. Thus, scrutiny reveals that Hayward resigned for the reasons that he was not able to manage well the repair of the leak.

Furthermore, I find that Hayward's resignation is argued to be insufficient reparation by BP. The reactions by the media were only the vicarious or impersonal objective social responses.⁸² The direct social responses are those of the individuals who were affected by the explosion – i.e. the fishermen and fishing towns whose livelihood was affected.⁸³ These are the individuals who demand that more be done by BP to own up to its responsibilities. In addition, I criticise the argument that Hayward's gesture of leaving the corporation meant that he took the corporate responsibility away with him. As a result, BP has externalised its responsibility to Hayward. In summary, the conglomerate's activity and responsibility are MI non-reducible to the actions and responsibilities of its members. As a result, its members are not directly exposed to praise or blame. Therefore, the corporation as a non-agent is not held responsible for its actions.

Its members are also (in theory – though the doctrine of vicarious liability is applicable in very exceptional circumstances) not held responsible for its joint actions for two reasons. First, a statement ascribing responsibility to a conglomerate is non-reducible to statements ascribing responsibility to its members and (2) the members of a conglomerate are not

⁸²PF Strawson, *Freedom and Resentment and Other Essays* (Reprint, Routledge, 2008)15. Cited in this chapter as Strawson (n82).

⁸³See pages 85-91 above.

exposed to direct praise or blame. In conclusion, MI non-reducibility of a conglomerate shows that the guidance control principle should not be applied to these collectivities.

(i)(d) A Summary of Section (i)

I introduced aggregate and conglomerate collectivities in section (i). The difference in the compositions of the two collectivities is the basis of a limitation on the theory of responsibility. As shown in Part A of this chapter, conglomerates are not agents and therefore the guidance control principle cannot be directly applied to conglomerates. I argued in Part B of this chapter that the guidance control principle cannot be indirectly applied to conglomerates.

Therefore, I find that the theory of responsibility is limited to the imposition of responsibility on three entities – (1) a human agent, (2) an aggregate collectivity formed by a random collection of individuals and (3) an aggregate collectivity formed by an organised group. The guidance control principle is directly applied to the individuals in all these entities. I argued that this theory of responsibility should not be applied to a conglomerate collectivity. The MI non-reducibility of statements ascribing responsibility to a conglomerate to statements ascribing responsibilities to its members means that the conglomerate and its members cannot be held responsible for its joint actions.

Therefore, there seems to be a need for a separate theory of corporate or conglomerate responsibility. I suggest that the answer to this need lies in the MI non-reducibility of a conglomerate. I unpack this MI non-reducibility of a conglomerate in section (ii).

(ii) Unpacking the MI Non-Reducibility of Conglomerates

John Welch⁸⁴ suggests that the phrase ‘non-reducible’ implies two outcomes - (1) the irreducibility of conglomerates. In other words, a statement ascribing responsibility to conglomerates ‘*can* not be reduced’.⁸⁵ Or, it implies (2) the unreduced statements about conglomerates. In other words, statements ascribing responsibility to conglomerates ‘*have not* been reduced’.⁸⁶ If a statement has not been reduced, this statement is therefore unreduced.

In section (i) of Part B of this chapter, I have demonstrated that statements about the responsibility of conglomerates are MI irreducible to statements about their members. I have explored the example of the conglomerates Apple, Inc. and BP, Plc. in section (i) and I have showed that statements ascribing responsibility to a corporation *can* not be reduced to statements ascribing responsibility to its members. Therefore in this section, I propose to shift the focus of the claim about the MI non-reducibility of conglomerates from the argument that statements about them ‘*can* not be reduced’ to the argument that statements about them ‘*have not* been reduced’ and thus statements about them are unreduced. The argument for the unreduced statements of conglomerates implies that statements about conglomerates have not undergone the process of MI reduction. It also implies that the statements of other collectivities have similarly not undergone the process of MI reduction. It seems to me that the unreduced statements have been made for all kinds of collectivities. In this section, I therefore propose that the imposition of responsibility on collectivities ought to depart from the theory of responsibility. My arguments in this section are as follows.

⁸⁴John R. Welch, ‘Corporate Agency and Reduction’ [1989] 39 157 THE PHILOSOPHICAL QUARTERLY 417. Cited in this chapter as Welch (n84).

⁸⁵ibid 422.

⁸⁶ibid.

D. E. Cooper's⁸⁷ arguments on collective responsibility are reproduced in subsection (ii)(a). He suggests that the MI reduction of collectivities results in collective responsibility 'neglect'.⁸⁸ Here, I reveal that when Cooper points out the flaws in the theory of responsibility and its MI reduction he touches upon an important issue. He points out that the notions of praise, punishment or blame of a collectivity have little to do with attempts to shape the behaviour of its members. In this subsection, I discuss this issue further and make a proposal to move away from the notion of blame and punishment to the notion of avoidance. Thus, I argue that the theory of collective responsibility should be based on the notion of avoidance. I propose a study of the unreduced statements of collectivities to create a separate theory of responsibility for collectivities. Since the unreduced statements of collectivities are prior to the process of reduction, they are based on the notion of avoidance rather than punishment.

In subsection (i)(b), I explore the unreduced statements of collectivities by using John R. Welch's idea of unreduced statements.⁸⁹ Unreduced statements express the collective goals of the collectivity's members. I argue that these collective goals form the basis for a theory of collective obligations.

⁸⁷D. E. Cooper, 'Collective Responsibility' 43 165 [1968] PHILOSOPHY 258. Cited in this chapter as Cooper (n87).

⁸⁸ibid.

⁸⁹Welch (n84) 409.

(ii)(a) The Departure from the Imposition of Responsibility

Cooper does not make the distinction between aggregate and conglomerate collectivities. His analysis is directed to the collective responsibility of collectivities. As already noted, he finds that MI reduction results in collective responsibility ‘neglect’.⁹⁰ His analysis also concludes that a statement ascribing responsibility to a collectivity is not reducible to statements ascribing responsibility to its members. Thus, he finds:–

‘we may decide that Collective Responsibility is not reducible, in any sense, to Individual Responsibility. If so, then theories of Individual Responsibility either are, or are not, easily amended to cover Collective Responsibility. If they are not, then we may treat Collective Responsibility either as a different type of Responsibility – so leaving intact our theories as theories of Individual Responsibility; or as showing that our theories are false as comprehensive accounts’.⁹¹

In the previous chapters, I attempted to determine the limits to the imposition of responsibility. In Chapter One, I outlined the problem arising from a corporation as a conglomerate collectivity. A corporation can outsource its activities to others. It benefits from the outsourced activities but it also excludes responsibility for the harm caused by these activities. In Part A of Chapter Two, I demonstrated that the theory of responsibility applies robustly to the imposition of responsibility on an individual.

In Part B of Chapter Two, I argued that ‘corporate responsibility’ is based on the imposition of responsibility on an individual. I illustrated this by two examples as follows – first, the doctrine of vicarious liability can be applied, but only when responsibility is imposed on the employee for whose harmful conduct the employer corporation may be indirectly liable. Second, a corporation is held responsible for corporate homicide or corporate

⁹⁰See (n87).

⁹¹ibid 258-259.

manslaughter only when the senior management (i.e. the responsible human agent(s)) are found to have the *mens rea* element for the committed crime. In Chapter Three, I provided a deeper understanding of the imposition of responsibility which revealed that the guidance control principle is applied robustly to human agents. Therefore in this present chapter, I put forward the limitation of this principle on two premises. Corporations are - (1) not agents, and (2) MI non-reducible to their members.

I find that my string of arguments corresponds to Cooper's findings. I wish to keep the theory of (individual) responsibility (i.e. the guidance control principle) intact and thus it perhaps should be set on one side at this point and should not be applied to collectivities. This therefore implies that collectivities should not be subjected to MI reduction and there should be a separate theory of collective responsibility. In addition, Cooper also suggests that the direct imposition of responsibility on a collectivity does not entail any favourable result. He explains, 'when a collective is held responsible, it is very often a completely unimportant, and irrelevant consideration as to whether blame or punishment would be effective in altering the behaviour of collectives'.⁹²

Cooper's explanation indicates that imposing responsibility based on the notion of blame and punishment is not effective. I argue that MI reduction of a collectivity does not necessarily result in the fact that every member of the collectivity is responsible. Therefore, if the imposition of responsibility on a collectivity is in terms of punishment and blame, the members (or many of them) do not necessarily feel the need to change their participatory behaviours in the collectivity. In this subsection, I propose to shift the focus. The theory of collective responsibility should move from the notion of blame and punishment to the notion of avoidance. The theory of collective responsibility should not be a product of MI reduction, but should be based on the study of unreduced statements before the process of MI reduction.

⁹²ibid 265.

This study of unreduced statements ascribing responsibility to collectivities is the focal issue. I find that Cooper's analysis of the two notions of responsibility indicates the importance of unreduced statements about collectivities. Although he thinks that these notions of responsibility are not plausible, I argue that Cooper nevertheless provides a helpful definition of the 'unreduced statements' of collective statements of responsibility. These two notions are:-

'(A) [t]he notion that 'X is responsible for Y' entails 'X could have avoided Y'.

(B) The notion that 'X is responsible for Y' entails that Y is an example of a type of behaviour, or state of affairs, which people may be deterred from performing or creating by blame or punishment'.⁹³

I aim to highlight unreduced statements about a collectivity by giving its interpretation of Cooper's arguments. The assertion in Premise (A) suggested that to hold the collectivity X responsible for the action Y entails the proposition that X could have avoided Y. Cooper gives the example of a tennis club closing down.⁹⁴ The application of Premise (A) entails that the tennis club (X) is responsible for its closing down (Y). Therefore, the tennis club could have avoided the closing down.

Cooper suggests in respect of Premise (A) that the tennis club's responsibility for its closing down does not follow from the statement that this club could have avoided the closing down.⁹⁵ Cooper believes that Premise (A) is not 'attributing the closure of the club to any particular actions, or act of negligence, on the part of the members'.⁹⁶ I agree with Cooper's analysis of Premise (A) as this premise does not depend upon the process of MI reduction. No

⁹³ibid 264.

⁹⁴ibid 266.

⁹⁵ibid 264.

⁹⁶ibid.

individual is identified as the one responsible for the closure. Thus, Premise (A) is an unreduced statement. In other words the statement – ‘the members of the tennis club ought to prevent its closure’ is unreduced.

In essence, Premise (A) implies that there are two ways of avoiding the tennis club’s closing down. One suggestion is to have different club members. The other suggestion is that its current members keep the club open. In other words, I find that Premise (A) is based on an underlying notion of avoidance, rather than the notion of punishment and blame. However, I interpret the first suggestion here as having a meaning that does not adequately capture the notion of avoidance. According to that suggestion the statement ‘the tennis club could have prevented the closing down’ implies that the club could still be open if the members were different. In retrospect, I find that this solution for keeping the tennis club open might not seem feasible. If it is not possible to change the entire membership of the tennis club, then the tennis club will be closed down anyway. There is no practical solution available to prevent the club from closing down.

I interpret the second suggestion as having a meaning which is more plausible. It suggests that its members *ought to* keep the club open. Cooper points out that there may be various reasons to close the club down, such as the club’s finances and the cost of the club’s maintenance. However, I argue that these problems could have been solved. I expand the discussion of Premise (B) more on this point. I take the view that Premise (B) is plausible. The application of Premise (B) suggests that the closure of the tennis club is the product of the ‘type of behaviour, or state of affairs of its members’.⁹⁷ In essence, the members are responsible for the closure of the tennis club because of the way they run it. Cooper suggests in Premise (B) that none of the members are identified as responsible for their attitudes. Therefore, I find that MI reduction is not applied to Premise (B) and I conclude that the

⁹⁷ibid.

statement – ‘the members would have kept the club open had it not been for their attitude’ – is unreduced.

Cooper suggests that the members may lack ‘*esprit de corps*’.⁹⁸ Perhaps, they lack the right attitude or commitment to the tennis club. In addition, Cooper suggests that the way in which the tennis club is being poorly run can be avoided by deterring its members from behaving in such a way through the notion of blame and punishment. As mentioned, Premise (B) is based on the notion of avoidance. Therefore it highlights the problem of the joint action resulting in the closing down of the tennis club as the lack of ‘*esprit de corps*’ of its members. In comparison to Premise (A), I find that the solution provided in Premise (B) which will avoid the closing down of the tennis club is practicable and plausible. Premise (B) suggests that its members ought to change their attitudes when running the tennis club. However, it does not suggest that each member is responsible for not changing their attitudes when running the club.

Rather, Premise (B) suggests that the club’s members can be deterred from behaving as they are if there is a form of mechanism of deterrence. Cooper believes that the absence of mechanisms which do this, in fact - results in the club being blamed for its closure. Therefore, he believes that the application of Premise (B) entails that collectivities are held responsible for their members being undedicated, unforgiving, cruel etc. Cooper however advances the criticism that blaming a collectivity for being responsible for the behaviour of its members is ineffective. In his explanation he uses nations, but I take the view that his criticism also applies to all collectivities:-

‘I am not even sure that it makes sense to speak of punishing nations. At least, this would hardly make sense in a world of national sovereignty. But even if it does make sense, it can hardly be claimed that the practice of ‘blaming’ or ‘punishing’ nations is of effect in

⁹⁸ibid 265.

altering the behaviour of nations, or their attitudes and internal structures'.⁹⁹

I agree with Cooper's criticism. The absence in a collectivity of a mechanism to prevent its members from acting in ways which are detrimental to the collectivity (and also to others – i.e. prospective club members, employees who maintain the site, etc.) has the result that it is not possible to hold the club responsible for its actions. The holding of the club's members responsible by way of punishment and blame will not alter their behaviour. Thus, the lack of a mechanism to deter members from behaving badly (i.e. the lack of the preventative measures) does not entail that the collectivity is responsible. Cooper's criticism implies that there is no need to apply MI reduction.

I summarise in this subsection by highlighting two points – (1) the study of unreduced statements shows that MI reduction does not have to apply to collectivities, and (2) the lack of preventative measures in a collectivity results in a lack of responsibility of any of the members for their non-cooperative attitude. Thus, MI reduction does not have to apply to collectivities. The statements of collective and joint actions remain unreduced. If Cooper is correct to state that holding the collectivity responsible for the behaviour of its members does not change their behaviour, then it is argued that it is time to depart from applying the theory of responsibility to collectivities.

In the light of this discussion, I find that Cooper's theory treats collectivities as separate entities from their composites. For example, Wal-Mart is a separate entity from its directors, shareholders and employees. So are BP and Apple. Although these conglomerate collectivities have legal personhoods, I find that they do not qualify to have agency. Thus, I argue that, unlike human agents who can be held responsible for their exercised guidance control over their wrongdoing, conglomerate non-agents cannot be held responsible for their

⁹⁹ibid 266.

wrongdoing (both the externalised and internalised ones). Nevertheless, they can be held strictly or vicariously liable. Since I have argued in the previous chapters that the doctrine of vicarious liability is not effective, and that strict liability does not impose liability on non-agents externalising their wrongdoing overseas, I suggest that it is not correct to treat conglomerate collectivities as agencies (in Fuchs's sense), but actors (in the modern sociological sense).¹⁰⁰

In Cooper's tennis club example, the members of the club are actors who ought to be obliged to act in a certain way in preventing the club's closure. These obligations to act responsibly stemmed from the unreduced statements created by the entity (the club). I therefore argue that these unreduced statements are the source for the theory of collective responsibility. Since I highlighted that collectivities have preventative mechanisms which shape the behaviour of their members, such mechanisms should form the basis for the theory.

(ii)(b) Unreduced Statements as the Source for a Theory of Collective Obligations

Unreduced statements are based on the notion of avoidance as opposed to the notion of blame and punishment. In subsection (iii)(a), I have suggested that the departure from the theory of responsibility renders it unnecessary to apply MI reduction to collectivities. Thus the source of a theory of collective obligations must be unreduced statements. An argument is advanced that these unreduced statements can shape the behaviours of members. The unreduced state of such statements ensures that no member of a collectivity can act alone, every decision a member makes must take into account the interests of the other members.

¹⁰⁰ Meyer J.W. and Jepperson R. L., 'The "Actors" of Modern Society: The Cultural Construction of Social Agency' [2000] 18:1 SOCIOLOGICAL THEORY 100

Welch depicts this unreduced state of the collective goal by giving this prisoner's dilemma scenario, an example of an organised aggregate collectivity:–

'Two prisoners, Dick and Dirk, each have the option to confess or not to confess. Each believes that their choices control the following consequences: if neither confesses, each will receive a light sentence of one year; if both confess, each will receive a heavier sentence of five years; but if only one confesses, he will go free while his silent partner will receive the very heavy sentence of ten years'.¹⁰¹

Dick and Dirk are assumed to have agreed to a joint enterprise which did not go well since both have been caught and are under interrogation. A joint enterprise has a collective goal. Suppose that prior to their capture, Dick and Dirk agreed to a condition. This condition was that if both of them were caught by the authorities, each of them must maximise their utility by not confessing. Dick and Dirk then have a shared understanding. This shared understanding – which can be expressed as 'we must maximise our utility' - is the unreduced statement. I interpret the strength of this shared understanding at two levels as being either (1) weak, or (2) strong.

Suppose the shared understanding between Dick and Dirk is weak. It then appears to me how Dick and Dirk will in fact react to the authorities is independent of this shared understanding. In this kind of situation, Welch points out; there is a 'divergence between the interest of each prisoner and the interest of the collectivity they form'.¹⁰² A weak shared understanding may imply that the member may diverge more towards their personal interests. It may appear that each prisoner has two options. Therefore, there is a possibility for each prisoner to go against the collective goal. As a result, Dick and Dirk may act independently in disregard of their agreed goals. Then the outcome of their sentences can be any of the three –

¹⁰¹Welch (n84) 420.

¹⁰²*ibid.*

(1) both get five years, (2) Dick goes free and Dirk gets ten years or (3) Dirk goes free and Dick gets ten years. In summary, a weak collective goal results in the dissolution of the collectivity. Therefore, the unreduced statement is erased or forgotten by its members.¹⁰³

Suppose the strength of the shared understanding between Dick and Dirk is strong. In this kind of situation, it is implied that the strong shared understanding of the collective goal by the members is shown in stability in each member's behaviour. Thus, there is a high tendency that each member may act in the interest of the collectivity. If Dick and Dirk choose not to confess, the collective goal is achieved and the collectivity stays intact. Thus, the unreduced statement is upheld. In summary, I find that the strength of the shared understanding (i.e. the unreduced statements) of the members of the collectivity keeps that collectivity intact. Furthermore, it is the strength of the unreduced statements which shape the behaviour of its members. These unreduced statements are the source of collective responsibility. They do not have to be MI reducible.

Although Dick and Dirk are individual actors (and thus each can be found individually responsible for his criminal act), I take the view that their joint enterprise is a separate entity. In other words, the existence or termination of the joint enterprise lies in the hands of its actors. The longevity of the joint enterprise depends on the strength of its actors' agreement (or obligation) to maintain it.

(iii) A Conclusion of Chapter Four

My arguments in this chapter are the following. I argue that corporations are not agents, but externalising entities. Therefore, there cannot be a direct imposition of responsibility on them. The reason why responsibility should not be indirectly imposed on

¹⁰³See pages 224-9 below.

them (except in the case of vicarious liability) is because of the composition of the corporation. Both arguments therefore have outlined the limitation of the imposition of responsibility.

I have argued that the holding of corporations accountable should depart from the imposition of responsibility. By doing so, the focus is shifted by moving from the notion of blame and punishment to the notion of avoidance. I find that Cooper's unreduced statements reveal factors which shape the behaviour of the members of a collectivity. These unreduced statements are the collective goals of a collectivity. The stronger a collective goal the more it can ensure that the members to act in accordance with it. In the light of this discussion, I take the view that a collectivity (especially a conglomerate) is a separate entity from its composites. This separate identity is a non-agent. I take the view that a collective non-agent cannot be held responsible for its wrongdoing. I take the view that the collective non-agent is rather the actor who is obliged to act responsibly. The non-agent actor acting responsibly depends on the unreduced statements created by its composites.

In the previous chapters, I argued that Kutz's theory of complicity is not compatible with the imposition of responsibility based on the guidance control principle. I also advance a criticism that this basis for holding corporations accountable is ineffective. The present chapter's departure from the imposition of responsibility aligns closer to Kutz's theory. I later show in Chapter Five that Kutz's theory is suitable for the development of the theory of collective obligations. However, I suggest that his theory is to be modified in alignment with the arguments of this thesis.

I find that the study of unreduced statements demonstrates the importance of the participations of the members of the collectivity. The strength of each member's participation is based on the collective goal. As is shown in this chapter, the members' participation and

the collective goal are the two features which shape the members' behaviour. I have therefore argued that these features are needed to be cultivated to form a theory to shape the behaviour of the members of corporations to prevent harm to others in outsourcing. Thus, I have argued that the focus should not be on the imposition of responsibility, it should be on the theory of obligations.

CHAPTER FIVE: THE THEORY OF COLLECTIVE OBLIGATIONS AS THE IMPOSITION OF ACCOUNTABILITY

In the previous chapter, I concluded on two grounds there are limitations to the imposition of responsibility on corporations. They are – (1) the corporation's lack of agency and (2) resulting from a corporation's conglomerate composition, the MI non-reducibility of corporate responsibility to the responsibilities of its members. Therefore I advanced an argument that there is no accountability resulting from the imposition of responsibility for the harmful consequences created by corporations. I argued that the holding of individuals, social groups and corporations accountable for causing collective wrongdoing should be based on a theory of collective obligations, and not on the imposition of responsibility. As mentioned in the introduction, Kutz's theory of complicity is the foundation for the development of a theory of collective obligations. Kutz suggests that complicit individuals or social groups who are participating in a collective action can be held accountable for their collective wrongdoing.¹

As mentioned in Chapter Two, Kutz suggests that the complicit human agent's participation is only a teleological link (as opposed to a causal link) between collective wrongdoing and the attribution of accountability to the participant.² He suggests that these complicit moral agents who are made aware of their participation must change their behaviour to prevent further engagement in this collective wrongdoing.³ Kutz's theory is interpreted as focussing on collective actions, for which it does not require participants to intend to participate in a joint action or to act together. For example, consumers need neither to share a collective goal nor to act together to demand products or services. Therefore,

¹Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (CUP, 2000) 146. Cited in this chapter as Kutz (n1).

²ibid 256.

³ibid 257.

Kutz's notion of collective actions is interpreted as meaning that he does not require an acting together by the participants. Thus, even those consumers who have contributed to the collective action in consuming products and services are human agents complicit in collective wrongdoing (e.g. the promotion of child labour, poverty in farmers, socio-economic and human rights violations of labourers and damage to the environment).

Kutz's theory is also interpreted as meaning that it has an underlying normative impetus. He suggests that the participants complicit in a collective wrongdoing ought – as human agents – to cooperate and work together to right these collective wrongs.⁴ I assess Kutz's theory and find that it centres on two important features - participation and collective goals - as follows. In section (i), I highlight the importance of participation to the notion of collective action in Kutz's theory. I later criticise this theory on the ground that it does not consider the importance of collective goals. The problem in Kutz's theory of accountability⁵ is highlighted to be the result of this lack of a collective goal.

In section (ii), I argue for a modification of Kutz's theory to incorporate the importance of collective goals. The creation of collective goals is based on the participants' associational obligations in a joint activity. In section (iii), I argue that these associational obligations can be erased or replaced by new associational obligations without incurring any consequences for these participants. I find that this feature also poses a problem for the enforcement by one participant of obligations of another participant using the theory of collective obligations.

I conclude this chapter as follows. First, Kutz's theory is the foundation for the development of the theory of collective obligations. Second, the theory of collective obligations is applicable to participants who are working towards a collective goal in a joint

⁴ibid.

⁵ibid 166.

activity. Third, an individual's participation in a collective goal requires this participant to create associational obligations with the other participants. These associational obligations can be erased or replaced by the participants. Therefore, this feature is found to pose a problem of enforcement in the development of a theory of collective obligations.

(i) Kutz's Theory of Complicity

I introduce the application of the theory of complicity by way of this example – 'I buy my cotton jumper from a store at a low retail price'. Kutz's theory of complicity suggests that I am accountable for my participation in the exploitation of labour and resources in the making of this jumper. According to this theory, my singular action of purchasing the cotton jumper is part of the global chain of actions. This purchase is one singular transaction which is in relation to millions of other participatory transactions by other human agents.

According to this theory, I exhibit my participatory intention in the exploitation of labour and resources when I purchase this jumper. This singular participatory intention overlaps with the participatory intentions of other participants,⁶ for example, the retailer who provides this cotton jumper to the customers, the exploitative manufacturer who produces the jumper, and the poverty-stricken cotton farmers who traded their produce at unsustainable prices for the making of this jumper. These participatory intentions of the other agents and me do not need to match. Kutz suggests that a teleological link suffices. In other words, each participant is related to the collective wrongdoing by the overlap in the content of their various participatory intentions.⁷ Although I do not intend to exploit the labour of manufacturing employees or to cause poverty to cotton farmers, I am still accountable to them

⁶ibid 94.

⁷ibid.

as my participatory intention overlaps with the participatory intentions of the exploitative agents. I am however not yet responsible or liable for causing these harms. Kutz suggests that holding a complicit individual responsible or liable requires one to turn to the ‘domain of law’ (i.e. civil or criminal liability).⁸

I now turn to give explanations for the terminologies used to describe the application of the theory of complicity. The definition of ‘participatory intention’ can be ascertained through its content. In section (i)(a), I explore this content. I take the view that participatory intention transcends all kinds of social groups and collectivities. In other words participation in collective wrongdoing occurs mainly on the part of a random collection of people. The overlapping of participatory intentions is explored in section (i)(b). I take the view that the overlapping of participatory intentions has a degree of influence on the behaviour of the participants. I find that there need be only a weak overlapping of participatory intentions by a random collection of people and therefore their influence on the behaviour of these participants is shallow. This weak overlap also creates Kutz’s problem with accountability.

In subsection (i)(c), I find that there is a strong overlapping of the participatory intentions of those individuals in social groups who share a collective goal. Therefore, the influence on the behaviour of these participants is deep. Although Kutz’s theory of complicity focuses on the importance of participation, I find that Kutz’s failure to consider the significance of participants’ membership of social groups and the importance of collective goals results in a failure to achieve the full potential strength of his theory.

⁸ibid 204.

*(i)(a) The Content of Participatory Intentions transcends all Kinds of Collectivities and
Draws Participants from Across the World*

The cotton jumper example depicts the collective action in achieving low priced cotton products. This collective action results in the exploitation of labour and cotton resources in the making and purchasing of these products. I noted that these participants in a collective action come from all kinds of collectivities. First, the consumers who purchased the same product are the participating random collection of people in the collective action (i.e. the action aimed at achieving low priced cotton products).

Second, the retailers (e.g. corporations or sole traders) who supply the product are participating conglomerates or individuals. Third, the cotton farmers (e.g. sole traders or cooperatives) are the participating organised aggregate of individuals or conglomerates which produce the raw material for the product. All of these participants exhibit their participatory intention in collective action. These participatory intentions are held by single human agents (i.e. individuals acting alone) or human agents in associational obligation in social groups or corporations (i.e. individuals acting together). Kutz suggests that there are two kinds of intentions for participatory intention - *executive* and *subsidiary*.⁹ He explains these two terminologies in turn:-

‘An *executive intention* is an intention whose content is an activity or outcome conceived of as a whole, and which plays a characteristic role in generating, commanding, or determining other intentions and mental states in order to achieve a total outcome. A *subsidiary intention* is an intention generated and rationalized by an executive intention, whose content is the achievement of a part of the total outcome or activity’.¹⁰

⁹ibid 87.

¹⁰ibid.

An *executive* intention is formed by many *subsidiary* intentions. Kutz elaborates by the example of a person playing the piano. The *subsidiary* intentions are those which give rise to the person's movements of the eyes, fingers, ankle, toes, etc...¹¹ These movements can be reflex actions (i.e. movements without needing the actor to think about them), or the actions of muscle or cognitive memory (i.e. actions from a learnt strategy or from conditioning through practice).¹² These *subsidiary* intentions are predicable on the *executive intention*, which can be expressed by the statement – ‘Dave is playing the piano’. Kutz suggests that the content of an executive intention ‘can be irreducibly intentionalistic, and even jointly intentionalistic, so long as the subsidiary intentions they command have nonintentional objects’.¹³ Thus, the example of my *subsidiary intention* to purchase the cotton jumper which has no relation to the collective action to exploit labour and resources might entail that I exhibit the *executive intention* to participate in that collective action.

In an activity conducted by more than one agent such as the joint activity of a game of chess,¹⁴ Kutz explains that this ‘collective joint activity thus becomes the object of an agent’s executive intention, having been built out of noncollective elements’.¹⁵ Therefore, it is implied that a human agent’s *subsidiary intention* does not need to have a collective element. In other words, I interpret this theory here as meaning that there is no need for the notion of ‘togetherness’ or of ‘acting together’ amongst the human agents. In essence, Kutz’s content of intention requires no membership.

¹¹ibid.

¹²ibid 86.

¹³ibid 87.

¹⁴ibid.

¹⁵ibid 88.

Although Kutz's explanations and examples are of 'collective joint activities',¹⁶ I attempt to show that Kutz's theory is applicable to participants from all kinds of collectivities who are involved in collective actions. Kutz argues:–

'But it is a mistake to conceive collective action only from the executive perspective because collective action often incorporates the contributions of participants who have no views, let alone intentions, concerning what the group as a whole should do'.¹⁷

In other words, he implies that added conditions to being a participant in a collective action, such as those of membership, or acting together by the participants, are superfluous.¹⁸ Therefore, I attempt to expand his argument to include participation in a collective action which transcends all kinds of collectivities. The example of my purchased cotton jumper shows that the supply and demand of the product are achieved by the participating agents from all kinds of collectivities in the industry. These participants do not need to engage in a shared collective goal nor is it necessary that they act together. Kutz believes that the minimal content which is required for the participants involved in collective action is the overlapping of their participatory intentions.

¹⁶ibid.

¹⁷ibid 96.

¹⁸See (n15).

(i)(b) The Overlapping of Participatory Intentions and its Influence on Participants'

Behaviour

Kutz explicates participatory intentions in a joint activity as follows:-

'Agents' participatory intentions to do their parts of a group act overlap if there is common ground in the states of affairs that satisfy the intentions of each. To be precise, agents' intentions overlap – they share goals – when the collective end component of their participatory intentions refers to the same activity or outcome and when there is a nonempty intersection of the sets of states of affairs satisfying those collective ends'.¹⁹

Kutz also adds the following passage in which he interprets a reference to the meaning of participatory intentions of participants in an activity as meaning that it involves participants from all kinds of collectivities.

'Matters are more confusing when the collective end component refers only to an activity or outcome generically, and does not refer to the other participants'.²⁰

The kind of matter Kutz is concerned with is referred to in the example of the purchased jumper. My intention was to purchase the cotton jumper at a low price. This intention overlaps with the intentions of the other participants in the collective end which is the exploitation of labour and resources. My singular action as a participant to this collective end however is minuscule. Nevertheless, I am accountable for the promotion or the involvement in the exploitation of labour and resources. The overlapping conduct of the other participants does not have to be taken into account in determining my accountability.

¹⁹ibid 94.

²⁰ibid.

Therefore, my accountability is not mitigated by the fact that the store where I bought the jumper trades with exploitative manufacturers.

Kutz believes that the imposition of complicit accountability can change the behaviour of the participants. I interpret this as meaning that the degree of influence which complicit accountability has on the participant depends on the degree of overlap of participatory intention. In the next two subsections, I show that there is a difference in the degrees of overlap in the composition of a collectivity.

(i)(b)(a) Participatory Intentions in a Random Collection of People

As mentioned, consumers are mainly classified as random collections of people. Thus, their participatory intentions are contributions to a collective end. The example of my purchased jumper is one where my participatory intention contributes to the collective end which is associated with the other participants who are involved in the production of my jumper. Consider another example – Apple Stores Inc. opened a new shop in Covent Garden, London in August 2010.²¹ There was a queue of customers outside the store before the launch. I take the view that these consumers were a random collection of individuals who held the same goal, which was to purchase Apple products. These consumers' goals were similar, but they were not shared. Therefore there was a weak overlapping *subsidiary intention* of any given customer with the rest of them.

Since each customer was not *sharing* the goal with the others, there was only a potential overlap of intention as opposed to an actual overlap.²² For example, one customer's *subsidiary intention* was to buy an iPhone for herself, while another consumer's *subsidiary*

²¹'World's Biggest Apple Store Opens in Covent Garden' BBC News (London, 07 August 2010)

<<http://www.bbc.co.uk/news/uk-england-london-10898866>> accessed 15 August 2011

²²Kutz (n1) 94.

intention was to buy an iPad as a present for someone. These subsidiary intentions formed the *executive intention* of the individuals in the random collection of individuals which was the collective action (i.e. to purchase an Apple product). In the absence of a joint action or a shared goal, the imposition of complicit accountability on each of the customers has a shallow influence on their behaviour. I note that the collective wrongs caused by the supply and demand of Apple products has resulted in a number of suicides committed by the employees of Foxconn, a business partner of Apple, Inc.²³ Therefore, I can argue in terms of Kutz's '*Complicity*' that each consumer of an Apple product is complicit in the suicides committed by the employees of Apple's business partners. However, since there is only a potential overlapping of participatory intentions of these consumers, the imposition of complicity accountability has a shallow impact on their behaviour as a result of which it might be suggested that Apple products consumers (and future Apple products consumers) will still purchase them.

The imposition of complicit accountability seems to invoke responsibility on the consumers. The invocation of consumer responsibility on complicit consumers may be taken to have a deep impact on consumer behaviour if they work together to prevent further contributions to the collective wrongdoing. However, (prior to the suggestion for avoidance) these consumers are mentioned as not necessarily *acting together* in contributing to the collective wrongdoing. I argue here that the commission of the collective wrongdoing without the consumers' acting together is the initial problem. Therefore, Kutz's suggestion that these complicit consumers should be subject to consumer responsibility *together* is a weak solution. In other words, these complicit consumers are argued to have no standing (of togetherness) to invoke an interpersonal enforcement of consumer responsibility between each other.

²³'Inside Foxconn's Suicide Factory' *The Telegraph* (London, 27 May 2010)
<<http://www.telegraph.co.uk/finance/china-business/7773011/A-look-inside-the-Foxconn-suicide-factory.html>>
accessed 15 August 2011

Individuals can nevertheless be taken to practice consumer responsibility voluntarily. As mentioned in section (i)(a)(a) of Part B of Chapter Four,²⁴ a statement ascribing responsibility to a random collection of people such as ‘consumers are socially responsible for the exploitation of labour and resources in the globalised world’ is MI reducible to a statement ascribing responsibility to each voluntary consumer. Therefore, each socially responsible aware consumer is reacting to that statement of responsibility. However the invocation of consumer responsibility of a random collection of individuals occurs in the absence of a collective goal or acting together. I can therefore make a criticism that the notion of consumer responsibility does not change the general behaviour of consumers. They still go for cheap products.

(i)(b)(b) Participatory Intentions in Joint Activities

The individuals who are involved in organised aggregate and conglomerate collectivities are engaged in joint activities. Examples of organised aggregate collectivities are used here to illustrate the impact of imposing complicity accountability on these participants. I take the view that the impact of the imposition of complicit accountability on participants in an organised aggregate collectivity is the same as its imposition on participants in a conglomerate collectivity. I give two examples of organised aggregate collectivity. These are of individuals who are in - (1) a game of tennis, and (2) a string quartet.

The first example concerns members of a tennis club, Adam, Ben, Claudia and Derek. There are two courts. Adam and Ben are on court 1 and Claudia and Derek are on court 2. Kutz suggests that a game of tennis requires participants to have an actual overlap of

²⁴See pages 166-71 above.

participatory intentions.²⁵ On court 1, Adam and Ben have an actual overlap of intentions, so do Claudia and Derek on court 2. However, according to his argument it is incorrect to say that Ben on court 1 and Claudia on court 2 have an actual overlap of intentions. Ben and Claudia are not playing the same game of tennis and therefore Kutz suggests that they only have a potential overlap of intention.²⁶

In a game of tennis, an actual overlap of participatory intention is crucial because it requires participants to agree to a joint action, as opposed to a collective action. I suggest that the impact of the actual overlap of participatory intentions on the participants' behaviour is deep. Therefore the imposition of complicit accountability on the participants has a strong influence on their behaviour. Suppose each of these players play for different reasons. Adam has a passion for tennis and is turning pro. Ben takes up tennis because he is a fan of Rafael Nadal. Claudia plays tennis because it is a hobby shared with her partner, Derek. Each player's behaviour towards playing tennis is influenced by their joint actions.

For example on court 1, Ben's aspirations to be like his idol encourage him to play good tennis with Adam. As a result, Ben and Adam play tennis together on a regular basis. On court 2, I may perhaps suggest that the joint action between Claudia and Derek is intended improve their relationship off-court. Claudia and Derek get to do things and spend time together by playing tennis. However, if their relationship breaks down, then the frequency or the possibility of them engaging in future games of tennis may perhaps also end. This example shows that the effect which the actual overlapping of participatory intention has on the behaviour of participants is deep. In the next example I consider whether the imposition of complicity accountability on the participants in joint action can potentially change their behaviour.

²⁵ Kutz (n1) 94.

²⁶ibid.

The second example concerns Alan, Brenda, Celine and Duncan who are members of the string quartet at a recital. This recital is a joint activity where there is an actual overlapping of every member's participatory intention. The collective end for each participant is to provide their audience with the best experience. Suppose this recital is held at the Royal Albert Hall for the BBC Proms. This is a very prestigious event where they have to be at their best. Each member's behaviour may be shaped by this. For example, they may rehearse more frequently before this event. Celine may watch her diet more carefully so she can fit in the dress which she wishes to wear on that night. Duncan, who has a wedding to attend the night before, must ensure that he does not drink too much on the wedding night.

The level of performance on the night of the recital is crucially dependent on each member's attitude in making their preparations. If one or a few or all of them have not prepared well, each member will be accountable for letting their audience down with their poor performance. Therefore, complicit accountability can instil the notion of avoidance of certain, different acts in the behaviour of participants. In other words, behaviour of participants who are in a joint activity can be influenced by the content of the collective goal. Although this finding seems promising for the development of a theory of collective obligations, Kutz highlights a problem which is encountered.

(i)(c) The Problem of Accountability through Complicity

In subsection (i)(b), I showed that the overlap of the participatory intentions of participants results in the imposition of complicit accountability on each participant for harmful consequences caused by the collective action. Kutz suggests that complicit individuals can cooperate with each other to prevent further engagements with collective wrongdoing. Kutz believes that this notion of cooperation amongst these complicit individuals

stems from solidarity and the internalisation of ‘collective oriented motivations of complicity’.²⁷ I take his theory to be applicable to human agents and thus only effective when a human agent considers that his or her role is ‘tempered by a respect for the decisions made by others about their own courses of action’.²⁸ For example, our roles as consumers ought to also consider the socio-economic wellbeing of the participants who are supplying us with the product and services. Thus, he may suggest that consumers ought not to demand cheaper products and services. Therefore, I take the view that the implementation of his theory is in the field of normativity. In other words, the effective application of his theory heavily depends on those complicit human agents who voluntarily work together to right these collective wrongs.

The problem with Kutz’s accountability theory lies in the case where it is not guaranteed that the imposition of complicit accountability on complicit individuals will change their behaviour so that they work together to right these collective wrongs. However I find that an effective imposition of complicit accountability seems to lie in the type of accountability which is imposed. Kutz suggests that there are two types of accountabilities – (1) inclusive accountability and (2) exclusive accountability. The participants in a random collection of individuals in the examples in subsection (i)(b)(a) are inclusively accountable for their collective actions. An individual is taken to be inclusively accountable when his or her participatory action is a contribution to a teleological relation to the collective wrongdoing.²⁹

In other words, I did not have to intend to promote the exploitation of labour and cotton resources for my action to result in me being complicit in promoting these activities. The customers who purchased the Apple products did not have to endorse the suicide committed by the employees of Apple’s business partners for their actions to result in them

²⁷ibid 257.

²⁸ibid 203.

²⁹ibid 147.

being complicit in promoting the kinds of employment practices which led to the suicides. The actions of consumers are not causal links to the collective wrongdoing, they are teleological links. The imposition of complicit accountability does not alter the behaviour of these consumers, who mostly acted alone. Since the links of the consumer actions are teleological to the collective harm, these complicit consumers do not have any reasons or impetus to work together in the prevention of further involvements of collective wrongdoing. In essence, the notion of consumer responsibility is found to be highly dependent on the volition of human agents. Therefore, consumer responsibility is more likely to be a personal responsibility than a collective one.

The participants in the joint activity examples in subsection (i)(b)(b) are exclusively accountable for their joint actions. An individual is taken to be exclusively accountable when his or her participatory intention bears a teleological relation and also a causal relation to the joint action.³⁰ For example, each tennis player must participate in order to have a game of tennis. If one of two players cancels, the one who cancels is exclusively accountable for their non-participation in the joint action. Every member of the string quartet is exclusively accountable for their participation in the recital. The imposition of exclusive accountability on the members is therefore taken to have a strong influence on their behaviour in relation to the joint action. In essence, the imposition of complicit accountability on participants in a joint action yields a better result than the imposition of complicit accountability on participants in a collective action.

Here I have highlighted complicit participation as the essential feature in imposing accountability on complicit individuals. However, I find that the imposition of complicity accountability is not effective unless these complicit participants are participants in a joint action; in other words, they are acting together towards a collective goal. These are the

³⁰ibid.

features which Kutz deemed superfluous. But I take the view that these features are important for the development of the theory of collective obligations.

This finding also ties in with the discussion in section (iii) of Part B of Chapter Four.³¹

A collective goal is required for agents who are acting together. This participants' collective goal is identified through the unreduced statements. Next, I explore these unreduced statements further. 'Unreduced statements' is a term replaced by 'associational obligations'. Both are found to refer to the same thing.

(ii) The Act of Acting Together towards a Collective Goal

In the previous section, I showed Kutz's theory to be the foundation for the development of the theory of obligations. Furthermore, I suggested that a solution to the problem in his accountability theory is to narrow the parameters to the study of complicit participants in a joint activity. Here, I attempt to align the theory of collective obligations closer to the underpinning features of the three projects which were introduced in Chapter One.

All participants in the projects are working together towards a collective goal. Therefore, the focal point for this section is to explore the essence of the notion of working (or acting) together. The participants in these three projects are collectivities (i.e. they are corporations and cooperatives). I focus the study of acting together on individuals who are in associational obligations amongst each other in a collectivity. I take the view that the properties of associational obligations created amongst individuals and amongst collectivities are the same.

³¹See pages 199-201 above.

I discuss as follows. In subsection (ii)(a), I explore Margaret Gilbert's concept of a plural subject and idea of joint commitment. In brief, a plural subject is a collectivity of participants who are involved in a joint activity. The joint commitment is made of the voluntary agreements of the participants who are involved in a joint activity. Gilbert suggests that this joint commitment creates rights and responsibilities to which all members are equally entitled.³² I explore this joint commitment in subsection (ii)(b) as to whether it is subject to the process of legitimate forgetting.³³ The associational obligations, which the participants are jointly committed to, can therefore be either forgotten or replaced by a new set of associational obligations.

Owing to the process of legitimate forgetting, I criticise this theory of a joint commitment in subsection (ii)(c) on the ground that it does not create rights and responsibilities for its participants. Rather, I suggest that the joint commitment merely contains the participants' mutual assurances to work together in a joint activity.³⁴ These mutual assurances created by jointly committed participants do not reflect Gilbert's claim that these associational obligations can create 'equal and correlated obligations and entitlements'³⁵ amongst the participants.

³²Margaret Gilbert, *On Social Facts* (Paperback, Princeton University Press, 1992) 411. Cited in this chapter as Gilbert *On Social Facts* (n32).

³³ibid 413.

³⁴Michael E. Bratman, 'Shared Intention' in Michael E. Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (CUP, 1999) 128. Cited in this chapter as Bratman 'Shared Intention' (n34).

³⁵Gilbert *On Social Facts* (n32) 409.

(ii)(a) *The Plural Subject and the Joint Commitment*

I note that Gilbert uses the term ‘joint commitment’³⁶ in ‘*A Theory of Political Obligation*’,³⁷ but not in ‘*On Social Facts*’.³⁸ However, I suggest that this idea is to be found in the minute detail in ‘*On Social Facts*’. Although she has not called it ‘joint commitment’ there, her discussion in ‘*On Social Facts*’ gives a holistic explanation for the behaviour of business parties in outsourcing. Therefore I attempt to introduce the essence of Gilbert’s notion of joint commitment by using her ideas in ‘*On Social Facts*’. The ‘joint commitment’ is found to have undergone a slight change in ‘*A Theory of Political Obligation*’. The behaviour of business partners in outsourcing is not captured by this slight change in the idea of joint commitment. However, I suggest that this slight change aids the development of the theory of collective obligations and also aids in finding a solution to regulate the behaviour of business partners in outsourcing.

Gilbert’s concept of a plural subject is:–

‘involved in our everyday concepts of a social group, a collective belief, a social convention, and in a number of related notions. According to our everyday notions, social groups are plural subjects, collective beliefs are the beliefs of plural subjects, and social conventions are the ‘fiats’ of plural subjects’.³⁹

A plural subject is formed by individuals working together in a joint action. A random collection of individuals is therefore not taken as a plural subject. A collective goal is nevertheless noted as being shared amongst the queue of customers outside the Apple store. (Each customer is hoping to purchase an Apple product). However, there is an absence of the

³⁶Margaret Gilbert, *A Theory of Political Obligation* (Paperback, OUP, 2008) 125. Cited as Gilbert *Theory of Political Obligation* (n36).

³⁷ibid.

³⁸Gilbert *On Social Facts* (n32).

³⁹ibid 408.

notion of acting together in this collectivity. Therefore, these customers do not have membership and thus they do not form a social group.

Gilbert believes that the participants in a plural subject must have a strong sense of ‘*doing something together*’.⁴⁰ She believes that the participants who are ‘*doing something together*’ can express their involvements by using the full-blooded ‘we*’.⁴¹ (Gilbert uses an asterisk as an indication that she means to use a full-blooded meaning of the word). Participants who use ‘we*’ must have:–

‘proper confidence to do something with certain others, [and] they must already justifiably see themselves in a certain special way, namely as parts of a plural subject of the relevant goal’.⁴²

Here I take the word ‘we*’ to be used by the participants in an organised aggregate collectivity such as members who are playing a game of tennis, in a string quartet, in the England football squad. As mentioned in the previous chapter, these members who use ‘we*’ are directly exposed to moral praise and blame from others.⁴³ This word ‘we*’ is also taken to be used by the participants in a conglomerate collectivity such as Wal-Mart, Apple, and BP. Although participants in a centralised organisational structure such as a corporation can be criticised as not suitable in employing the word ‘we*’ to describe their involvements with the corporate activities, the application of the word ‘we*’ however can be taken to demystify the concept of the corporate veil.

⁴⁰ibid 169. Emphasis in the original.

⁴¹ibid 199.

⁴²ibid 169.

⁴³See pages 183-4 above.

As mentioned in Chapter Two, the corporate veil protects the corporate members from liability and responsibility.⁴⁴ I attempt to show that the corporate veil might not protect corporate members from collective obligations because these are created by associational obligations rather than legal agreements. Legal agreements are the terms and conditions expressed in contract. These terms and conditions are taken to originate from associational obligations. Thus, they are prior to legal obligations, and it is suggested that the ‘corporate veil’ does not apply to them.

The corporations and cooperatives which are involved in the three projects have agreed to act according to the associational obligations which are crystallised into multilateral contractual agreements. The corporate veil cannot protect the corporate members from these obligations because these obligations demand the performance of action by the participants rather than the imposition of responsibility on them. Gilbert calls this associational obligation the ‘joint commitment’. A participant gains membership when he or she agrees to jointly commit to a joint activity. She believes that a member: –

‘must openly* express one’s willingness to [act in a joint action] with certain others. And it must be common knowledge among the parties that one has done this’.⁴⁵

Gilbert believes that there are two ways that a member is *open** to express their willingness to commit to a joint activity. A member (1) has a joint readiness to jointly perform a collective action or (2) is committed to a pool of wills. Gilbert notes all the parties to the joint action have common knowledge of every member’s *open** expression to participate. These features formed the joint commitment which Gilbert believes creates a set

⁴⁴See page 61-3 above.

⁴⁵Gilbert *On Social Facts* (n32) 200. Emphasis in the original.

of rights and equal responsibilities for all participants.⁴⁶ I explore the features of the participant's joint readiness, the commitment to a pool of wills and the creation of a set of rights and equal responsibilities for the jointly committed participants in the following three subsections.

(ii)(a)(a) Participants in the Plural Subject and Joint Readiness

Gilbert believes that a participant cannot carry out a joint action alone, nor be ready to carry out a joint action alone.⁴⁷ Therefore, participants must express joint readiness for a joint activity. This is the feature which keeps the plural subject together. Participants who are jointly ready to engage in a joint activity are entitled to demand or oblige one another to perform their agreed tasks. Gilbert explains:-

‘the people [who are] *jointly ready* jointly [...] perform a certain action in certain circumstances. Each would then have a general obligation to participate in action appropriate to joint readiness for the relevant kind. There would be a variety of consequent obligations and entitlements for each person. The specific obligations and entitlements of one person would not be independent of those of others. As long as joint readiness was maintained, all would have equal and correlated obligations and entitlements’.⁴⁸

Gilbert's explanation correlates with project UCA Soppexcca. The members of the collective of farming cooperatives are jointly ready to do business only with partners who are socially responsibly aware. Thus, if a member of Soppexcca seriously considers doing

⁴⁶ibid 411.

⁴⁷ibid 408.

⁴⁸ibid 409.

business with an exploitative partner; this member may potentially violate their joint commitment. I can therefore take it that the other members will demand that this member should not agree to do business with such a partner.

(ii)(a)(b) Participants in the Plural Subject and Commitment to the Pool of Wills

A plural subject may have a belief or a goal. For example, the England football squad believe that they can win the World Cup. Or the string quartet's goal is to give an excellent performance. Or the EPFIs believe in the Equator Principles.⁴⁹ A participant commits to the pool of wills when he or she has 'openly*' manifested his [or her] quasi-acceptance' of the shared belief or goal.⁵⁰ By doing so, Gilbert believes that:–

'Humans [and the view is taken that corporations are also capable] can express conditional commitments of their individual wills, on the understanding that in a situation of common knowledge a set of such conditional commitments results in a set of jointly committed wills, that is a pool of wills. The 'nominal owner' of each will must understand that his [or her] will has been given over to a certain joint cause, and that this is common knowledge'.⁵¹

The behaviour and decisions of the participants to the joint commitment are influenced by the behaviour and decisions of the others in the joint activity. The personal goals of the individual or the participating collectivity (like a corporation) gain lower priority over the associational obligation to the joint activity.

⁴⁹See pages 28-31 above.

⁵⁰See (n48).

⁵¹Gilbert *On Social Facts* (n32) 410.

(ii)(a)(c) Participants in the Plural Subject and the Set of Rights and Equal Responsibilities

According to Gilbert, the participants in a joint activity are ‘taking on or accepting a set of responsibilities and rights: it involves recognizing a new set of constraints on one’s behaviour. (One also accepts certain new entitlements)’.⁵² In other words, each participant in a joint activity has a set of rights and ‘*equal* responsibilities’.⁵³ Gilbert’s idea of ‘equal responsibilities’ is interpreted as meaning the ‘equality of responsibilities where each participant achieves (or tries to achieve) a joint ideal’.⁵⁴ I therefore interpret this as meaning that each participant is responsible for maintaining the joint activity.

The behaviour of individuals and the participating collectivities can be influenced by the associational obligations raising from the joint activity. Gilbert suggests that these sets of rights and equal responsibilities are not legal or moral.⁵⁵ Rather, she suggests that they are political or associational.⁵⁶ These sets of rights and equal responsibilities – in Strawson’s terminology –are interpersonal amongst the participants. In other words, each participant has a right to demand that the other participants fulfil their obligations. Gilbert suggests that these associational obligations however can be subject to the process of ‘legitimate forgetting’.⁵⁷

⁵²ibid 411.

⁵³ibid.

⁵⁴ibid 412.

⁵⁵ibid 411.

⁵⁶ibid.

⁵⁷ibid 413.

(ii)(b) *The Legitimate Forgetting of Associational Obligations*

Gilbert suggests that participants who are jointly committed to an associational obligation can bring it to an end by simply forgetting about it.⁵⁸ There are two processes of legitimate forgetting – (1) a unilateral violation by one or more members of the collectivity and (2) mutual agreement by all members to dissolve the joint commitment. I attempt a clear illustration of the processes of legitimate forgetting in the following example, in which the participants agreed to create a new common knowledge for themselves:-

Dick and Dirk created their own lunchtime game called ‘Yellow Car.’ In making up the rules to ‘Yellow Car’, Dick and Dirk are open* to a common knowledge of this game. Say, this game requires two or more participants to play. These participants engage in play during lunch. Thus the game comes to be played when there is already a prior joint commitment, i.e. when the participants leave the office together to go for lunch. The rule of this game is that the person who sees a yellow car anywhere around the vicinity taps any of the other participants on the shoulder and calls out, ‘Yellow car!’ The participant who is tapped on the shoulder has to buy coffee for the others.

Suppose Dick and Dirk are the only participants in this game. The common knowledge (i.e. the rules of this game) is openly* known to them. As a result, Dick and Dirk exhibit quasi-acceptance in a joint commitment to conduct this joint action. Each participant in doing so can confidently state the following: ‘the ‘Yellow Car’ is *our** game’ or ‘*we** are playing *our** game’.⁵⁹ Dick and Dirk each takes on a set of associational rights and equal responsibilities. Thus, Dick and Dirk are both obliged to play this game when they go to lunch together. Next, I explore the two processes of legitimate forgetting.

⁵⁸ibid.

⁵⁹ibid 199.

(ii)(b)(a) Unilateral Violation by one or a few Participants

Gilbert's first process of legitimate forgetting occurs when one or some of the participants perform a unilateral violation of their associational rights and responsibilities. The issue here is to assess whether either Dick or Dirk can exit their joint commitment. In other words, I assess whether this statement – ‘*we** are playing *our** game’ – can be legitimately forgotten by any one of them. Consider the following scenario:–

Suppose one day Dick and Dirk went out for lunch together. Dick tapped Dirk and called out, ‘Yellow car!’ as one drove by. But, this time Dirk reacted in anger and told him off for acting childishly.

Dirk has not upheld his set of associational rights and equal responsibilities towards Dick. Therefore, Dirk has clearly committed a unilateral violation of the joint commitment with Dick. Dick however is the party who has not violated the conditions contained in the joint commitment. Therefore, Gilbert suggests that Dick is in the position to make a choice from three options. She explains:–

‘In a case like this, it seems that the party who has not yet violated any obligations [i.e. Dick] has a range of options. He [or she] probably need not continue to act as one who jointly accepts the proposition in question. Certainly he need not do for so long. He [or she] could question the violator, and try to bring things back on track, or quite legitimately forget the whole thing’.⁶⁰

Suppose it has been three weeks without a yellow car sighted within the vicinity on their way to lunch. Thus, Dick might think that Dirk’s reaction was probably because they have not played the game in a while. Thus, Dick might choose the first option whereby he discontinues the game this one time and attempts to try it again another time. Suppose Dirk’s

⁶⁰ibid 413. Endnote omitted.

reaction takes Dick by surprise and Dick opts for the second option. Dick questions the violator – Dirk – on his reaction. Say, Dick reminds Dirk of the ‘Yellow Car’ game which they invented and runs through the rules with Dirk again. In addition, Dick may go as far as to assert that Dirk is obliged to buy him a coffee since that is the common knowledge shared by the two of them. The issue concerned here is whether the violator will uphold the joint commitment (i.e. whether Dirk buys Dick a coffee).

I take the view that the violator’s inclination to uphold the joint commitment rests on its normative enforcement. Therefore, the violator is not guaranteed to uphold the joint commitment when the others demand compliance from him or her. In the event that Dirk refuses to comply with the joint commitment - Dick will have to opt for the third option which is to forget about the whole thing. This is different from the first option where Dick temporarily set the joint commitment aside. Rather, the third option requires him to dissolve the joint commitment entirely. The dissolution of a joint commitment is therefore suggested to be initiated by one or more participants in the collectivity. The joint commitment is legitimately forgotten when all participants have accepted to dissolve it.

This finding ties in with the discussion in subsection (ii)(b) of Part B of Chapter Four. I suggested that the unreduced statements are contained in the associational obligation. The enforcement of these unreduced statements heavily depends on the degree of force carried by the notion of avoiding its termination. A strong notion of avoiding termination of the agreement entails that participants do not easily forget. A weak notion of avoiding termination of the agreement entails that participants can easily forget.

(ii)(b)(b) Mutual Agreement to Legitimately Forget

Gilbert's second process of legitimate forgetting is mutual agreement by all participants to dissolve the joint commitment. She explains, 'if the parties agree to end their collusion, they will dissolve the set of associational obligations they had previously incurred'.⁶¹ In the given event if Dick and Dirk thought that the 'Yellow Car' game was a silly idea and both decided not to play it anymore, then I can state that the 'Yellow Car' game and their joint commitment to participate are dissolved between these two participants.

(ii)(b)(c) Non-Consequential Legitimate Forgetting of Associational Obligations

I interpret the dissolution of the joint commitment as meaning this event does not result in any consequences. For example, when Dirk unilaterally violates the joint commitment, he can effectively coerce or put pressure on Dick to legitimately forget about the whole thing. Dirk can terminate the joint commitment without incurring any consequences. In other words, he does not need to make amends to Dick. In addition, a mutual agreement to dissolve a joint commitment also results in no consequences being incurred from it.

I find that Gilbert's process of legitimate forgetting correlates to behaviour of the business partners in outsourcing. The *Wal-Mart* case gives an insight into this. Wal-Mart and the outsourced partner made a bilateral contractual agreement to incorporate the 'Standards' to prevent the violation of the outsourced partner's employees. In Gilbert's terminology, this bilateral contractual agreement stemmed from an initial associational obligation between the two partners. However, this associational obligation is shown to be legitimately forgotten. Wal-Mart, as is noted in Chapter One, has conducted independent audits into the practices of

⁶¹ibid.

the outsourced partners. Violations were detected. However, Wal-Mart chose neither to enforce the practice of ‘Standards’ on the outsourced partner nor to terminate the bilateral contractual agreement.

Here, I find that the non-enforcement of the terms of contract amounts to a unilateral violation of the associational obligation by the outsourced partners. It is shown that they did not adhere to the ‘Standards’ when conducting their business. Wal-Mart detected these violations, but did not act in accordance with their associational obligation to either enforce the standards or terminate the contract. I take the view that Wal-Mart legitimately forgot about the terms and conditions in the agreement. The dissolution of the bilateral agreement incurs no consequences for either Wal-Mart or the outsourced partners.

The forgetting of the associational obligation or the bilateral contractual agreement gives opportunities for both business partners to replace their original expressed agreement with new associational obligations (and perhaps, these are unexpressed). These new associational obligations between the partners do not need to be expressed in a legal document. The partners therefore simply continue to conduct business as usual but in a way which does not reflect the terms of the contract.

(ii)(c) An Evaluation of the Theory of Joint Commitment

The creation of a joint commitment shown in the previous section provides a set of rights, and equal responsibilities of, the participants which can be terminated. This termination of associational obligations incurs no consequences. The non-violators of the joint commitment have the opportunity to demand their entitlement in the associational obligation. For example, Dick can demand that Dirk plays the ‘Yellow Car’ game. Or, it is plausible that

the outsourced partners' employees can demand that Wal-Mart should enforce its 'Standards'. In the present circumstance, these employees are not participants in the bilateral contractual agreement, but if they were, the associational obligation would be taken as a multilateral rather than a bilateral agreement. Thus, if these employees were included as participants in a multilateral agreement, they could enforce the 'Standards' against both Wal-Mart and their employers. According to the outcome of the *Wal-Mart* case, those outsourced partners' employees are participants neither in the associational obligation nor in the bilateral legal agreement.

The non-violator has to decide either to enforce terms and conditions of the bilateral agreement or to legitimately forget them. Whether the non-violator chooses to claim a remedy against the violator depends on normative enforcement. I later explore the notion of 'normative enforcement' in Chapter Six.⁶² It is an enforcement mechanism which demands an actor to perform or maintain the associational obligation at the intrapersonal level. A weak normative enforcement entails that the non-violator can choose to legitimately forget about the terms and conditions of the associational obligation. Examples here have led to the conclusion that there is a lack of normative and legal enforcement at the intrapersonal level. This also affects the prospects for enforcements of these associational obligations at the interpersonal level.

I raise two points from this conclusion. First, Gilbert claims that associational obligations provide participants with associational rights and equal responsibilities. However, I have found that Gilbert's claim is defeated by the lack of normative enforcement in associational obligations and the lack of legal enforcements in these agreements when expressed as bilateral contractual agreements. Second, since the termination of these associational obligations is suggested to incur no consequence amongst the participants, these

⁶²See pages 256-68 below.

associational obligations therefore create something other than rights and equal responsibilities for their participants.

Next, I advance the argument that Gilbert's notion of a joint commitment cannot create rights and equal responsibilities for the participants. However, the argument can nevertheless be maintained that these non-consequential associational obligations can influence the behaviour of participants.

(iii) Associational Obligations Create Mutual Assurances, Not Rights and Responsibilities

Here I argue that associational obligations create neither sets of rights nor equal responsibilities for the participants. I rather take the view that associational obligations are the contents of robust communication and negotiation amongst participants. In other words, there is no creation of rights and responsibilities. Michael Bratman's 'Shared Intention'⁶³ best describes the behaviour of the participants after the formation of the associational obligation. Bratman's theory behind 'Shared Intention' is similar to Gilbert's theory of joint commitment. Participants in a shared intention also have to agree to act together in a joint activity.

The participants' joint readiness and commitment to the pool of wills however does not create a set of rights and equal responsibilities for each of them. Bratman suggests that each participant plans his or her activities with the other participants in the common knowledge that all participants have agreed to the joint activity. Bratman calls this plural subject's planning the meshing subplans. He explains:-

'We intend to *J* if and only if

1. (a) I intend that we *J* and (b) you intend that we *J*.

⁶³Bratman 'Shared Intention' (n34).

2. I intend that we *J* in accordance with and because 1a, 1b, and the meshing subplans of 1a and 1b; you intend that we *J* in accordance with and because 1a, 1b, and [the] meshing subplans of 1a and 1b.

3. 1 and 2 are common knowledge between us'.⁶⁴

The meshing subplans amongst participants are the shared intention. I suggest that the associational obligation is contained in this shared intention. In the following two subsections, I give two arguments suggesting that Gilbert's claim is unfounded. They are based on the grounds that the associational obligation does not create - (1) equal responsibilities for its participants, nor (2) a set of rights and responsibilities for its participants.

An example illustrates these arguments:-

Ed, Fiona and George are a group of friends who decide to spend a day trip in London together on Tuesday. It is common knowledge to all of them that they like art. They plan to meet at Piccadilly Circus at 11am.

In the terminology of Gilbert, the joint action is stated as the day trip. This joint action is agreed amongst the three friends. Each participant thus manifests joint readiness to carry out this joint activity. Furthermore, each participant is openly* committed to the pool of wills of the joint commitment which Gilbert claims gives each participant a set of rights and equal responsibilities.

⁶⁴ibid 121.

(iii)(a) An Argument on the Point that the Associational Obligation does not Create Equal Responsibilities for Its Participants

I noted that Gilbert's idea of equal responsibilities refers to the responsibilities arising when each participant's achievement (or attempted achievement) is aimed towards a joint ideal.⁶⁵ I argue that an associational obligation does not create equal responsibilities for each of the participants at either of two stages. Participants have equal responsibilities neither at the joint readiness stage nor at the stage when they have committed to their 'pool of wills'.

Suppose the three friends have agreed to meet at Piccadilly Circus at 11am. Each participant manifests a joint readiness to engage in the joint activity. Thus, the behaviour of the participants is shaped in the following ways. Each participant plans to arrive at the meeting point by taking their preferred mode of transport. I interpret Gilbert's theory as implying 'equal responsibilities' meaning that each participant in this scenario is equally responsible for being on time.

I criticise Gilbert's suggestion of equal responsibilities for each participant on the ground that she does not take account of the characteristics of each participant which can affect their 'bargaining power'. Equality of responsibilities entails that in the ideal joint activity all participants have equally weighted responsibilities shared amongst the others. This equality of responsibilities is taken to correspond to each participant having equal rights. Here I advance the argument that this is not the case in practice. Consider this scenario:—

Suppose it is common knowledge to all participants that George has a habit of keeping everyone waiting at a meeting point. On past occasions, Ed and Fiona have always been punctual. On this day in London however George and Ed are on time. Fiona is running late. All the participants' characteristics ought to be therefore factored into his or her set of associated rights and responsibilities. Thus, George's habit of keeping

⁶⁵ Gilbert *On Social Facts* (n32) 412.

everyone waiting at a meeting is measured against Ed and Fiona's habit of being punctual.

I suggest here, that George who is on time has a lesser associational right (in comparison with Ed) to complain of Fiona's lateness, because he has kept Fiona waiting on past occasions. Ed however has a stronger associational right to complain of Fiona's lateness. He can demand that Fiona ought to be punctual. I suggest that Fiona's attitude towards the others for her lateness also varies. She may feel less apologetic towards George for her lateness, but genuinely so towards Ed. In essence, the associational 'bargaining power' should take account of the characteristics of the participants. Each participant's joint readiness with the others in a joint activity is therefore suggested to be seen in relation to his or her ability.

Suppose Fiona has a disability and that she requires a wheelchair. This feature could influence the joint readiness of all participants in the joint activity. All participants should plan visits to places with wheelchair access. Ed and George should make compromises as to the places to which all three plan to go together. The corresponding associational rights and responsibilities amongst the three are imbalanced. For example, Ed and George's joint readiness involves them in giving Fiona assistance to gain access to buildings or in public transport. Therefore, I can state that Ed and George have greater responsibilities in the joint activity in comparison with Fiona.

In essence, the associational responsibilities of participants are shown here to not necessarily be equal. I suggest that each participant's characteristics and abilities are factored into his or her associational responsibility. The degree of responsibility should correspond with the degree of right a participant can invoke against the others in a joint activity. This

suggestion aligns with the Global Business Coalition's project which was introduced in Chapter One.⁶⁶ Each participant in the Global Business Coalition can contribute as much or as little as their resources allow them to in the joint action to fight HIV, malaria and tuberculosis.

A degree of flexibility as to the participant's involvement in creating associational obligation should be taken into consideration. This notion of flexibility can however result in asymmetry between the participants' roles and standing in a joint activity. This participants' dissymmetry of roles and standings raises the question of whether associational obligations can create rights and responsibilities.

(iii)(b) An Argument on the Point that the Associational Obligation does not Create Associational Rights and Responsibilities for Its Participants

Gilbert suggests that the participants' commitment to the pool of wills entails that each of them takes on a set of associational rights and responsibilities. I argue the contrary in this section. One of the reasons behind this argument is the process of non-consequential legitimate forgetting. I contend that participants are more likely than Gilbert allows to create associational obligations and dissolve them at any point without incurring any costs or burdens.

Here I find that participants who are jointly committed in an associational obligation replace this by new sets of associational obligation. This is shown in the *Wal-Mart* case. The incorporation of the 'Standards' in the outsourcing contracts might have been agreed by both parties. However, their business practices did not reflect the terms in the contract. The later

⁶⁶See pages 33-5 above.

associational obligations of both parties overrode the terms in the contractual agreement. Therefore, legal documents such as bilateral contracts are not necessarily an effective tool in regulating the behaviour of business partners. The frequent changes in the associational obligations between the two may entail the forgetting of the terms of contracts.

This process of forgetting can be unilateral where one party is coerced into forgetting the terms. For example, a farmer, who is a sole trader, may be coerced by a multinational to accept the given price of the produce although this is not the price agreed in the contract. Or, this process can be mutual where both parties agree to set aside the terms in the contract. Here, I can speculate that in the *Wal-Mart* case both parties had agreed that the ‘Standards’ would not be enforced. I therefore aim to show that associational obligation can be either erased or changed by the participants over time. This defeats Gilbert’s claim of the creation of a joint ‘*commitment*’, since there is nothing which the participants are committed to.

Consider this scenario:–

The three friends have met up in Piccadilly Circus and are planning what to do. Ed and Fiona suggest going to the Royal Academy of Arts nearby. George suggests going to an exclusive arts exhibition at the Jewish Museum.

The associational obligation by the three friends may incorporate visits either to the two venues or to just one of the two. Suppose Fiona would prefer them to visit the Royal Academy of Art as it is nearby. A visit to the Jewish Museum would require travel by public transport which she in a wheelchair might be less keen to agree to engage in. Ed agrees with Fiona. George may need to compromise with the majority. George may have two options. First, he could switch from his initial plan (i.e. taking the two to the museum) to the current plan (i.e. tagging along with them to the Royal Academy). By doing so, he undertakes

Bratman's meshing subplans. In other words, George plans his activities to mesh with the activities of the two friends. The joint activity of a day with Ed and Fiona stays intact if George chooses this option.

Second, he could leave the associational obligation. As a unilateral violator, George can initiate a new agreement with Ed and Fiona to forget about the joint commitment of 'a day with Ed, Fiona and George'. In this case, Ed and Fiona can legitimately forget about it. As a result, the new joint commitment - 'A visit to the Royal Academy of Arts' - is created by Ed and Fiona. And George is free to plan the remainder of his day. Suppose George chose the first option. Consider the next scenario:-

All three find that the exhibitions at the Academy are the same as on their last visit. Therefore, they find that this visit is not as enriching or beneficial to their interests. Therefore, they decide to go for a new plan and make a trip to the Jewish Museum.

This example illustrates that the initial associational obligation can be replaced by a new associational obligation. This kind of behaviour is also present in outsourcing. The arrangement of independent audits incurs costs for the 'regulating' outsourcing partner. The enforcement of the 'Standards' incurs costs and burdens for both outsourced and outsourcing partners. The preservation of the socio-economic wellbeing of the outsourced partners' employees suggest that Wal-Mart ought to conduct audits and implement the 'Standards' if the partner does not adhere to them. This incurs costs. Production costs cannot be reduced to the lowest price. Thus, Wal-Mart's aim for wealth maximisation is not met. Therefore the replacement of the 'Standards' of the bilateral contract with associational obligations of other business practices saves the partners from the need to terminate the contract. The termination of the bilateral agreement also incurs costs to both parties. In other words, the outsourcing

corporation has to look for another outsourced partner, and the outsourced partner who loses the bilateral contract loses business.

If the enforcement of ‘Standards’ in the bilateral contract is disadvantageous to both the partners there is then a high tendency for both partners to agree to forget about it. They can replace these terms with a new associational obligation. In other words, both partners can agree to arrange new business practices which do not reflect the terms of their contract. Here I note that associational obligations are flexible and are always changing. The participants in the joint activity can also change. Consider this next scenario:–

By the afternoon, all three have had an enriching experience at the exclusive art exhibition in the Jewish museum. Ed suggests that an ‘open mic’ session at the nearby Jazz Café is a good way to wind down and end the day. George agrees. But Fiona is not too keen. As a result, she ends the day after the visit to the museum and leaves Ed and George to carry on to the Jazz Café.

This illustration touches upon two of Bratman’s ideas in ‘Shared Intention’. First, the example illustrates that there are frequently ‘meshing subplans’ amongst the participants.⁶⁷ These participants are constantly planning their activities to mesh with the plans of one another. A joint activity is for this reason not just the quasi-acceptance of each participant to become a member of it. It also requires constant review of a participant’s plans with the others. Second, the example also illustrates that a robust communication between participants is needed for the planning of personal activities to mesh with the other participants in a joint activity. Participants are constantly in negotiation in planning a joint activity. There is no set task or plan. Hence I advance the argument that there cannot be a set of rights and

⁶⁷See page 231-2 above.

responsibilities given to each participant. On the contrary, participants have to negotiate constantly for their appropriate plans of action in a joint activity. Bratman explains:-

'I need neither know nor seek to know of all your subplans for us to have a shared intention [or a joint commitment]; nor need we already have arrived at complete, meshing subplans. What is required is that each of us *intends* that we *J* [or act together] by way of meshing subplans. Perhaps you and I have not yet filled in our plans. Or perhaps we have filled in each of our subplans, they do not yet mesh, but we intend to seek revisions that allow them to mesh. We may even have conflicting preferences concerning subplans and be involved in negotiations about how to fill our plans. We may be involved in such negotiations even while we have already begun to *J*'.⁶⁸

In essence, participants in a joint activity do not need to know the others' exact plan of action. Each participant's role and plan of action in a joint activity can be decided through negotiation. Since the associational obligation is prone to be subjected to changes, the participants in a joint activity are not strictly bound to participate. In the light of Bratman's terminology, each participant who meshes his or her subplans with the others in a joint activity is giving assurances to the others that he or she is a member. Thus, the maintenance of a joint activity is by the mutual assurances of its participants.⁶⁹ A participant can leave the activity when he or she ceases to give such an assurance. For example, Fiona ceases to give an assurance that she is part of the day in London when she is not keen to go to the Jazz Café.

⁶⁸See (n64).

⁶⁹Bratman 'Shared Intention' (n34) 128.

(iv) Conclusion of Chapter Five

I summarise this chapter as follows. I have explored the foundation for the development of a theory of collective obligations. I have shown that the notion of participation in Kutz's theory of complicity is an important feature. I have shown that collective wrongdoing is also created by the participation of individuals, social groups and corporations. However, I have advanced the criticism of Kutz's notion of accountability through complicity that it lacked enforcement at two levels.

First, accountability through complicity is based on the prospect that complicit human agents (such as consumers) ought to voluntarily practice consumer responsibility for the prevention of further collective wrongdoing. The argument advanced shows that there is a lack of normative enforcement of this theory. Although voluntary consumers can enforce accountability at an intrapersonal level (i.e. when an individual chooses to be socially responsible), I later argue in Chapter Six that this enforcement is weak, in that a human agent can bind and unbind him- or herself by decisions as to whether to be (or not be) a socially responsible consumer.

Kutz's suggestion that human agents should cooperate in the avoidance of further occurrences of collective wrongdoing is also, I argued, weak. I therefore argued that the contributions to collective wrongdoing are caused by singular actions of consumers who are mainly a random collection of individuals. These consumers therefore did not contribute to the collective wrongdoing together and I conclude that there is no notion of togetherness to fix or prevent this harm. Kutz's suggestion is therefore not effective.

Second, I found that accountability through complicity lacks normative enforcement at the interpersonal level (as when a fellow consumer persuades other consumers to be socially responsible). I argue that a participant does not have the standing to enforce

accountability on another participant. A consumer who practices consumer responsibility does not have the standing to tell other consumers also to practice consumer responsibility. The problem found in Kutz's theory of complicity is that he does not seem to appreciate the importance of participants acting together.

These two points suggest that Kutz's theory should be modified. Margaret Gilbert's 'joint commitment' highlights the importance of joint activity and her theory shows that this can have a strong influence on the behaviour of the participants. A degree of interpersonal enforcement of 'accountability' on the participants can be found in a joint action. The associational obligations created by participants are shown to be flexible and are also frequently subjected to changes. Furthermore, the process of non-consequential legitimate forgetting is shown to diminish the degree of interpersonal enforcement of 'accountability' amongst the participants. The accountability of participants can be forgotten by dissolving the associational obligation.

Bilateral contractual agreements in outsourcing are shown to be subject to the process of legitimate forgetting. The participants can respect the socio-economic well-being of stakeholders in contract, but the later associational obligations created between them in business practices can erase these written terms. I conclude that the process of legitimate forgetting does not give a participant non-violator the standing to invoke interpersonal enforcement of 'accountability' against the violator. I find that this is the problem is faced by the creation of bilateral contractual agreements in outsourcing. The solution to this problem lies in the prospect of creating multilateral contractual agreements. Next, I explore this solution.

CHAPTER SIX: MULTILATERAL CONTRACTUAL AGREEMENT AND THE SOURCES OF ‘COLLECTIVE’ NORMATIVE GOOD

In the previous chapter, I have shown that associational obligations are created amongst individuals in a social group and also amongst collectivities (i.e. corporations and cooperatives), which are engaged in a joint activity. The problems encountered by the creation of these associational obligations are - (1) the process of non-consequential legitimate forgetting of associational obligations and (2) the lack of interpersonal enforcement of accountability amongst its participants. I noted that Gilbert’s ‘joint commitment’ has undergone a slight change in ‘*A Theory of Political Obligations*'.¹ Here, I attempt to unpack this slight change in Gilbert’s theory. The joint commitment is shown in ‘*A Theory of Obligations*’ to be based on normative value, which is not the case in ‘*On Social Facts*’. I believe that the normative value of a joint commitment is enhanced by normative enforcement. I discuss here as follows.

In section (i), I argue that Gilbert transformed her ‘joint commitment’ from a commitment which was subject to non-consequential dissolution to one which was subject to a consequential dissolution. I note two important points of discussion in Gilbert’s modification - (1) participants who are jointly committed to the associational obligation can invoke an interpersonal enforcement of accountability amongst each other from which the prospect of unilateral legitimate forgetting is eliminated, and (2) those associational obligations which are based on the normative good give each participant a stronger standing to invoke an interpersonal enforcement of accountability. Thus, I conclude that these associational obligations are based on the sources of normativity.

¹See pages 218-21 above.

In section (ii), I conduct an investigation into Christine Korsgaard's sources of normativity.² The interpersonal enforcement of accountability is ascertained to determine whether the associational obligation based on normative good can be invoked at two levels:- (1) by the participants in a conglomerate collectivity, and (2) amongst conglomerate participants in global business practice (such as outsourcing). Korsgaard suggests that the enforcement of normative good is strictly at the intrapersonal level. In other words, it is only human agents who are bound by normative good (or normative laws) and each of them enforces these normative laws against him or herself (i.e. there is only an intrapersonal enforcement of accountability). I find that these normative laws, as well as normative good, do not have interpersonal enforcement of accountability. This investigation therefore poses a problem for the development of a theory of collective obligations.

In section (iii), I further investigate the purpose of Korsgaard's sources of normativity to ascertain a solution to this problem. Korsgaard's theory aims to create a Kingdom of Ends.³ She suggests that the normative good (or normative laws) can be shared in reciprocity between human agents in a social group (i.e. in the Kingdom).⁴ This implies that an interpersonal enforcement of the normative good is plausible. I object to her suggestion. I take the view that these individuals are independent silos (or separate normative systems from one another) that are enforcing similar normative laws against themselves at the intrapersonal level. In other words, each individual has a normative enforcement mechanism which only applies to him- or herself. I take this as private normativity. Therefore, I conclude that there is in this theory no basis for a theory of collective normative good. It seems that

²Christine M Korsgaard, *The Sources of Normativity* (14th Reprint, CUP, 2010). Cited in this chapter as Korsgaard *Sources of Normativity* (n2).

³Christine M Korsgaard, *Creating the Kingdom of Ends* (Reprinted, CUP, 2000). Cited in this chapter as Korsgaard *Kingdom of Ends* (n3).

⁴See pages 268-72 below.

the normative good for joint actions has to be based on something different. In other words, it can be based on public normativity.

In section (iv), I therefore argue that the content of the normative good must determine whether the associational obligation can be invoked by its participants at either an intrapersonal or an interpersonal level. I take the view that Korsgaard's Kingdom of Ends is the Kingdom of *personal* ends (private normativity). This finding gives an opportunity to expand the discussion into suggesting a possible Kingdom of *collective* ends for participants in a joint activity (public normativity). I suggest that the content of the associational obligations in social groups and the multilateral contractual agreements is based on the 'collective' normative good. Three projects introduced in Chapter One provide a rough idea as of this content.

I conclude this chapter by proposing the key features of a theory of collective obligations as follows. First, joint activity and its participants have a global reach. Second, every participant in a joint activity ought to agree to enter in an associational obligation. Third, the content of the associational obligation ought to be based on the collective normative good. This collective normative good can be secured by negotiation, the sharing of knowledge and joint problem-solving of these participants. Fourth, the content of the associational obligation which demands joint action from participants ought to be crystallised into multilateral contractual agreements. Fifth, multilateral contractual agreements ensure that all participants can enforce the terms and conditions against other participants.

(i) From a Non-Consequential Joint Commitment to a Consequential Joint Commitment

I find that Gilbert does not mention the process of legitimate forgetting in '*A Theory of Political Obligation*'.⁵ Nevertheless, participants who are jointly committed to an associational obligation have four types of standing of right to advance objections against a unilateral violator.⁶ According to Gilbert, these types of standing of right are – ‘betrayal’, ‘trust’, ‘answerability’ and ‘owing’. Although she explains that the assumption of these four types of standing of right by participants against a unilateral violator do not always have to be justified,⁷ her changes to the ‘joint commitment’ still have implications for how associational obligation can influence the behaviour of participants.

Gilbert suggests that the new ‘joint commitment’ leaves no room for any participant to commit a unilateral violation.⁸ Therefore, all dissolution of joint commitments is implied to be mutually agreed by all participants. In other words, every participant must waive his or her right that they act together.⁹ This new ‘joint commitment’ also ensures that every participant can invoke an interpersonal enforcement of accountability against a unilateral violator. As a result, this is a consequential joint commitment.

In this section, I discuss as follows. I introduce Gilbert’s four types of standing of right in subsection (i)(a) by the use of one of her examples. In subsection (i)(b), I show that the application of these four types of standing of right to the different kinds of social groups have varying degrees of influence on the behaviour of participants in these kinds of joint activities. In section (i)(c), I show that Gilbert’s consequential ‘joint commitment’ is the source of collective obligation. I highlight two features contributing to the effectiveness of

⁵Margaret Gilbert, *A Theory of Political Obligation* (Paperback, OUP, 2008). Cited in this chapter as Gilbert *Theory of Political Obligation* (n5).

⁶ibid 149.

⁷ibid 147.

⁸ibid 148.

⁹ibid.

the interpersonal enforcement of these obligations by the participants - (1) there should be more than two participants in a joint activity to minimise the possibility of dissolution and (2) this joint activity must be based on normative good.

(i)(a) The Interpersonal Enforcement of Accountability by Participants Employing the Four Types of Standing of Right

I introduce the four types of standing of right in terms of Gilbert's example. These rights are taken as normative rights which are 'trust', 'betrayal', 'answerability' and 'owing'. Her example is of two participants who are committed to an interpersonal relationship. Here, I highlight the features in this example and then later apply these findings to the different kinds of social groups in the next section. Nan and Felicity are 'jointly committed to love and cherish each other till death parts them'.¹⁰ The creation of this joint commitment is implied to be based on trust which goes thus: Nan trusts Felicity to love and cherish her till death parts them and Felicity trusts Nan to do the same.

The placing of trust is, as noted, at the interpersonal level at which it gives a ground for invoking a type of standing of right – betrayal – by Nan or Felicity if either of them were to act contrary to the joint commitment. In other words, an associational relationship which is only created by trust enables each participant to invoke a charge of betrayal against the violator. Suppose Nan and Felicity are in a non-committed relationship. Say, for example, both participants are seeking a short-term fling. In this scenario, I take the view, and Gilbert might agree, that the agreement they have created is not based on trusting one another to commit to a long-term relationship. Gilbert explains, '[i]f I am not in a position to trust you to do something, you cannot betray me when you fail to do it. You can surprise me, disappoint

¹⁰ibid 150.

me, wound me, but you cannot betray me'.¹¹ Thus, any unfaithful behaviour by either Nan or Felicity committed during their short-term relationship does not amount to a betrayal.

Consider this scenario. Suppose they are in a committed relationship and their associational obligation encounters a challenge. Say for example, Felicity goes out of town on a business trip for three weeks and Nan cannot go with her as she has job commitments. During this trip, Felicity meets a very attractive lady and spends a lot of time with her. Suppose Felicity finds herself struggling between two choices. She has to choose between – (1) taking a personal decision and as a result ending up being unfaithful to Nan, and (2) observing her joint commitment to a loving and cherishing relationship with Nan. I analyse each of Felicity's choices in the following.

Suppose Felicity feels strongly towards taking her personal decision. I suggest that the standing of a right – to abstain from 'betrayal' – is in issue at the intrapersonal level. In other words, the possibility of an intrapersonal charge of betrayal by Felicity against herself may effectively stop her from acting on her personal decision. This private normativity would inflict the sense of self-betrayal on Felicity.¹² However, although Felicity may be inclined to uphold her joint commitment with Nan, the feeling of self-betrayal may not guarantee that she will not act on her personal decision. There is a possibility where Felicity may still act on her personal decision and also as a result of this, she will feel self-betrayed.

Suppose Nan finds out that Felicity had been unfaithful to her on the business trip. Gilbert might suggest that Nan experiences 'a full-blooded sense of betrayal'.¹³ Nan can therefore invoke an interpersonal claim of betrayal against Felicity. In this case, Felicity experiences a two-fold sense of betrayal – one from Nan (i.e. the betrayed, in the form of

¹¹ibid 152. See also Scanlon's idea of permissibility of an action between individuals in a highly committed relationship. TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (HUP, 2008) 55.

¹²ibid 149.

¹³ibid 150.

public normativity) and the other from herself (i.e. the betrayer, in the form of private normativity). In addition to the two-fold sense of betrayal, Gilbert suggests that Felicity has to be answerable to Nan. Nan can therefore invoke the type of standing of right - answerability - against Felicity.¹⁴ Nan can demand from her an explanation for the violation of their associational obligation.

In essence, the unilateral violator of an associational obligation is subject to several demands of accountability from the non-violating participant. The non-violating participant can invoke an interpersonal sense of being betrayed against the violator as well as an interpersonal demand from that violator to be answerable for the violation. The violator has to justify his or her decision in acting contrary to the associational obligation. Therefore, the unilateral violation of a joint commitment incurs normative consequences. In addition, the violator may also (but this is possible, not guaranteed) experience a sense of self-betrayal.

Suppose Felicity deliberates and then chooses to uphold her joint commitment with Nan. According to Gilbert, two factors may have resulted in Felicity in making this choice. First, she suggests that the standing of a right – ‘owing’ – can be demanded at the intrapersonal level by Felicity against herself. In other words, Felicity may feel that she owes Nan to uphold their associational obligation. Therefore, she ought to conform to it. Likewise, Nan owes Felicity the same, since both participants are co-owners of their joint commitment.¹⁵ Thus, Nan and Felicity can confidently state, ‘this relationship is *ours**’,¹⁶

The co-owners of the associational obligation can also invoke an interpersonal demand against each another to jointly observe it. Thus, suppose the telephone conversations

¹⁴ibid 153.

¹⁵ibid 155. Samuel Scheffler calls the co-ownership of a joint commitment the ‘relationship-dependant reasons’. He takes the view that ‘we have the right to pursue our projects, we have special duties or obligations arising out of our relationships’. See Samuel Schelffer, ‘Projects, Relationships, and Reasons’ in Wallace *et al*, ‘Reason and Value’ (OUP, 2004) 258-59.

¹⁶See pages 224-9 above.

between Felicity and Nan are mostly on the topic of Felicity's day spent with that attractive lady. Nan might invoke her interpersonal claim against Felicity according to which Felicity owes her the task of being faithful to their relationship. All these four types of standing of right are noted to create obligations for the participants in this joint activity. Felicity and Nan's relationship demonstrates that the behaviour of both participants is strongly shaped by their associational obligation. Therefore, these associational obligations created by the parties are correctly stated to be the sources of collective obligations.

Gilbert explains that these associational obligations are more than what contemporary moral philosophers call 'promises'. She explains:—

'I take it that a given promise may obligate in more than one sense, including the sense at issue in the standard view [i.e. the view taken by contemporary moral philosophy]; and I argue that every promise obligates in the way the standard view does not contemplate'.¹⁷

Gilbert in the quoted passage means that these associational obligations are not just mere promises made by the participants. This certainly is not the case between participants who are jointly committed to a deep interpersonal relationship. Felicity and Nan have not merely promised each other to love and cherish each other till death parts them. Rather, I take the view that participants who are jointly committed to a deep interpersonal relationship create covenants. In essence, an associational obligation between participants who are jointly committed to a deep interpersonal relationship creates obligatory covenants. A strong enforcement of these demands depends on the importance of this associational obligation.

These obligatory covenants can be enforced by each participant at two levels. First, each participant can enforce an intrapersonal demand to fulfil an obligation to him- or herself

¹⁷Gilbert *Theory of Political Obligation* (n5) 224.

(private normativity). Second, each participant can enforce an interpersonal demand to fulfil an obligation against the other participants (public normativity). However, I note that these associational obligations are nevertheless dissolved if there is agreement to that effect by all participants.

(i)(b)The Standing of a Normative Right and the Interpersonal Enforcement of Accountability in Social Groups

Here, I analyse the associational obligations to determine whether they include covenants (as opposed to promises) when formed by participants in the different kinds of social groups. The three social groups are formed by – (1) participants in an organised aggregate group who are not bound by contract, (2) participants in a conglomerate, or collectivity, and (3) participants in an organised aggregate group who are bound by contract.

(i)(b)(a) Participants in An Organised Aggregate Group who are not bound by Contract

The three friends on a day trip and the participants in the ‘Yellow Car’ game are examples of participants in an organised group who are not bound by contract. I suggest that such participants form a shallow interpersonal relationship as opposed to a deep one such as that depicted in the case of Felicity and Nan. The joint commitment formed by Felicity and Nan was based on a higher commitment value than the joint commitments formed by the participants in shallow interpersonal relationships. As shown above, an associational obligation by which the participants are jointly committed to a high commitment value can create covenants.

Thus, participants in a loving relationship, a loyal friendship, or a patriotic alliance towards a country, a clan, a religious fellowship or a cult are jointly committed to a high commitment value. Therefore these participants are bound by covenants. In contrast, participants who are in a shallow interpersonal relationship are jointly committed to a lesser commitment value. Therefore, this kind of associational obligation is subject to the process of non-consequential legitimate forgetting. In essence, Dick and Dirk – as participants in the ‘Yellow car’ game – can each unilaterally violate their associational obligation without incurring consequences.

In the case of the three friends on a day trip, each participant may invoke any one of their claims against a violating participant. The invocation of these claims in an associational obligation with a shallow commitment value may have no effect on the behaviour of the participant. Consider this example. Suppose George decides at the last minute that he is not meeting Fiona and Ed in Piccadilly Circus at 11am. As a result, George violates this joint commitment. Suppose Fiona invokes her claim by which she insists that George owes her his presence. She might say, ‘this day trip is *our** plan! Perform it!’¹⁸ I take the view that this shallow interpersonal relationship amongst them gives Fiona no strong standing of right to demand that George change his decision. George might also not feel that he owes either Fiona or Ed his presence and time on that day. As a result, George can unilaterally violate the associational obligation which therefore initiates the prospect of all participants legitimately forgetting about it.

¹⁸ibid 155. The substance of the quoted argument is taken from Gilbert.

(i)(b)(b) *A Conglomerate Collectivity*

A corporation can express the associational obligation of its participants (i.e. its corporate agents) in the form of writing. I take the view that the corporate ‘code of conduct’ is a symbolic associational obligation contained in the form of a document which is practiced by its corporate agents. The generic requirements in a corporate ‘code of conduct’ may include the following examples of the corporate business practice - (1) no engagement in child labour, (2) fair remuneration for employees, (3) freedom of association of employees and (4) safe working conditions.¹⁹

The corporation which produces the ‘code of conduct’ proves to its stakeholders by its corporate social responsibility reports that it practices them. The practice of social responsibility is incorporated into the business practice of corporations through the voluntary adoption of these codes. The enforcement of this associational obligation is therefore at the intrapersonal level. The associational obligations practiced by these participants in a corporation can shape their behaviour which is manifested in corporate activities. However, as noted in the *Wal-Mart* case, the corporate activities which are required by corporations to practice corporate social responsibility may also be externalised by them through outsourcing.

Furthermore, corporations are also shown in the *Wal-Mart* case to create associational obligations amongst themselves. I take the view that the bilateral contractual agreement between Wal-Mart and its overseas business partners is their associational obligation. Wal-Mart is also noted to have incorporated its ‘Standards’ or ‘code of conduct’ in this said

¹⁹See the following codes of conduct of Wal-Mart Stores, Inc. <http://walmartstores.com/media/cdnfull/statementofethics/pdf/U.S._SOE.pdf> accessed 16 August 2011, Gap, Inc. <http://www2.gapinc.com/GapIncSubSites/csr/documents/COVC_070909.pdf> accessed 16 August 2011; and H&M <http://about.hm.com/filearea/corporate/fileobjects/pdf/en/RM_DOWNLOAD_CODEOFCONDUCT_PDF_ENGLISH_1150269822085.pdf> accessed 16 August 2011.

associational obligation.²⁰ The case ruled that only the participants in a bilateral contractual agreement are able to invoke an interpersonal enforcement of the terms in the contract. Since there are two participants in this associational obligation, these participants can therefore quite easily dissolve it by mutual agreement.²¹

In essence, the associational obligation which is practiced by corporate agents can influence the behaviour of a corporation at both the intrapersonal and interpersonal levels. These corporations can however externalise these activities to exclude the prospects of intrapersonal enforcements of these codes against themselves. They can also (after having externalised or outsourced these activities) exclude the prospects of interpersonal enforcements of these codes against each other by mutual legitimate forgetting of these codes.

(i)(b)(c) Participants in An Organised Aggregate Group who are bound by Contract

Here, I analyse the examples of the string quartet and the England football team. Consider this scenario for the case of the string quartet. The string quartet is a professional group which is on tour. They are therefore bound by the terms and conditions of their contract in this joint activity.²²

Although the contractual obligation is the main reason for which each participant is committed to the joint activity, this is only a participant's minimum reason. The participants' motivation in acting together runs much deeper than that of having only this minimum

²⁰See *Doe v Wal-Mart* 2007 US Dist LEXIS 98102 4-5.

²¹ibid and see also the outcome in the case of *Doe v Wal-Mart* 572 F 3d 677 2009 US APP LEXIS 15279 Lab Cas (CCH) P60 836 15 Wage & Hour Cas 2d (BNA) 7.

²² For the purpose of the discussion in this thesis, an individual's contractual obligation in a joint activity is taken as his or her role as a team member. In terms of contract law, strictly speaking, an individual's contractual obligation is bilateral such as in an employer-employee relationship.

reason. Suppose that each member of the string quartet has joined the other because of his or her passion and love for music. Then it is suggested that each participant is jointly committed at a high commitment value. All four members are therefore co-owners of this associational obligation. Each participant is then owed by the others the task of sharing with them the passion and love for music by performing together. Suppose this associational obligation is also built on trust. Thus, any attempt to violate this agreement (e.g. a participant's threat of going solo or to another group) can result in feelings of betrayal on the part of the non-violators. In addition, the violator also has to be answerable to them. Thus, a participant who is found in deliberation of whether to betray the others has to be prepared to endure the intrapersonal (by him- or herself) and interpersonal demands for accountability (by the other participants). Thus, a unilateral violation of this kind of associational obligation is very difficult.

In the case of the England football team, the arguments are similar to those in the string quartet example. Although each player is fulfilling his or her contractual obligation in a joint activity, the players' motivation to act together is also taken to run much deeper than simply performing these terms and conditions in a contract. Suppose the team shares a love for football and also pride in its country. Each participant is then jointly committed to a high commitment value. All participants are co-owners of this associational obligation. Therefore, each participant is subject to the enforcement of the associational obligation at both the intrapersonal and the interpersonal levels.

In essence, the associational obligation created by participants in an organised aggregate group who are bound has a strong influence on their behaviour. This is however only the case for participants whose commitment has a high value. An associational

obligation created by participants with lesser commitment value may entail that the standing to invoke interpersonal enforcement of obligations amongst participants is weak.

(i)(c) A Summary of Section (i)

I have shown that Gilbert's focus is to change from a non-consequential violation of the joint commitment to a consequential one. As mentioned in the previous chapter, a non-consequential violation of the joint commitment entails that the participants in a joint activity do not have the standing to enforce their associational obligation at the interpersonal level. The consequential violation of the joint commitment is however shown here to be effective only in one kind of collectivity. I have shown that this kind of collectivity has two features - (1) the number of participants in the joint activity is more than two. The prospect of a mutual agreement to dissolve the associational obligation by all participants is therefore minimised. (2) These participants are jointly committed to an associational obligation with a high commitment value.

Here, I focused on human agents who are involved in a joint activity. These findings can nevertheless be applied to groups of corporations in a joint activity. Multilateral contractual agreements ensure that the prospect of dissolving an associational obligation through mutual legitimate forgetting by conglomerate participants is minimised. The first feature of a collectivity which can be subjected to a theory of collective obligations is therefore satisfied. The second feature of this kind of collectivity requires further unpacking of what consists of a high commitment value.

Here, I have shown that an associational obligation which requires participants to commit to a high commitment value ensures that these participants are in a strong position to

invoke interpersonal enforcements of accountability against each other. Thus, I conclude that these associational obligations are sources of collective obligations which shape the behaviour of participants. I therefore propose that the normative good is the basis of the highest commitment value. Next, I explore this normative good in relation to the question whether this normative enforcement can be invoked at the intrapersonal and interpersonal levels. In other words, I investigate whether there is a principle of normative good for joint activity.

(ii) The Source of Normative Good is Normativity

I take the view that an associational obligation which is based on normative good creates a deep interpersonal relationship amongst the participants. That between Felicity and Nan is an example of a deep interpersonal relationship. Participants in groups who are bound by contract and are jointly committed to a high commitment value are examples of deep multilateral relationships. So far, the associational obligation of that nature which is created between individuals has been shown to influence the behaviour of the participants. Therefore, I have shown that public normativity can be enforced by participants at the interpersonal level.

Here I show that the associational obligation of this nature, which is created by conglomerate participants, influences the behaviour of corporations. Corporations can internalise their social responsibility through adopting voluntary codes of conduct or they can subject themselves to multilateral contractual agreements which promote socially responsible business activities. Corporations however can avoid entering into these kinds of associational obligations by using bilateral contractual agreements in outsourcing. Corporations also can

create associational obligations to exploit labour and resources. These forms of associational obligations are not based on normative good.

Here, I aim to investigate whether the associational obligations which are based on normative good can allow the participants to put forward claims to enforce accountability at the interpersonal level. There are two kinds of participants considered - (1) the participants in a conglomerate collectivity, and (2) the conglomerate participants in multilateral contractual agreements. The discussion is as follows. In subsection (ii)(a), I explore Christine Korsgaard's '*Sources of Normativity*'.²³ I take the view that the normative good derives from normativity and therefore, it derives from the human agent. In subsection (ii)(b), I ascertain the content of the normative good by examining the role of a human agent. In subsection (ii)(c), I explore the enforcement of this normative good. I show that this enforcement of normative good is strictly at the intrapersonal level. The invocation of an interpersonal enforcement of normative good amongst participants in a social group is therefore excluded. Thus, this finding poses a problem to the development of a theory of collective obligations.

(ii)(a) Normativity and the Normative Question

Korsgaard suggests that normativity arises when an actor (i.e. a person who acts or is required to act in a certain way) asks a philosopher (or simply another individual) a normative question.²⁴ She suggests that this normative question must be framed in a certain way.²⁵ The normative question must abide by a specific condition. It needs to be asked in the first-person by the actor. So the question – ‘why do *I* act for the normative good?’ – is taken

²³Korsgaard (n2).

²⁴Christine M Korsgaard, ‘Lecture 1: The Normative Question’ in Christine M Korsgaard, *The Sources of Normativity* (14th Reprint, CUP, 2010) 16. Cited in this chapter as Korsgaard ‘Lecture 1’ (n24).

²⁵ibid.

to be adequate.²⁶ This normative question should also not be framed in a manner which asks for a description of some sort. Thus, a question to the philosopher, ‘what is the normative good?’ is not taken as a normative question. This sort of question asks a philosopher to talk about a subject matter. Korsgaard objects that this is a theoretical question, not a normative one.²⁷

Rather, Korsgaard suggests that the normative question is to be framed in such a manner that it asks for either of two things. First, the actor may ask the philosopher to justify the choice of action which is committed by this actor. A question to the philosopher, ‘why did *I* act for the normative good?’ demands a justification for that choice of action.²⁸ Second, the actor may ask the philosopher to justify a demand for an action which is required of that actor. A question to the philosopher, ‘why must *I* really act for the normative good?’ suggests that the philosopher’s demand (the society’s demand) for an action from the actor ought to be justified.²⁹ The answers which the philosopher provides are the normative reasons underpinning the actor’s action or the reasons for which the actor ought to have acted. Korsgaard also takes the view that these reasons are the contents of normative good.

According to Korsgaard, this answer which the philosopher provides must satisfy three conditions. First, it must address the actor.³⁰ In other words, the philosopher must engage with the actor.³¹ For example the answers, ‘*you* act for the normative good because...’, or ‘*you* ought to have acted for the normative good because...’ suffice. Second, the answer needs to have ‘transparency’, which Korsgaard explains as:-

²⁶ibid.

²⁷ibid.

²⁸Gerald Cohen turned Korsgaard’s normative question around. In Cohen’s argument, the actor does not know why he should do what he has done. Thus, his statement, ‘I don’t know why I should do X’ is answered with the philosopher’s answer ‘because your conscience compels you to’. See Gerald A Cohen, ‘Reason, humanity, and the moral law’ in Christine M. Korsgaard, *The Sources of Normativity* (14th Reprint, CUP, 2010) 181. Cited in this chapter as Cohen ‘Reason’ (n28).

²⁹Korsgaard ‘Lecture 1’ (n24) 16.

³⁰ibid.

³¹ibid.

‘A normative moral theory must be one that allows us to act in the full light of knowledge of what morality is and why we are susceptible to its influences, and at the same time to believe that our actions are justified and make sense’.³²

In other words, the answer has to satisfy either of two things in the second condition. First, if the philosopher is asked to justify an actor’s choice of action, the answer must provide a justification of the actor’s action in a way which makes sense to him or her. For example, the answer, ‘*you* act for the normative good because there is something in *you* which endorsed this action’ might suffice. Second, if the philosopher is asked to justify a demand for an action which is required of an actor, the answer must alternatively provide a justification for demand of that action from that actor. An example is the answer – ‘*you* must act for the normative good because it is *your* conscience which compels *you* to’.³³ The reasons behind these justifications are transparent to the actor. The third condition is that the answer must ‘appeal, in a deep way, to our sense of who we are, to our sense of our identity’.³⁴ I find that this third condition provides an explanation as to why normative good must derive from the human agent and from not social groups.

In essence, there are two characteristics found in normativity. First, normativity justifies the actions which are carried out by the actor. Second, normativity also demands actions which ought to be carried out by the actor. In the light of associational obligations created by participants in a conglomerate group such as a corporation, the criticism of corporations adopting voluntary ‘codes of conduct’ is that these codes are descriptive, they should not be. These documents ought also to endorse the performance of actions which are needed to be carried out by corporate agents. In the light of associational obligations created

³²ibid.

³³Cohen ‘Reason’ (n28) 181.

³⁴ Korsgaard ‘Lecture 1’ (n24) 17.

by conglomerate participants in bilateral contractual agreements, the criticism of the incorporation of the corporate ‘codes of conduct’ into these agreements is that this incorporation is purely descriptive, and should be more than this. The performance of these incorporated codes is also needed to be carried out by the contractual parties. The *Wal-Mart* case has shown that in spite of audits which were carried out by Wal-Mart, no action was taken to implement these reports.

Here I demonstrate that the descriptive incorporation of normative good in associational obligation has no effect on the behaviour of the participants. I therefore advance the criticism that the normative questions in these associational obligations are not properly framed. These normative questions ought to demand the performance of actions and not consist of descriptions of them. Participants in these kinds of joint actions therefore do not need to act for the normative good. Nor do they need to be told to act for the normative good.

In conclusion, business ventures are not necessarily required to engage in philanthropy (i.e. to act for the normative good) as there is generally no mechanism in place (although there can be legislation governing these ventures). Here, I suggest that the mechanism which demands that these participants act for the normative good is in the form of performance actions. Thus, documents such as the corporate ‘codes of conduct’, bilateral and multilateral agreements ought to contain performances of actions.

Korsgaard suggests that the content of normative good is in the actor’s practical identity. Next, I unpack this content to show whether participants can enforce associational obligations which are based on the content at the interpersonal level.

(ii)(b) *The Actor's Practical Identity is the Source of Normative Law for the Act of Normative Good*

Korsgaard suggests that human beings have practical identities.³⁵ The explanation of practical identity is:—

'a complex matter and for the average person there will be a jumble of such conceptions. You are a human being, a woman or a man, an adherent of a certain religion, a member of an ethnic group, a member of a certain profession, someone's lover or friend, and so on. And all of these identities give rise to reasons and obligations. Your reasons express your identity, your nature; your obligations spring from what that identity forbids'.³⁶

I interpret the practical identity as meaning the actor is taken as who he or she really is. An actor has a role according to which society demands that they act in certain ways. A loving wife, an honest friend and a fair judge are examples of the social roles described by normativity. However, actors may act contrary to these roles. As mentioned in Part A of Chapter Four, human agency consists of free will, consciousness and reflexivity. Similarly, I find that Korsgaard's explanation of practical identity quoted below corresponds to Chapter Four's explanation of human agency:—

'the reflective structure of human consciousness gives us authority over ourselves. Reflection gives us a kind of distance from our impulses which both forces us, and enables us, to make a law for ourselves and it makes those laws normative. To make a law for yourself, however, is at the same time to give expression to a practical conception of your identity'.³⁷

³⁵Christine M Korsgaard, 'Lecture 3: The Authority of Reflection' in Christine M Korsgaard, *The Sources of Normativity* (14th Reprint, CUP, 2010) 129. Cited in this chapter as Korsgaard 'Lecture 3' (n35).

³⁶ibid 101.

³⁷ibid 128-129.

According to Korsgaard, the human consciousness (the second element of Fuchs's theory of agency) enables a human being to gain authority (this is interpreted as meaning to contain the first element of agency i.e. free will) and also to reflect (I interpret as meaning to contain the third element of agency i.e. to be reflexive). Thus, the content of normative good, the practical identity and human agency are all contained in the human being. Social entities such as social groups are therefore not (natural) actors of normative good. Korsgaard believes that this practical identity can create normative laws and also enforce them.³⁸ Therefore, Korsgaard suggests that these normative laws are enforced by the actor at the intrapersonal level.

Furthermore, I find that the actor's practical identity gives some explanations for some social groups with participants who have a stronger sense of acting together than the other groups. An organised aggregate group with participants who are united with a passion or a hobby is said to have a strong sense of acting together. A young mothers' club, karate club or a non-profit organisation are examples which display these participants' practical identities. Participants in organised aggregate groups who are bound by contractual agreements are also suggested to have a strong sense of acting together.

The examples given in the previous section concerning a string quartet and the England football team have shown this notion.³⁹ A strong sense of acting together by the participants is only found to be present amongst participants whose commitment is at a high value. These are the participants who can portray their practical identities. In addition to social roles, Korsgaard also indicates that practical identity runs deeper than an actor's social identity. She suggests that an actor is also 'a party of humanity, or a Citizen of the Kingdom

³⁸ibid 129.

³⁹See pages 253-4.

of Ends'.⁴⁰ In an ideal situation she suggests that '[e]ach citizen takes his [or her] own perfection and the happiness of others as an end and treats every other as an end in itself'.⁴¹

Thus, the concept of normative laws governing acts of normative good implies that the sharing of normative laws in the joint actions of these kinds of collectivity is plausible.

By contrast, I advance the criticism that the given roles in a conglomerate group like a corporation are not grounded in the practical identities of actors. I advance the criticism that the corporate cultures and roles are artificial. Therefore, corporate agents are taken to mask their practical identities under their corporate roles. In addition, the creation of a separate legal identity excludes the shareholders (i.e. the potential sources of normative law of a corporation) from liabilities or responsibilities. Therefore, an argument for the majority of the corporation's centralised structure goes thus. I argue that the present corporate structure does not welcome normative laws governing the normative good in its corporate acts and roles. This argument holds unless however a corporation has a decentralised structure.

In conclusion, the human agent is therefore the key which unlocks the content of normative good. So far, I have mentioned two features required for collective obligations according to the theory – (1) associational obligations which are expressed in the form of performing actions, and (2) such agreements the content of which is derived from human agents. I believe that only a human agent creates normative laws for him- or herself. Any such normative law is enforced only by that particular actor who creates it. In essence, the human agent binds itself with normative laws at an intrapersonal level. Human agents cannot enforce these laws against others, as this is private normativity. This finding poses a problem for the development of a theory of collective obligations. Next, I ascertain whether there is a plausible arrangement for the enforcement of these normative laws at the interpersonal level.

⁴⁰Korsgaard 'Lecture 3' (n35) 129.

⁴¹Korsgaard *Kingdom of Ends* (n3) 23.

(ii)(c) *The Interpersonal Enforcement of Normative Laws to Secure Acts of Normative Good*

In the previous section, I demonstrated that the human agent's practical identity creates binding normative laws at the intrapersonal level. According Korsgaard, the intrapersonal enforcement is achieved by the 'two selves' of the actor.⁴² These are – (1) the 'self' which everybody associates with (i.e. the 'me'), and (2) the other 'self' which is taken here as the enforcer. In other words, the enforcer is the one Korsgaard believes is the creator of the normative law who he or she 'must live with and so must not fail'.⁴³ In essence, Korsgaard implies that normative laws are tailored to the specific actor who creates them. These laws are the answers given to the normative question. If an actor asks the philosopher – 'why do *I* act for the normative good?' This philosopher as the enforcer may answer, '*you* must act because *your* practical identity states that *you*, as a citizen of the Kingdom of Ends, must'.

Here I can make a connection between the intrapersonal enforcement of normative laws and a contemporary moral philosopher's interpretation of 'promises' which is mentioned in section (i)(a).⁴⁴ I can suggest that normative laws are an actor's promise to him or herself to achieve personal goals. For example, an actor may hold the value embodied in the injunction, '*I* must cultivate good values for *me* to be truthful, enlightened, and prosperous or not be corrupted'. These promises can perhaps also have an interpersonal effect on others. For example, the meaning behind this normative law, '*I* must be truthful' can be interpreted at two levels – (1) the intrapersonal as meaning, '*I* must be truthful to *myself*', or (2) the interpersonal as meaning, '*I* must be truthful to others'. In the latter, I take the view that the promise is being made unilaterally by the promisor to the promisees.

⁴²ibid 101.

⁴³ibid.

⁴⁴Cohen 'Reason' (n28) 182.

The example of Nan and Felicity illustrates this. Suppose Nan's practical identity as a faithful partner creates a normative law which entails two effects - (1) an effect at the intrapersonal level where Nan promises herself that she must play the role of a faithful partner (i.e. this is her personal goal). (2) An effect at the interpersonal level where Nan promises Felicity that she will uphold the role of a faithful partner (i.e. this is part of a collective goal with Felicity). It is however only Nan who is able to enforce this normative law. Thus, if Nan decides to unbind herself from the promise she can also retract the promise made to Felicity. In other words, Nan is entitled to make her decision. I may object that the object of the enforcer is defeated when the human agent can bind and unbind him- or herself from normative laws.

Gerald Cohen argues that in the instance where Nan can unbind herself from the normative law, an actor who has the roles of both the lawmaker and enforcer is not truly bound by this law.⁴⁵ This law is repealed at any point when the actor sees fit. He argues, '[t]here's not much 'must' in a 'must' that [this actor] can readily get rid of'.⁴⁶ In the light of Cohen's argument, his suggestion modifies and improves Korsgaard's theory of enforcement of the practical identity. I will later explore these modifications and improvements. At the interpersonal level, Nan is taken to have retracted her promise to Felicity. Her normative law is found however to give Felicity no standing of right to confront her. If Nan (the actor) asks Felicity (the interpersonal enforcer), 'why do *I* have to continue this partnership?' Felicity's reply is taken by Cohen and Korsgaard to belong to the role of the protester or interrogator.⁴⁷

Her answer may be, '*you* must not leave me because it is *your* practical identity which compels *you* to be a faithful partner'. However, Felicity's answer as the interpersonal enforcer has no effect on Nan's decision. Although the protestor or interrogator may speak in

⁴⁵ibid 170.

⁴⁶ibid.

⁴⁷See Korsgaard 'Lecture Three' (n35) 101 and see Cohen 'Reason' (n28) 179.

the terms of the normative enforcer, this enforcement of normative law at the interpersonal level has no impact on the behaviour of the actor. In other words, the protestor or interrogator (Felicity) cannot bind the actor (Nan) with the actor's private normative law. In essence, this example shows that there is no enforcement of normative laws at the interpersonal level between participants in a joint activity. The role of the interrogator or protester as enforcer is shown to have no effect on the behaviour of the actor.

Cohen suggests modifying and improving Korsgaard's interpersonal enforcer. He argues that the role of this enforcer is not to interrogate the actor or protest against his or her action. Rather, Cohen suggests that the interpersonal enforcer should take the position of making the actor justify his or her behaviour.⁴⁸ In other words, Cohen holds that the role of enforcers is not to answer normative questions. Rather, their role is to ask the actors normative questions. Cohen suggests that the actors should take on the role of answering normative questions.⁴⁹ Thus, he suggests that the answers to normative questions are more powerful. He explains, '[i]t is powerful to say 'I couldn't live with myself if I did that', but off the mark to say 'you couldn't live with yourself if you did that', to someone who is evidently managing to do so'.⁵⁰

I find that the application of Cohen's modification improves Nan's reason for her decision to unbind herself from her previous normative law. Suppose Nan tells Felicity that she wants a divorce. In the light of Cohen's modification, Felicity's role is no longer that of the interrogator or the protester. Her role now is to demand that Nan justifies her decision. She asks Nan, 'why do *you* want to leave me?' Or, 'what justifications have *you* for leaving me?' Nan's answers to these questions will contain her current normative laws as the previous ones have been repealed. Nan's answers nevertheless ought to satisfy Korsgaard's

⁴⁸Cohen 'Reason' (n28) 179.

⁴⁹ibid 182.

⁵⁰ibid.

three conditions. Therefore, these answers ought to address Nan. The reasons underpinning her behaviour ought to be transparent to her and to make sense to her. These answers given by her ought to ‘appeal, in a deep way’,⁵¹ to her current practical identity. In short, Nan’s answers to Felicity may be, ‘because *I* cannot live with myself if *I* continued to stay with you for *I* do not love you anymore’.

In essence, Cohen’s modification is shown to turn the role of the philosopher from ‘the interrogator’ who demands that the actor ought to perform an act to the one who frames and asks a normative question for the actor to justify an action. This modification strengthens the actor’s role of lawmaker and repealer of laws. Cohen’s modification also confirms that the actor is the sole enforcer of private normative laws at the intrapersonal level. This implies that these private normative laws cannot be enforced at the interpersonal level. In other words, although the content of associational obligations can be based on normative good, there is no theoretical support to suggest that participants can enforce the acts required to perform normative good against each other at the interpersonal level.

In conclusion, there is no theoretical mechanism of enforcement for participants in a conglomerate group to compel each other to act for the normative good at the interpersonal level. Thus, there is also no theoretical mechanism of enforcement for conglomerate participants in a joint action to act for the normative good at the interpersonal level. Perhaps this is the reason why the majority of business practices are exploitative and devoid of normative good. Perhaps, this is also the reason why the incorporation of terms and conditions which promote normative good acts in bilateral business agreements such as outsourcing are unenforced by the partners. This finding poses a problem for the development of a theory of collective obligations. There is a lack of enforcement against participants in a joint activity to promote acts of normative good at the interpersonal level.

⁵¹ Korsgaard ‘Lecture 1’ (n24) 17.

Korsgaard however suggests that actors in a social group such as the Kingdom of Ends can hold one another responsible.⁵² This is her idea of reciprocity. Next, I investigate whether Korsgaard's idea of reciprocity can provide a solution to the problem of the development of a theory of collective obligations.

(iii) The Kingdom of Ends meets the Kingdom of Collective Ends

I have shown in the previous section that private normative laws requiring acts of normative good are enforced only at the intrapersonal level. This implies that an actor can achieve self-improvement or self-enlightenment by creating private normative laws for and enforcing them against him- or herself. I have shown that these actors in a social group are unable to enforce these normative laws at the interpersonal level. Korsgaard however suggests that the enforcement of normative laws amongst the actors in the Kingdom of Ends can be done reciprocally. She suggests that this reciprocity appears in the context of personal relations.⁵³ She explains:-

'People who enter into relations of reciprocity must be prepared to share their ends and reason; to hold them jointly; and to act together. Reciprocity is the sharing of reasons, and you will enter into it only with someone you expect to deal with reasons in a rational way. In this sense, reciprocity requires that you hold the other responsible'.

The actors who are relations of reciprocity are those who are citizens of the Kingdom of Ends. Korsgaard's notion of this kingdom, it will be recalled, is of the situation where '[e]ach citizen takes his [or her] own perfection and the happiness of others as an end and

⁵²Korsgaard *Kingdom of Ends* (n3) 188.

⁵³ibid 188.

treats every other as an end in itself.⁵⁴ Therefore, I may interpret Korsgaard's 'sharing of reasons' of actors as meaning these actors adopt the same private normative law or normative end for their personal goals. The following example illustrates this view taken.

Suppose a minority group of five members in a village believe that the achievement of nirvana is a normative end for their personal goals. It can be stated that each of these five villagers hold the same normative end. Each villager binds him- or herself with the private normative laws to achieve nirvana.

According to Korsgaard, to say that actors hold the same normative end means that each actor can enter into personal relationships of reciprocity with another who holds a similar normative end. Therefore, she suggests that these actors can hold the normative end jointly and also act together to achieve it. Furthermore, this reciprocity in a relationship enables these actors to hold one another responsible. In addition, Korsgaard suggests that the actors who are involved in these personal relations form friendships.⁵⁵ She borrows Aristotle and Kant's concept of friendship where it ranges between two degrees. Actors in a friendship can either demonstrate the 'maximum reciprocity of love' amongst each other.⁵⁶ Or, they can act as 'people who are only moderately benevolent'.⁵⁷ Korsgaard believes that in both these cases there is no need for justice. She finds that these friends 'have no use for it'.⁵⁸

I contend that Korsgaard's suggestion is true only when these actors are actively maintaining their own normative ends in their personal relations. In the case of the villager's example, suppose the five villagers who hold the same normative end practice to achieve nirvana together. These actors may be perceived to hold their own normative goal jointly. These actors may also be perceived to be acting together in achieving their personal goals.

⁵⁴ibid 23.

⁵⁵ibid 190.

⁵⁶ibid 191.

⁵⁷ibid.

⁵⁸See (n54).

However, each actor in this group is simply enforcing the private normative law against him or herself at the intrapersonal level. In other words, I take the view that each villager is a separate silo (or a separate normative system from the other villager)⁵⁹ who enforces private normative law against him- or herself at the intrapersonal level. Hence, I take the view that there is no need for justice as every actor is a self-contained enforcer of private normative law in achieving that normative end.

In essence, the achievement of nirvana by each of the five villagers is a collective action. This collective action consists of a collection of similar but separate individual actions (or separate personal goals). There is therefore found to be no sense of acting together. It is necessary to agree with Korsgaard's suggestion that actors who are in personal relations do not need justice to achieve normative ends. However the reason for agreeing is not that the participants in a personal relation are either working together or have a shared normative law. The reason is rather that each actor is enforcing private normative laws against him- or herself at the intrapersonal level. There is no need for justice when every participant is maintaining his or her personal goal.

Furthermore, I find that there is also no need for justice in a given event when an actor either fails to maintain the normative end or has decided to no longer pursue it. Consider this scenario – Ed, one of the five in the achievement of nirvana, changes his mind and does not see this as his normative end anymore. Normative laws as mentioned in the previous section⁶⁰ can be bound and unbound by the actor. Therefore, Ed can leave the group. I take the view that the others in that group have no standing to protest against his decision to leave.

⁵⁹See page 243 above. Samuel Scheffler calls this 'project-dependent reasons'. He takes the view that it is the project (or the normative end) which provides the actor with the reasons for achieving it. These kinds of reason provided by the actor's project are not found in other people's activities or projects. See Samuel Scheffler, 'Projects, Relationships, and Reasons' in R. Jay Wallace *et al*, 'Reason and Value' (OUP, 2004) 254.

⁶⁰See pages 264-8 above. See also TM Scanlon, 'Reasons: A Puzzling Duality?' in Wallace *et al*, 'Reason and Value' (OUP, 2004) 246.

Furthermore the personal relation of friendship also does not allow the other four villagers to hold Ed responsible in reciprocity for he no longer pursues a similar normative end with them.

In essence, I argue that reciprocity cannot impose responsibility on an actor who no longer pursues the original normative end. Furthermore, I also suggest that reciprocity does not apply to individuals who do not hold the same normative end. For example, the four villagers cannot hold other villagers responsible who do not have the achievement of nirvana as their normative ends. Therefore, I advance the argument which shows that there is no enforcement of private normative laws at the interpersonal level in Korsgaard's reciprocity amongst the citizens in the Kingdom of Ends. I find that her idea of reciprocity does not aid the development of a theory of collective obligations. Perhaps the reason why her view of the enforcement of private normative laws is strictly at the intrapersonal level is that Korsgaard's normative ends and normativity are focused on the individual's personal goals. Thus, I take the view that Korsgaard's Kingdom of Ends is the Kingdom of *personal* Ends.

I therefore argue that there is a limit to the theory of normativity. According to Korsgaard, the content of normative ends is personal ends. Therefore, the actors who create these ends are the sole enforcers. These actors in the Kingdom of *personal* Ends prioritise their personal goals over their joint activity. I also suggest that this is true for conglomerate actors (i.e. corporations). Corporations prioritise their personal interests such as the maximisation of wealth. I therefore propose that a theoretical contribution of something similar to a Kingdom of *collective* Ends (or public ends) is needed. There should be a theory which ensures that participants in a joint activity can enforce their associational obligations at the interpersonal level. In other words, participants in joint activities should be governed by agreements which ensure that they engage in acts of collective normative good.

I therefore can propose that multilateral contractual agreements put the theory of collective obligations into practice. The two key features of the theory of collective obligations are achieved by multilateral contractual agreements. (1) The terms and conditions preserve the collective normative good, and (2) the feature of being multilateral i.e. having more than two participants ensures that each participant can enforce these terms and conditions against the others at the interpersonal level.

(iv) The Theory of Collective Obligations is hidden in Multilateral Agreements

As noted in Chapter One, there is an underlying theory of collective obligations in the three projects. The development of the theory of collective obligations has progressed at this stage of discussion in the following way. First, collective wrongdoing is stated to have been attributed to participants who are working together in a joint activity. A joint activity can involve participants from across the globalised world. For example, the supply of a product or a service to consumers involves business participants from the primary, secondary and tertiary sectors. Second, I have suggested that these participants in a joint activity create associational obligations with each other in conducting the joint activity.

Third, associational obligations can influence the behaviour of the participants. The impact of influence on the behaviour of these participants heavily depends on the content of these associational obligations. I have suggested that these associational obligations are based on a concept of a collective normative good which leads business practices to avoid engaging in collective wrongdoing. Fourth, multilateral associational obligations enable all the participants to enforce the terms of agreements against one another at the interpersonal level. Bilateral contractual agreements created by participants are highlighted as an ineffective method of enforcing the terms and conditions (i.e. the normative good) in the associational

obligation.⁶¹ Multilateral contractual agreements are proposed as the method to create an effective associational obligation which contains collective obligations for the participants.

⁶¹See pages 35-6 above.

CHAPTER SEVEN: OUTSOURCING AND THE THEORY OF COLLECTIVE OBLIGATIONS

Many acts of collective wrongdoing committed by individuals, social groups and corporations in the globalised world are attributable to those participants who conduct the business practice of outsourcing.¹ Outsourcing involves businesses working together to achieve a collective goal. This goal is identified as the generic business practice to maximise wealth through the production of goods and services at the lowest cost. Outsourcing does not however guarantee that every business maximises wealth. The outsourcing business which initiates this practice is able to lower its cost of production and therefore it can maximise profit. The outsourced businesses are left to find solutions to sustain their business at a low cost of production. Although these outsourced businesses do not necessarily maximise wealth through making great profit, they nevertheless generate a profit by putting pressure on other business participants to keep production costs low. This low cost of production is achieved by exploiting labour and resources.

As mentioned in the thesis's introduction, the socio-economic violations which are caused by outsourcing affect stakeholders in all sectors of an industry. These violations are identified as collective wrongdoing in the globalised world. As shown in Chapter One, there is little regulation to ensure that those businesses engaging in outsourcing behave in such a way that they avoid contributing to collective wrongdoing. It is suggestede that these outsourcing businesses can therefore legitimately outsource their activities to others and by doing so they can also exclude their socio-economic responsibilities to their stakeholders.² In

¹It is important to note that the phrase ‘collective wrongdoing’ is used to include both collective actions and joint actions. Collective actions are created by a random collection of people. Joint actions are taken by participants who are working together.

²See page s 37-9 above.

addition, those businesses also utilise the globalised world to avoid the legal imposition of responsibility for their collective wrongdoing.

Thus, I propose to develop a theory of collective obligations as a contribution to the literature aimed at solving this problem. I suggest that the three examples which are introduced in Chapter One underpin a possible and plausible theory of collective obligations. This theory is shown not to be covered by the theory which enables actors (individuals or collectivities) to be held accountable for contributing to collective wrongdoing.³ The development of the theory of collective obligations has shown that the theories which are analysed in this thesis lack a satisfactory explanation of these multilateral contractual agreements. These theories which are borrowed from Kutz, Gilbert, Bratman and Korsgaard are attempts to capture the features of multilateral contractual agreements.

These features are – (1) the inclusion of participants in all kinds of collectivities from all sectors of an industry. Those participants can be in locations worldwide. (2) The creation of the content of the associational agreement by negotiations amongst these participants. Robust communication and joint problem-solving are business practices which are adopted to create the positive competitive edge in business. Thus, these multilateral contractual agreements can contain the terms and conditions of collective normative good. (3) The possibility for outsourcing participants still to continue to outsource their activities to other participants in the industry. These multilateral contractual agreements however do not allow those outsourcing participants to avoid their socio-economic responsibilities by shifting them to their outsourced partners. All participants have the standing to enforce the multilateral terms and conditions against one another at the interpersonal level. Outsourcing and outsourced participants therefore have (almost) equal standing. (4) All participants are under an obligation to perform their agreed activities. Multilateral contractual agreements start from

³See pages 224-9 above.

the premise that they do not aim to impose responsibility on participants who behave badly. Badly behaved participants are simply excluded and thus they lose business.

Kutz's theory is focused on the notion of participation in action which contributes to collective wrongdoing. According to Kutz, all actors are complicit in collective wrongdoing when their overlapping intentions result in them being inclusive participants. Thus, these actors ought to be accountable for collective wrongdoing. The criticism of Kutz's theory that it is too loose argues that he does not consider the importance of participants complicit in a joint activity.⁴

Kutz's theory is then modified by Gilbert's theory of joint commitment. This theory is centred on joint activities. Multilateral contractual agreements are agreements for joint activities. Here, I suggest that participants in joint activity create associational obligations with one another. Gilbert's non-consequential joint commitment is found (and this is also shown in bilateral outsourcing contractual agreements) to be easily affected by legitimate forgetting. I argue that the process of legitimate forgetting in bilateral contracts is frequently performed by the parties for two possible reasons. First, the meeting of two minds is easily achieved. Second, the stronger partner can coerce the weaker one to legitimately forget terms and conditions in the contract. Therefore, new associational obligations (although these are not contractually expressed) are able to replace those in bilateral contracts.⁵

Gilbert's consequential joint commitment is found to have an impact on the behaviour of participants in some collectivities. Participants in organised aggregate groups who are committed at a high commitment value are more likely to perform those agreed associational activities. The process of unilateral legitimate forgetting is minimised for the following reasons. First, participants in these joint activities display their practical identities which

⁴He deemed participation in a joint activity superfluous. See pages 206-8 above.

⁵See pages 214-7 above.

relate to their private normative laws.⁶ Therefore, they are more inclined to perform activities which benefit themselves in achieving their personal goals. Second, participants in these joint activities have the standing to enforce these associational obligations against each other at the interpersonal level. The invocation of this standing can therefore have an impact on the behaviour of participants. The consequential joint commitment does not however have an impact on the behaviour of participants in conglomerate collectivities in bilateral contractual agreements.

I find that conglomerate participants in bilateral outsourcing contractual agreements are again found to be able to mutually agree to forget these terms and conditions of high commitment value for the following reasons. First, I argue that the corporate roles of corporate agents do not reflect their practical identities. Therefore, associational obligations such as corporation ‘code of conduct’ are likely have little to no impact on these agents’ behaviour.⁷ Second, the corporation’s legal personality in the form of the corporate veil separates the key agents, i.e. the shareholders and directors, from responsibility as well as from the need to adhere to these ‘codes of conduct’.⁸ Third, outsourcing corporations can again exclude their socio-economic responsibilities to stakeholders through outsourcing.⁹ In conclusion, there is no enforcement of these associational obligations at the interpersonal level for participants in bilateral contractual agreements.

A study of Korsgaard’s theory of normativity also shows that the enforcement of normative good (or the theory which is available to describe normative good) is strictly at the intrapersonal level. Korsgaard’s suggestions of normativity and normative ends (or ‘normative good’ as identified in this thesis) are the achievement of personal goals. The

⁶See pages 264-8 above.

⁷See pages 35-6 above.

⁸See pages 164 above.

⁹See (n7) above.

normative good is to be criticised on the ground that it prioritises the personal goals of actors over the joint activity. In the context of conglomerate participants, bilateral contractual agreements prioritise the outsourcing participant's personal interest (i.e. in maximising its profit) over the joint activity (i.e. of supplying products and services to the consumer). This theory also does not support the enforcement of terms and conditions at the interpersonal level. In addition, this theory is found to provide no satisfactory explanation for the enforcement of multilateral contractual agreements by participants at the interpersonal level. I therefore conclude that there is no theory which covers the function of multilateral contractual agreements and their content of collective normative good.

I propose that multilateral contractual agreements are the solution to the avoidance of responsibility for collective wrongdoing in outsourcing. These contractual agreements are already being created between participants in an industry such as project finance, participants in a sector of an industry such as the coffee farmers of UCA Soppexcca, and participants from cross-industries such as those of Global Business Coalition. The communication between these participants and their joint problem-solving techniques suggests that the genetic competitive spirit of those businesses can be used to promote activities of collective normative good. The violations of the socio-economic rights of the businesses' stakeholders can be effectively regulated and minimised.

There are three levels at which such outsourcing agreements can be created. First, multilateral contractual agreements for outsourcing can be created at the cross-industry level. For example, participants in the apparel and garment industry can work with those in food and agriculture on joint problem-solving in the usage of water resources. The sustainable use of resources is perhaps the first step towards the control of socio-economic violations of the interests of stakeholders who are affected by these industries. The model of Global Business

Coalition provides a guideline. Voluntary participants in cross-industries can work together to jointly solve a collective problem. In the case of Global Business Coalition, the voluntary participants joint-solve problems of human disease. This notion, although remarkable and a constructive step towards performing acts of collective normative good, however does not tackle the core problem created by business activities. The collective wrongdoing is of a socio-economic nature, and solutions for these problems should also be addressed. In the context of outsourcing, I suggest that those voluntary participants in cross-industries should agree to jointly solve problems which concern the sustainable production of goods and services.

A criticism of this recommendation is the reluctance of businesses to communicate with each other. Thus businesses are reluctant to work together voluntarily in their fields of expertise to achieve collective normative goods. At present, the focal agenda of business practices (i.e. to maximise wealth and also to keep trade secrets) do not support this recommendation.

Second, multilateral contractual agreements for outsourcing can be created at industry level. The model of project finance which practices the Equator Principles provides a guideline. Businesses from all sectors of an industry are participants in this agreement. In the context of project finance, the Equator Principles Funding Institutes (EPFIs) are the creators of the principles which form the basis of the multilateral contractual agreement. These EPFIs are shown in Chapter One to be the most powerful bodies in project finance. They have the resources (i.e. money) which give them the authority to determine the terms and conditions of contracts in project finance.

The EPFIs are not the institutions which are actively conducting these projects. They are therefore not directly carrying out the exploitation and the violations of the socio-

economic rights of their stakeholders. Rather, the partners in project finance (such as constructors of power plants, roads and airports and the states which need those infrastructures) are the ones which are actively running the projects. Those are the partners which are identified as the potential actors who may exploit and violate the socio-economic rights of their stakeholders. Those are also the initiators of these projects (which perhaps create those violations), the role of EPFIs being to fund them. In essence, the EPFIs are the regulators of the behaviour of their partners in project finance through multilateral contractual agreements.

In the context of outsourcing, the retail sector is identified as the most powerful in the industry. Although the businesses in this sector are not the ones which directly exploit and violate the socio-economic rights of their stakeholders, they are identified as the initiators of these violations. As mentioned, those businesses in the retail sectors are mostly the outsourcing businesses. Therefore, they cannot be seen as suitable participants to regulate violations of socio-economic rights of the stakeholders in outsourcing. Although the participants in this sector are capable of creating principles of collective normative good in the form of ‘codes of conduct’, the likelihood of these being incorporated into multilateral contractual agreements seems very low. The unlikelihood of this incorporation arises from the fact that the interest of the retail sector to maximise profits is pursued in bilateral contractual agreements. The creation of bilateral contracts of outsourcing is preferred by businesses in the retail sector. This recommendation is therefore unlikely to be adopted by participants in this kind of industry.

Third, outsourcing in the form of multilateral contractual agreements can be created at sector level. The model of UCA Soppexcca provides a guideline. Businesses in a particular sector can create core values and principles to incorporate into either multilateral contractual

agreements between themselves or other kinds of agreements (bilateral or multilateral) created with others. Here, I suggest that businesses in the primary and also perhaps the secondary industries may benefit from this model. UCA Soppexcca has succeeded in maintaining a sustainable business locally. This collective has also established business ties with several overseas outlets.

As mentioned, businesses in the primary and secondary sectors are identified as those which are adversely affected by outsourcing. A suggestion can therefore be made that those businesses in primary or secondary sectors can also create multilateral agreements containing principles to strengthen their ‘collective bargaining’ with the rest of the other sectors in the industry. These multilateral agreements are similar to the retail sector’s ‘codes of conduct’, but lead to the preservation of the primary or secondary sector’s socio-economic rights. Thus, businesses in these sectors are not owed responsibility by their outsourcing partners. Rather, multilateral agreements enable them to secure the performance of obligations from the outsourcing sectors. Businesses in these sectors which agree to the shared goals have the joint-readiness to commit to joint actions.¹⁰ Gilbert’s theory of consequential joint commitment is applicable and thus provides the theoretical basis for this kind of multilateral agreement.

In addition, the businesses in these sectors (excluding the fossil fuel and energy businesses such as oil and gas) are generally small. UCA Soppexcca is composed of cooperatives. Most farmers in the primary sector are sole traders. A suggestion can therefore be made here that the multilateral agreements created by them are more likely to represent their practical identities. As discussed, the multilateral agreements created by them contain objectives which are akin to the collective normative good. These agreements ought to be

¹⁰See pages 231-9 above. Joint-readiness to commit to joint actions may provide participants with better standing to invoke ‘incentive threats’ which are not impermissible against powerful multinational corporations. See TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (HUP, 2008) 81.

designed to preserve their socio-economic wellbeing and the sustainability of their businesses. Those businesses which collectively hold these kinds of multilateral agreements are able to influence the behaviour of other businesses. The example of UCA Soppexcca shows that the practice of these multilateral agreements has global appeal. They can also gain business ties with retailers which hold similar principles. This recommendation is taken as one which might be successfully adopted by businesses.

These are the three plausible recommendations for solutions to collective wrongdoing committed by individuals, social groups and corporations. In all three of them, negotiation and communication amongst participants are required for the creation of multilateral contractual agreements. The application of Bratman's theory of mutual assurances is taken to underpin the creation of these agreements. In other words, these agreements (in terms of collective obligations) have to be flexible enough to be adapted. Adaptations can include the replacement of old solutions with better solutions, and the adapting of business practices to the current economic climate to avoid socio-economic violations of rights of stakeholders.

In conclusion, the adoption of the first recommendation by businesses is suggested as the ideal solution to the problem addressed in this thesis. Collective obligations can be fine-tuned through negotiations and communications across all sectors in cross-industries. In addition, the third recommendation complements the first recommendation. Multilateral agreements amongst businesses in small sectors such as primary and secondary sectors enable these businesses to conduct 'collective bargaining' with the multinational corporations which dominate the retail sector. Perhaps the collective obligations formulated in those kinds of negotiation may contain interesting terms and conditions. These terms and conditions may reflect the kinds which are discussed in the scenario of the three friends on a day trip in London. The capabilities of each participant in the agreement (e.g. the financially powerful

multinational corporations and the sole-trader farmers) ought to be taken into account. However, I conclude that the adoption of the first recommendation is unlikely. The third recommendation is the most likely of the three to be adopted.

CONCLUSION

Outsourcing is a business practice identified as the impetus for violations of socio-economic rights of stakeholders of businesses (i.e. collective wrongdoing) in the globalised world. The arguments advanced in this thesis demonstrate that the imposition of accountability on individuals, social groups and corporations for collective wrongdoing in a globalised world needs to depart from a method which employs the notion of imposing responsibility on these various bodies. It ought rather to be based on the notion that, where individuals or business entities are working together in a joint activity, they can demand the fulfilment of obligations from one another. In other words, an effective imposition of accountability is argued to be based on a theory of collective obligations.

Four arguments are advanced in Chapter One. First, the law is limited in its capacity to hold an outsourcing corporation responsible for the socio-economic violations committed by its outsourced overseas business partners. It is shown in the *Wal-Mart* case that domestic labour law, which governs the behaviour of the outsourcing corporation residing in its jurisdiction, does not cover the behaviour of overseas partners. Transnational law, which governs the overseas behaviour of corporations, does not cover the socio-economic violations of interests of stakeholders. In addition, the law legitimises business practices of outsourcing by the creation of bilateral contractual agreements between partners. Second, corporations can also legitimately externalise costs and burdens to others and thus at the same time can exclude their (socio-economic) responsibilities to others. It is found in the *Wal-Mart* case that Wal-Mart does not owe the stakeholders a duty of care, nor does it have joint-employer status with its outsourced partners. In other words, an outsourcing corporation does not exhibit the components of guidance control, the exercise of which might ground legal responsibility. Third, the bilateral outsourcing agreement is not an effective legal tool to regulate or control

the commission of collective wrongdoing across the globalised world, even when it includes an agreement to adhere to proper ‘standards’, as in the *Wal-Mart* case. It is shown in that case that the stakeholders failed to establish successful legal arguments in five areas of law – contract, tort, unjust enrichment, breach of domestic law and breach of transnational law.

Fourth, the bilateral agreement does not influence the behaviour of the partners. The stronger partner is found to be able to initiate against a weaker partner a unilateral legitimate forgetting of the terms of the contract. Thus, the business practices between the two partners do not reflect the terms of their contract. The *Wal-Mart* case has shown that the imposition of legal responsibility is not effective on two grounds. First, the imposition of legal responsibility on the outsourced partners for the socio-economic violations is impossible because these outsourced partners are situated in countries where health and safety, employment and labour laws are not robustly implemented. Second, the employees of outsourced partners are not participants in the bilateral contracts and therefore the terms and conditions in those contracts which are designed to protect them cannot be enforced by them. These four arguments indicate that the imposition of accountability on business by holding them responsible is not adequate.

The principle underlying the imposition of responsibility is identified in Chapter Two as the guidance control principle. Four arguments are advanced in this chapter. First, although the guidance control principle is understood to have originated from the moral theory of responsibility, the discussion in Chapter Two demonstrates that the imposition of responsibility in the social and legal contexts also adheres to this principle. The elements of *actus reus* and *mens rea* exhibit the components of guidance control. The elements of negligence also amount to the components of guidance control. Second, the imposition of responsibility for acts of individuals and corporations in the social and legal contexts is

grounded on the human agent. In other words, a human agent who exercises guidance control over his or her actions is thereby responsible for them. Similarly, a human agent (or a few agents) who acts on behalf of a corporation and has guidance control over the corporate activities is also responsible for them. It is found in exceptional circumstances that the doctrine of vicarious liability extends an employee's responsibility-imposing actions to be regarded also as the employer-corporation's liability-imposing actions. Therefore, it is concluded that the human agent is crucial to ground responsibility. This imposition of responsibility is also suggested to follow the method of Methodological Individualist reduction whereby a statement ascribing responsibility to a collectivity is reducible to statements ascribing responsibility to its individuals.

Third, a human agent who does not exhibit the two components of guidance control cannot be held responsible. Similarly, if the components of the guidance control principle are divided between individuals, no responsibility can be grounded in any of them. Responsibility can therefore only be shared between individuals when each exhibits the two components of guidance control. Fourth, corporations are found to avoid responsibility in two ways. They can either outsource their activities to others, by doing which they can externalise their responsibility to protect the socio-economic rights of their stakeholders, or they can expel the corporate agents who are perceived by society to have guidance control over the corporate activities by inducing their resignations. This imposition of accountability by holding individuals in a collectivity responsible for collective actions is concluded to be ineffective.

The arguments advanced in Chapter Three show that the components of the guidance control principle are grounded in the choices which are made and the practical reasons which are followed by a human agent. It is only the human agent who has *some* kind of control over

his or her actions. It is also the human agent who can be moderately reasons-responsive to engage in his or her actions. It is shown in the analysis in Chapters Two and Three that Kutz's theory of complicity is incompatible with the imposition of responsibility in practice and also in theory. The focus of Kutz's theory is on the participation of an individual in a collective wrongdoing. According to him, an individual does not need to exhibit the components of guidance control to be held accountable for being complicit in collective wrongdoing. However, Kutz's theory of accountability contradicts the guidance control principle. Since Kutz's theory is identified as the foundation for the development of the theory of collective obligations, the arguments advanced in Chapter Four show that the imposition of accountability on individuals, social groups and corporations needs to be by a method which departs from the imposition of responsibility. The notion underlying the imposition of responsibility based on the guidance control principle is argued to be applicable only to acts of an individual. Two arguments are advanced to demonstrate that this notion should not be applicable to the activities of collectivities such as corporations.

The first argument is that a corporation has no agency. This argument criticises two viewpoints which suggest that a corporation is an agent. These viewpoints correspond to the components of guidance control. However, it is argued that these suggestions have presupposed that a corporation has agency and thus it has been taken for granted. The argument shows that a corporation does not possess any of the elements – the ‘free will’, ‘consciousness’ and ‘reflexivity’ – required for agency. The second argument is that the imposition of responsibility on a corporation by way of MI reduction is theoretically implausible. Although the doctrine of vicarious liability is suggested as an exceptional principle, the discussion in Chapter Four demonstrates that a statement ascribing responsibility to a conglomerate collectivity like a corporation is not MI reducible to statements ascribing responsibility to individuals. Therefore, the imposition of corporate

responsibility by reference to the responsibility of one or a few of its individuals is an inaccurate reflection of corporate accountability for a wrongdoing. This argument also provides a theoretical explanation for the low prosecution rate under the Corporate Manslaughter and Corporate Homicide Act. Thus, the arguments in this chapter propose to depart from the imposition of responsibility used on individuals in the legal, social and moral contexts.

The development of a theory of collective obligations starts to take form in Chapter Five. A detailed investigation of Kutz's theory shows that it is too loose. According to him, the implementation of his theory is in the normative. He believes that agents who are aware of their complicit participation in collective wrongdoing ought to work together to right them. Two criticisms of his suggestion may be put. First, Kutz's theory implies that his solution to collective wrongdoing is the practice of consumer responsibility. This practice is suggested to be implemented by voluntary consumers. In other words, the enforcement of consumer responsibility is suggested to be at the intrapersonal level. An individual is argued to be able to bind and unbind him- or herself of this responsibility. Thus, the practice of consumer responsibility is not uniform across the behaviour of all consumers.

Second, since consumers in a globalised world are mostly composed of random collections of people, the enforcement of consumer responsibility at an interpersonal level is argued to be generally unlikely. It is noted that Kutz's theory does not consider the importance of joint activities and shared goals. Thus, the activities of consumers are seen to be collective actions falling short of those of participants acting together. Since the commission of collective wrongdoing is thus seen to occur without those participants acting together, Kutz's suggestion that those same participants ought to work together to right those wrongs is not very plausible. In the absence of participants working together in committing

the wrongdoing, there is unlikely to be enforcement of consumer responsibility at the interpersonal level to undertake acts to right those wrongs. Thus, the practice of consumer responsibility is criticised as weak.

A modification is therefore suggested to give parameters to his theory. Margaret Gilbert's theory of joint commitment demonstrates the importance of joint activities and associational obligations as opposed to collective actions. Thus, the joint actions of businesses as opposed to the practice of consumer responsibility are brought into focus. It is suggested that Gilbert's joint commitment underwent a slight change from the discussion in '*On Social Facts*' to that in '*A Theory of Political Obligations*'. Although it is noted that Gilbert does not use the term 'joint commitment' in '*On Social Facts*'; an argument is nevertheless advanced to demonstrate that the essence of her 'joint commitment' derives from her discussion in '*On Social Facts*'. It is suggested by Gilbert that the joint readiness and the pool of wills agreed by the participants in the associational obligation are subjected to the process of non-consequential legitimate forgetting either by mutual agreement of the parties or as a result unilateral violation by one or a few parties.

The non-consequential legitimate forgetting is found to occur in the practice of bilateral contractual agreements between business partners. Those business partners can include terms and conditions which preserve the socio-economic wellbeing of their stakeholders. They however can also mutually agree not to enforce these terms and to replace them with new associational obligations. The findings in this chapter show that although associational obligations can change the behaviour of individuals in a collectivity to a certain extent, associational obligations in the form of bilateral contractual agreements between collectivities in business do not appear to change their behaviour.

The process of non-consequential legitimate forgetting however does not pose a problem for the development of a theory of collective obligations. The multilateral contractual agreements of the three examples introduced demonstrate that the enforcement of those agreements at the interpersonal level is practicable. In addition, a study of Gilbert's consequential joint commitment in Chapter Six suggests that the higher a participant's value commitment to a joint action, the stronger the impact that this participant's associational obligation will have on his or her behaviour. The terms and conditions which preserve the socio-economic wellbeing of stakeholders in multilateral contractual agreements are taken as subjects of high value commitment. The content of those commitments is identified as the normative good which derives from normativity. It is found that Korsgaard's theory of normativity does not cover the function of multilateral contractual agreements. Korsgaard suggests that the enforcement of private normative laws to act for the normative good is strictly at the intrapersonal level. This theory of normativity cannot provide an explanation for joint acts of normative good resulting from associational obligations. Thus, it is suggested that the theory of collective obligations which underpins multilateral agreements provides an explanation for the enforcement of joint actions for the normative good at the interpersonal level.

The three recommendations made in Chapter Seven demonstrate how associational obligations between more than two participants create collective obligations which are enforceable at the interpersonal level. Multilateral contractual agreements can be created at three levels. First, participants may create cross-industry multilateral contractual agreements. For example, participants in primary sectors from different industries can create a multilateral agreement on an issue such as the sustainable use of labour and resources. Secondly, participants from the same industry may create multilateral contractual agreements which preserve the socio-economic wellbeing of their stakeholders. Thirdly participants from the

same sector of an industry may create multilateral contractual agreements which preserve the socio-economic wellbeing of their stakeholders.

All those three levels of multilateral contractual agreements are formed in the same manner. A multilateral contractual agreement at any level is created by the voluntary initiatives of individuals, social groups and corporations which are participating in joint activity to supply consumers with products and services. The agreement contains collective obligations which are the products of negotiations and joint problem-solving by those participants. The financial and business capabilities of each participant ought to be taken into account. That a participant is the most powerful amongst the others does not automatically entail that they ought to be the regulator of the multilateral contractual agreements.

For example, the EPFIs of project finance are the most powerful business partners and they are also the regulators of Equator Principles because their roles are to fund the projects. The other business partners in project finance engage in business activities affecting the socio-economic wellbeing of their stakeholders. Therefore these EPFIs are seen as fit to regulate multilateral contractual agreements. In the apparel and garment industry, the retail sector is the most powerful amongst other sectors. However, it is suggested that these financially powerful partners are unfit to regulate these multilateral contractual agreements. An argument is advanced to the effect that these businesses in the retail sector are the outsourcing businesses. In other words, they are the initiators of the socio-economic violations affecting stakeholders. Therefore these businesses are not in a position to regulate these multilateral agreements as they may initiate a unilateral process of legitimate forgetting on their partners.

Moreover, a suggestion is advanced to demonstrate that collective obligations arising from a multilateral agreement are better formulated when the businesses in the sectors which

are adversely affected by outsourcing can insist that the other sectors have socio-economic obligations. Collective bargaining can provide businesses in the primary and secondary sectors - which are those which in the main are adversely affected by outsourcing – the opportunity to enter into a multilateral agreement to preserve their socio-economic rights. This method of bargaining provides businesses in these sectors with better bargaining power in negotiation with financially powerful multinational corporations. Similarly, businesses in the retail sector which share the same associational obligations with the primary and secondary sectors (e.g. the sociably responsible retailers) can benefit from entering into multilateral contractual agreements which preserve the socio-economic wellbeing of their stakeholders. These terms and conditions of agreement can be enforced by the participants at the interpersonal level.

In conclusion, joint activities traverse national boundaries and welcome participants from across the globe. A multilateral agreement between all participants in a joint activity enables participants to preserve the socio-economic wellbeing of their stakeholders. Each participant is able to enforce the agreement against the others at the interpersonal level. The business practice of outsourcing can still be practiced. However, costs and burdens are not externalised by the outsourcing corporation. On the contrary, the preservation of the socio-economic wellbeing of stakeholders in the form of collective obligations enables business to internalise the responsibilities through the process of performing their obligations in joint activities.

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