

Chapter 5: Corporate Criminal Liability for Agents Action

5.1. SCOPE OF EMPLOYMENT

The scope of employment is the first of the three inquiries used to determine the vicarious liability of corporation for the acts of its employees. Acting within the scope of employment is related to the authority of the employees, where meeting such requirement implies that the employee has the actual or apparent authority to engage in the act. The actual authority is intentionality authorizing the employee to act on the company's behalf, while the apparent authority implies that a third party reasonably believes that the agent has the authority to perform the act (Geraghty 329-30).

Taking the notion of the scope and the nature of the employment, it can be seen that in contrary to the identification doctrine, liability can be imputed, regardless of the position of the employee. Nevertheless, it can be stated that the application of such test inquiry can be hindered by the fact that many companies adopt corporate policies, which can insulate the company from liability, however, the court might apply criminal liability nevertheless, although with reduced penalty.

5.2. FOR THE BENEFITS OF THE CORPORATION

Such element of corporate criminal liability can be distinguished in that matter, as the fact of receiving a benefit of a particular act is enough to fulfil this condition. Despite such distinction the court s might choose different mechanism to impute liability to the company, e.g. the act is not inimical to the interests of the company or the employee is acting for his/her own personal benefit. In that regard, it is easier to determine the conditions when the liability cannot be imputed in such scenarios, i.e. acts that are "expressly contrary to the interests of the corporation" (Geraghty 332).

Accordingly, it can be stated that the factor of intent might be difficult to establish, as in cases when benefit was not required, it might surface, as long as the actions are not inimical to the interests. In that regard, it can be stated that the inclusion of this test might act as a prevention of corporations being held liable when they are victims of the act (Gruner 3-58). When there are no benefits or harm from a certain action of an employee, the court might decide to look at the preventive measures, which the company had the opportunity to implement. In case such managerial opportunities were clear, the court might impose corporate criminal liability “to encourage control over employee offenses” (3-85).

5.3. SIGNIFICANCE OF THE AGENTS EMPLOYMENT STATUS

This factor is mainly related to the identification doctrine, and accordingly when of the methods of imputing the intention of the employee to the organisation. Taking the notion that the company as an entity is always acting through its representatives, and thus, the status of the employee is decisive when analyzing whether the behaviour and the thoughts of the employee are representative of the corporation. It is logically acceptable to assume that employees from lower ranks would be sufficiently limited in representing the actions and the thoughts of a legal body.

It can be stated that the formal status, as to what capabilities to make decisions the employee hold, is irrelevant in that regard. The tests used in the English law makes use of the factor of independence to make a decision, where the main question is whether “the person is part of the directing mind and will of the corporation, regardless of his or her formal status” (Stessens 509). Accordingly, the latter might not be considered contradictory, as independence is usually correlated with the status of employment, unless the authority of decision making was delegated was not delegated to a lower-rank employee.

5.4. CORPORATE DEFENCES

Despite the fact that the doctrines of corporate criminal liability are based on the premise of establishing the guilt of the corporation, it can be stated that there are many pitfalls that are used by the organizations to escape liability. Such pitfalls are mainly seen in the realities in which corporations operate. In that regard, even when an evidence of guilt exists within the organization, it is difficult to determine to which agent intent it can be attributed. Additionally, there is also such aspect as compliance programs, which introduction by the organisation can be seen as an exploitation of the current laws of corporate vicarious liability, through which they can escape corporate liability.

Accordingly, the identification doctrine implemented in the UK can also provide loopholes through which the organisation can escape liability. Striping control offices of the ability to make decisions, or structuring the hierarchy of the company in such way as to avoid responsibility can be seen as a direction of such exploitation. Nevertheless, the tendency of making the company liable is more applicable to current laws of corporate liability. In that regard, even if the company has taken all the measures to prevent wrongdoing within its structure and policies, it still can be convicted of a corporate crime, leaving no possibility, specifically for small companies in order to immune themselves from such cases. Accordingly, the conviction of a company, which lacked a criminal intent, might lead to the most severe consequences for its businesses, not limited to loss of all kind of licenses (Thompson 136).

5.5. PREVENTING CORPORATE CRIME

The prevention of corporate crime should be implemented in such a way that it can include a deterrence effect. In that regard, such prevention would lead to the fact that

corporations would be taking all possible steps to eliminate the possibility of illegal corporate conduct, and at the same time protect corporations that reasonably do so, from prosecution. With the corporations taking all reasonable steps to police themselves, through introducing effective compliance programs, the company would detect law violations prior to their occurrence. It should be stated that the implementation of such compliance programs should go beyond merely presenting a list of rules and policies, but also, a system of effective monitoring, evidences of which should be presented to the court, when determining the liability of the corporation.

Accordingly, in case violations do occur, no distinctions should be made to the application of criminal laws to companies. The application of criminal liability laws has several advantages over the civil liability. Criminal liabilities are better enforced, with more powerful enforcement agencies, and at the same time involve stronger procedural protection not to mention the symbolism and the message carried in criminal liability, more related to the basic principle of crime and punishment (Clarkson para 5).

Chapter 6: Conclusion

6.1. CORPORATE CRIMINAL LIABILITY IN THE MODERN WORLD

The significance of an identified corporate liability can be seen through the extension of the implementation of law beyond American and European practices. In that regard, an illustrative example is the example of India, a developing country, where “it has not been defined under any statute, rule or regulation” (Suri and Jhusiwala 55) despite the importance of corporate criminal liability. The confusion can be seen through the fact that Indian criminal liability is scattered across several statutes. Nevertheless, the theoretical foundation of corporate liability can be seen through the influence of the English law. Accordingly, under the present penal system both corporations and the managing officers can be held liable for an illegal conduct. Despite being scattered over many statutes it can be highlighted that the major law governing corporations in India is “codified in The Company Act, 1956 and the definition of “Corporation” (Kumar 7) as given in the Act under Section 2 (7) includes a company”.

In Indian legislation, the separation of the legal entity and the individual led to making provision through which the individual can be prosecuted out of the corporation “veil”, where “the benefit of separate legal entity will not be available and the court will presume the absence of such separate existence” (7).

6.2. CORPORATE CRIMINAL LIABILITY IN NIGERIA

The issue of corporate liability in Nigeria can be considered in worse state, where the issue of distinct corporate personality is ignored. Additionally, the nature of the crime for which corporations might be liable is white-collar, and in that regard, the corruption in the Nigerian society prevents effective prosecution. The imputation of criminal liability requires the presence involvement and guilt of “directing mind and

will of the corporation” (Okoli 36), the identification of which can be seen as one of the issues that Nigerian legislation faced. The advent of Companies and Allied Matters Act (CAMA) provided more strict regulations of the conduct of corporations. The achievement of the act can be seen in providing clarifications of the law on corporate liability (Okoli).

6.3. IMPOSSIBILITY OF CORPORATE CRIMINAL LIABILITY

The enforcement of the Corporate Manslaughter and Corporate Homicide Act 2007 can be seen as a step further for clarifying whether it is impossible to hold the corporation criminally liable for a homicide. It should be stated that the enforcement of the act is a perfect example, where the required effect of punishment is combined with deterrence, as it can be seen that the focus of the law is on the working practices of the corporation, rather than “on the basis of any immediate, operational negligence causing death” (Laurel and Natalya 228). The expansion of such management failure model as well as the requirement of compliance program can be seen as an effective step for the companies not only to be held liable, but also help to reduce corruption and white-collar crime in general through self-regulations.

6.4. A REFORM FOR NIGERIA

Finally, it can be emphasised that a mix of the aforementioned approaches, i.e. the application of the criminal laws through management failure model, an example of which can be seen in Corporate Manslaughter and Corporate Homicide Act 2007, would be beneficial step for reform in Nigeria. Being in the rating of the most corrupt nations, the implementation of such model, not only in homicide cases, might help the business to gradually turn toward self-regulation. In that regard, strict punishment approaches would not be helpful, ignoring deterrence as a desired effect.

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