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CORPORATE CRIMINALITY: TOWARDS REGULATING CORPORATE BEHAVIOUR THROUGH CRIMINAL SANCTIONS

★
K. O. Akanbi*

Abstract

There is no gainsaying that in today's world, corporations play a dominant role in world's economies. In fact, the important role played by corporations in this age of globalisation and technology continues to increase at an alarming rate. This and the attendant corrupting and often damaging influence of corporate crimes makes for the need for an active prosecution of corporations.

However, in the past, it was inconceivable that a corporation could be held criminally liable, because it was thought that a corporation as an abstract entity was incapable of committing a crime. This is because it was thought that a corporation had no physical intent or mensrea and therefore incapable of committing a crime. Also because of the practical and jurisprudential problems that can arise in imposing criminal liability on fictitious entities. Nevertheless, the ineffectiveness of pursuing only civil remedies and the gravity of most corporate crimes make for a need to actively prosecute corporations.

The main objective of this paper therefore is to attempt an analysis of corporate criminality with special emphasis on the ways of determining the mensrea of a corporation. Essentially, the Nigerian laws as it relates to crime and corporations will be examined and appropriate recommendations will be made with a view to improving the Nigerian legal jurisprudence on corporate criminality.

Introduction

Corporate personality¹ is defined in the dictionary of law² as the sum total of a person's legal rights and duties. The rules of law are the main determinants of legal personality. They may select different entities and endow them with different legal functions so that it will be a mistake to suppose that by merely describing an entity as a person, one is formulating capacities in law. In determining personality of an entity, the following questions are essential.

* Akanbi, Khairat Oluwakemi, LLB (HONS) B.L, LL.M Lecturer, Department of Business Law, Faculty of Law, University of Ilorin. E-mail kaskola@yahoo.com. Tel: 08034206155

¹ Also known as legal personality

² L.B Curzon Dictionary of Law 14th ed. Pitman Publishing 1994 United Kingdom p.285

1. Do the rules of law establish that the claimant has the capacity which it claims?
2. What exactly is the capacity of which it claims and which is allowed to it in order words, just sort of legal relations may this entity enter into?
3. Should the entity be recognised as having the capacity which it claims to have?

In essence, the determination of corporate personality depends mainly on the capacity bestowed by law on an entity to perform certain acts and the competence to enforce rights if breached. Capacity implies personality, but it is the capacity to do particular acts. Therefore, personality as a term is only a proposition that an entity is endowed by law with legal capacity.

Corporate personality is a relative phenomenon varying with circumstances. Entity A may have the capacity to perform acts X and Y but not act Z. Entity B may have capacity to perform acts Y and Z but not act X and Entity C to perform all three. Corporate personality therefore necessitates the consideration of the relationship between rights and duties and the capacity to enforce such rights.

The common law principle as laid down in the case of *Salomon v. Salomon & Co Ltd*³ gave the initial impetus to the idea of corporate criminality. This case established the recognition of a corporation as a legal entity, distinct from its founders or members. Lord Macnaghten⁴ held:

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith', to use the words of the enactment, 'of exercising all the functions of an incorporated company'. Those are strong words. The company attains majority on its birth. There is no period of minority- no interval of incapacity. I cannot understand how a body corporate thus made 'capable' by statute can lose individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is a different person altogether from the subscribers to the memorandum and, although, it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and

1897) AC 22

ibid

the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act....' That I think is the declared intention of the enactment.

This principle was extended to the subsidiary of a corporation in *Ebb Vale UDC v. South Wales Traffic Area Licensing Authority*⁵

Although a company is a legal entity and has an independent legal personality, it is of course, an artificial person or entity. Therefore all the activities of the company are carried out by its agents.

The independent legal personality of the company is fundamental to the whole operation of business of the company as it affects its stature, capacity, existence, powers, rights and liabilities. A non- legal person has no existence in law and cannot be made a party to any action. Therefore, a major incidence of corporate personality is the ability to sue and be sued. It is settled that a company as an artificial person in law can be liable for civil wrongs. Sometimes, the doctrine of lifting the veil is used and the separate personality of the company is jettisoned to determine liability.⁶ In lifting the veil, the company may be treated as the agent of its subscribers and the separate personality of the company is jettisoned.⁷ Also, the corporate veil can be lifted as a means of combating fraud.⁸

Corporate Personality under the Nigerian Legal System

The Nigerian legal system which is fashioned along that of the English system has recognised the legal personality of juristic persons. Nigerian courts for example accord juristic personality to corporation sole as evident in the cases of *Fawehinmi v. N.B.A* No 2,⁹ *Emenite Ltd v. Oleka*¹⁰ and *Magbeola v. Sanni*¹¹

Corporations aggregate are limited liability companies whether private or public. The law treats the corporations aggregate as persons in order to facilitate the investing of certain

⁵(1951)2 KB366

⁶*Dimbley & Sons Ltd v. National Union of Journalists* (1984)1 WLR 427 at 435 B-G, HL

⁷ See *Hotel Terrigal Pty v. Latec Investments Ltd* (No2)

⁸ *Gilford Motor Co Ltd v. Horne* (1933)Ch935

⁹(1989) 2 NWLR at577

¹⁰ (2005) 6 NWLR (pt 921) 350

¹¹ (2005)11NWLR (pt 936) 239

powers and rights on such enterprise e.g. the capacity to sue and be sued, to own property, to enter into contractual relations. The Companies and Allied Matters Act provides for legal personality as a consequence of incorporating a company in Nigeria.¹² In the case of *Union Bank (Nigeria) Ltd v. Penny-Mort Ltd*¹³, it was held that where a company is registered under the Companies and Allied Matters Act or any other previous Act, it continues to retain its status of a legal entity distinct from its members. Also, in *Marina Nominees Ltd v. FBIR*¹⁴, the Supreme Court reiterated the fact that an incorporated company is a separate legal entity which must fulfil its own obligations under the law.

Corporate Criminal Liability

Corporate crimes are defined as illegal acts, omissions or commissions by corporate organisations themselves as social or legal entities or by officials or employees of the corporation acting in accordance with the operative goals or standards, operating procedures and cultural norms of the organisation, intended to benefit the corporation themselves.¹⁵

Corporate criminality determines the extent to which a corporation as a legal person can be liable for acts and omissions of the natural persons it employs. It is different from civil liability as it is a means of regulating corporations. It is sometimes regarded as an act of criminal vicarious liability, as distinct from the situation in which the wording of a statutory offence specifically attaches liability to the corporation as the principal or joint principal with a human agent.¹⁶

Initially under the common law, corporations were held liable for actions of non-feasance and but this was later extended to misfeasance. However, movement from the common law rule started with the strict liability offences where no mensrea was required and the penalty was always in form of fine. The case for corporate criminal liability was strongest in such instances as public duties imposed upon a corporation by the law. Such duties applies to corporations as individuals and for such omissions, no individual corporation employee could be said to be in breach of these duties. It was these reasoning that led some courts to rule that a corporation could not be convicted for misfeasance. Besides, the distinction between non-feasance and misfeasance offences was seen as more of a matter of form than of substance, in that the same offence could be characterised as a failure to do an act like

¹² Section 37 Companies and Allied Matters Act Cap C20 LFN 2004

¹³ (1992) 5 NWLR (pt. 240)228 at 237

¹⁴ (1986)2 NWLR (pt. 20)48

¹⁵ C Reasons: *Crime against the environment: some theoretical and practical concerns*. Crime L Q vol34 nov.1 (1991) see also R. Krame *corporate criminality: the development of an idea*; in E Holchstedlered, *Corporate as Criminals* (Beverly hills: Sage Publications 1984).

¹⁶ http://en.wikipedia.org/wiki/corporate_liability assessed on September, 20th, 2011.

Failure to construct a safe bridge as an act, for example and the construction of a bridge in an unsafe manner. It seemed appropriate therefore to punish for misfeasance when the mischief aimed at by the penal statute could easily be produced by a corporation. In *R v Birmingham & Gloucester Railway Company Ltd*,¹⁷ a corporation was convicted for failing to fulfil a statutory duty imposed on it. It was in such cases that the earliest development of corporate criminal liability took place.

It was however in 1944 that the common law scope of corporate criminal liability was considerably extended.¹⁸ It was the case of *DPP v. Kent & Sussex Contractors Ltd* that fully established the modern principle of criminal liability of companies. It was held thus:

It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate... If the responsible agent of a company, acting within the scope of its authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that ... his knowledge and intention must be imputed to the company.

In the subsequent case of *Bolton (Engineering) Co Ltd v. Graham and Sons*¹⁹, Lord

Denning LJ held:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to the work and cannot be said to represent the mind or will. Others are directors and

¹⁷ 1842 2 QB 114 ER 492

¹⁸ As Evident in these Cases *R v. ICR Haulage*, 1944 1 KB 551, *Moore v. Bresler* 1944 2 ALL ER 515, *DPP v. Kent & Sussex Contractors* 1944 1 KB 146.

¹⁹ (1957) 1 QB 159

managers who represent the directing mind and will of the company, and control what it does...

Essentially, under the common law, unlike in the past, corporations are now criminally liable subject to certain limitations such as assault and rape. The movement from the old common law rule started with strict liability offences. In this respect, no mental state was required and the penalty which was practicable then was a fine which a corporation could easily be made to pay. It was offences requiring mensrea that was the problem because of the difficulty of determining the mensrea of an abstract entity. This is because of the basic criminal law principle of actus non facit reum nisi mens sit rea, it was thought that a corporation being an artificial person could not be said to have a mensrea, a mind or an intention. The proof of a corporation's state of mind posed a problem since a corporation does not have a physical existence like a natural person. Again, where it was possible to ascribe the state of mind of any of its employee to a corporation, the problem faced was who among the employees of a corporation should be regarded as acting on behalf of a corporation so as to make such employee's act the act of the corporation. This is because it was thought that some employees are so low in rank that their acts in relation to their schedule of duty can never bind the corporation²⁰

It is now settled however as corporations have been vicariously and criminally held liable for the acts of some junior employees like drivers or clerks and this is done through either the law of agency or labour law which makes the principal liable for the act of its agent and the master liable for the act of its servant. Also, corporations are made criminally liable by imputing the state of the mind of the directors or some other officers as the state of mind of the corporation.

Determining the Mensrea of a Company:

It is possible that three acts are exactly the same but the implications different in law. It is the mensrea or guilty mind that determines essentially the implication of an act in criminal law. This therefore underscores the importance of mensrea in criminal law. As stated in the preceding paragraphs, the main challenge to criminal prosecution of companies is the problem of determining the mensrea since a company is an artificial entity with no physical 'mind'.

The following theories have however evolved in determining the mensrea of a company.

²⁰ In the Nigerian case of DPP Western Nigeria v. Associated Press of Nigeria Ltd & Anor (1959) W.S. 247, the court held the newspaper liable for the acts of a mere reporter.

The Organic Theory:

The locus classicus of this theory is the case of *Lennard's Carrying Co v. Asiatic Petroleum Co Ltd*²¹ which was about a cargo claim which the appellant sought to defend by relying on the provisions of the *Merchant Shipping Act 1894* which exonerated the owner from losses arising without his actual fault. The House of Lords held that the defence could not hold since the fault of the appropriate organ such as the board of directors or managing director could be attributed to the company. Lord Viscount held:

...a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for all intent and purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

This theory essentially ascribes the will and intention of persons who control the affairs of the company to the company as evident in the decision reached in the famous case of *Tesco Supermarket Ltd v. Natrass*²². Sometimes, the actions of an employee who is not a director but who acts for the company in the course of his employment can be attributed to the company, it was in fact stretched to include instances when such employee is acting dishonestly or contrary to its orders as long as the company is not a victim in the case of *Rv. Roziek*.²³

The Agency Theory:

Under this theory, an officer of the company is treated as an agent of the company and the basic principles of agency is to the effect that a principal is bound by the contracts of an agent acting within the scope of express, implied or apparent authority. A problem with this theory is when an officer acts ultra vires the powers assigned to it or ultra vires the company's act itself. In *Re Supply of Ready Mixed Concrete (NO2) Director General of Fair Trading v. Pioneer Concrete (UK) Ltd*²⁴, the company was held in contempt for giving effect to an agreement registrable under a law which had not been registered. The actions were

²¹ (1915) AC 705 HL

²² (1972) AC 153, (1971) 2 ALL ER 127, HL

²³ (1996) 3 ALL ER 281, 286, CA

²⁴ (1995) 1 ALL ER 135

those of local managers without express or ostensible authority and without knowledge of the management of the company.

The Theory of Attribution:

This theory apparently the most recent, proposes rules by which actions are attributed to the company. It was adopted by the Judicial Committee of the Privy Council in the case of *Meridian Global Funds Management Asia Ltd v. Securities Commission*²⁵ where two employees of the Meridian had improperly used their authority to purchase in the name of the company a substantial interest in Euro-National Corp Ltd which is a New Zealand company. Under the New Zealand securities law, Meridian was required to give notice of its acquisition to the stock exchange and the Euro-National Corp. The two employees knew this fact but the board of directors and management of the Meridian did not and therefore no notice was given. Heron J held that the company was in breach, holding that, the knowledge of the two employees was to be attributed to the company. The Court of Appeal upheld that decision and the company appealed to the Privy Council. The Judicial Committee of the Privy Council upheld the decisions and affirmed that the Meridian had contravened the law, imputing the knowledge of its two employees to the Meridian. In arriving at the decision, the court propounded that it is imperative as part of corporate personality that there should be rules by which acts are attributed to the company known as rules of attribution.

The court went further as evident in the dictum of Lord Hoffmann that the rules of attribution are in two main classifications namely primary and secondary rules of attribution. The primary rule of attribution according to him²⁶ is contained in the memorandum and articles of association of the company which essentially serve as the constitution of the company. He stated further:

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business... The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company

²⁵ (1995) 2 AC 500

²⁶ *ibid*

As is evident in the above quotation, the company's primary rules of attribution coupled with the general rules of attribution like the law of vicarious liability, agency, labour law should all be collectively analysed in order to determine whose act or intention was intended to count as the act of the company.

It will seem that the attribution theory provides a comprehensive approach to the daunting question of determining the mensrea and criminal liability of a company.

Corporate Criminality under the Nigerian Legal System

The Nigerian legal system accommodates the position at Common law to the effect that corporations could be criminally held liable but not for all offences. In fact, *section 65 Companies and Allied Matters Act*²⁷ provides:

Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company, shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person

The practical implication of the above provision is that the mensrea of the members in general meeting, the board of directors or the managing director shall be attributed to the company and therefore treated as the mensrea of the company.

The Act further provides in its section 66:

Except as provided in section 65 of this Act, the acts of any officer or agent of a company shall not be deemed to be the acts of the company, unless-
(a) *the company, acting through its members in general meeting, board of directors, or managing director, shall have expressly or impliedly authorised such officer or agent to act in like manner;..*

Of course, the effect of the provision of section 66 is that the mensrea of other officers or agents of the company will be attributed to the company if such has been authorised either

²⁷ Op cit

expressly or by implication by the board, the managing director or the members in a general meeting. In the case of *Adenijiv. The State*²⁸, the court reiterated that the acts of an individual can be taken as the act of the company in appropriate cases where the director represents the directing mind and will of the company.

It is settled that a company can be criminally liable for strict liability offences. Crimes created by statutes are usually strict in nature. They do not require the proof of mensrea in form of intention, recklessness, knowledge or even negligence. All that is needed is a proof of the actus reus. Offences like pollution, tax evasion, production of harmful drugs and offences against other regulatory laws attract corporate criminal liability.²⁹

Nigerian courts were initially sceptical about convicting a corporation for a crime. This problem was as summed up in *R v. Anglo – Nigerian Tin Mines Ltd*³⁰ thus:

personal appearance at assizes was a necessary feature of criminal procedure, and as a corporation had no physical personality, there was no one who could be brought before the court and if necessary placed in the dock

However, in *IGP v. Mandillas and Karaberis & Anor*³¹, the court jointly held liable a company and its manager for the offence of stealing. The company was punished with a fine and the manager who is the second defendant was punished with a term of imprisonment. Essentially, corporate criminal liability is just evolving in Nigeria so the cases are comparatively few. However, the attitude of our courts seems to accept the assertion that a company being an artificial person can only incur liability through its officers and organs³². A curious decision was reached however in the case of *FRV v. Odogwu & Anor No 1*³³, where both a bank and its managing director were charged before the failed bank tribunal. The corporate veil was lifted and only the managing director who was the promoter of the bank was convicted and the bank discharged.

Conclusively, corporate criminality is a comparatively recent development in Nigeria. There are not yet precise standard of determining liability and assessing guilt especially as it relates to offences requiring mensrea. This is however a global issue because until very

²⁸ (1992) 4 NWLR (pt. 597) 53 at 66

²⁹ An example is the Weight and Measures Act Cap W3 vol 5 LFN 2004

³⁰ (1936) 10 NLR 69

³¹ (1958) WRNL 147

³² *Trenco (Nigeria) Ltd v. African Real Estate Ltd* (1978) ILRN146, *Faith Enterprises Ltd v. Baf Nigeria Ltd* (2001) 8 NWLR (pt. 715) 262

³³ (1997) 1 FBTLR 179

recently, corporations were not held liable in international law of human rights. Under the American legal system, the approach to determining the criminal liability of corporations is through the principle of respondent superior which makes a corporation liable for the acts of its agents who commits a crime within the scope of his employment and with intent to benefit the company. This principle was first recognised in the case of *New York Central & Hudson River Railroad v. United States*³⁴ where the court held that the principle of respondent superior was well established in civil tort law and that every reason in public policy justified applying respondent superior to criminal law. The *American Model Penal Code*³⁵ imposes corporate criminal liability only for the acts of some corporate agents that was authorised, requested, commended, performed or recklessly tolerated by the board of directors or a high managerial agent acting on behalf of the company within the scope of his employment. Subsequently, in *United States v. Hilton Hotels Corp*³⁶ where the purchasing agent at Hilton Hotel in Portland Oregon threatened a supplier of goods with the loss of the hotel's business if the supplier did not contribute to an association formed to attract conventions to Portland. The corporate president testified that such action was contrary to corporate policy. Both the manager and the assistant manager of the hotel testified that they specifically told the purchasing agent not to threaten suppliers. The court nevertheless convicted Hilton Hotels of antitrust violations under the respondent superior standard because to outsiders, the assistant manager appeared to be acting on behalf of the corporation.

The position in India is illustrated by the ground breaking case of *Standard Chartered Bank & Ors v. Directorate of Enforcement*³⁷ which decided that companies can be criminally liable for strict liability offences requiring no mensrea and punishable with a fine. The practical effect of that decision is that if a fine is not included in the sentencing by the law, then such prosecution would not stand. The case also failed to address the issue of mensrea. The court did not develop its reasoning far enough so as to specifically hold that a corporation is capable of forming mensrea and acting pursuant to it. Many of the offenses, punishable by fines, however do have *mens rea* as a necessary element of the offense. By implication, it can be said that post *Standard Chartered Bank* decision, corporations are capable of possessing the requisite mens rea.

³⁴ 212 us 481 (1909)

³⁵ Section 2.01, American Law Institute Model Penal Code 1962

³⁶ 467 f.2d 1000 (9th Cir. 1972)

³⁷ AIR 2005 SC 2622

*The Juris Review***Conclusion**

There is a global discord on whether and how corporations should be held criminally liable for offences. There are also no generally accepted standards for assessing liability even when it is agreed that corporations should be liable. But, undeniable is the fact that corporations are major actors in today's world and crime cannot be fought effectively without tools to pursue all major actors. Corporate criminal liability can change corporate behaviour and therefore is an idea that has come to stay. The future has arrived for corporate criminal liability.

Recommendations

There is no doubt that the whole areas of law such as contract, tort and criminal law have been built upon the premise of individual autonomy. There is no doubt also that the world has evolved and is in fact evolving and companies play and continues to play a major role in virtually all human endeavours. There is therefore a need for a reform of our criminal and company laws with a view to developing a more sophisticated and all-encompassing standard for assessing corporate criminal liability.

There is also, the need to evolve appropriate sanctions other than fine. This is because fines can easily be borne by most corporations so the end of justice may not be served. Also, because imposing fine hurts innocent shareholders and consumers who inevitably pay higher prices and indirectly pay the fine.

Thirdly, there should be an improvement on our criminal laws to include the crime of corporate manslaughter which is gradually gaining prominence in view of environmental pollution of some corporate acts.