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Corporate Criminal Liability in Money Laundering and Terrorism Financing Prosecution in Nigeria, United Kingdom and United States: A Comparative Review

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Abstract: *The United Kingdom and the United States are the dominant jurisdictions in assessing the applicability and impact of corporate criminal liability in a criminal justice system. Hence the two Countries have been influencing the direction other jurisdictions are charting in determination of both applicability and approach to corporate criminal liability. This Paper is a two-route review of the approach in Nigeria with the position in the United Kingdom and the United States. Thus the review looks at the concepts as they apply to determination of corporate criminal liability in money laundering and terrorism financing prosecution in relation to Nigeria based on the approach in the United Kingdom and same review will be conducted in line with the position in the United States. The Paper will also review the current position in relation to determination and application of willful blindness as a substitute to the traditional mens rea in corporate criminal prosecution in the three jurisdictions.*

Keywords*: Respondeat Superior, Alter ego, Attribution Principles, Wilful Blindness, criminal liability*

I. CORPORATE CRIMINAL LIABILITY UNDER NIGERIAN LAWS

The concept of corporate criminal liability has been established as a counterpart element to liability of natural persons with the attendant basis for determination of culpability of corporate persons. The two dominant jurisdictions in laying out the parametres and approaches to determining corporate criminal liability are the United States (US) and the United Kingdom (UK); hence they have had an enduring influence on the direction and width of the applicability of the concept in most jurisdictions. Thus this Paper, taking into cognizance this dominance, will analyze the approaches and extent of applicability of this concept in the two jurisdictions in comparison to the situation in Nigeria. Secondly the UK jurisdiction has a lifelong influence on Nigerian jurisprudence, far beyond the natural impact of colonial rule that ended more than fifty years ago. This has in a long way pushed the Country's approach to corporate criminal liability towards the UK system with the reliance on the alter ego doctrine.

The rising number of companies facing criminal liability has been ascribed to the courts' understanding of the need to impose certain obligations on the company even if it lacks human attributes. In *Alphacell v Woodward*[1] the House of Lords in the UK states that 'if the law imposes an obligation the corporation must organize itself well enough so they can abide by the law'[2]. The fictional nature of the company has neither bestowed immunity on the company nor excuse it from consequences of breaches of criminal law statutes. This attitude of the House of Lords was reaffirmed in *Seaboard Offshore Limited v Secretary of State for Transport*[3] where the same court decided that a company can be convicted for negligently omitting to take some preventive measures in relation to commission of crimes. These cases highlight the growing impact of corporate criminal liability on national jurisdictions across the globe; Nigeria is not an exception to this growing trend.

The Money Laundering (Prohibition) Act[4] and the Terrorism (Prevention) Act[5] form the core statutory instruments in prosecution of both natural and corporate persons in Nigeria; this has also laid the bedrock for investigation and prosecution of suspected wrongdoers. Incidentally both laws have recognized the concept of corporate criminal liability in determining culpability for either money laundering or terrorism financing. The two key Acts have been tested in Nigerian Courts with varied outcomes; but more importantly corporate persons have been charged under the provisions of these Acts. Therefore there is a need to review the current judicial and statutory position in Nigeria before we can achieve a more thorough comparative analysis with other jurisdictions. In the last five years several companies have been investigated and quite a high percentage of them have been arraigned for the offences outlined in the two Acts. Furthermore to fully grasp the existing jurisdictional direction in Nigeria, this Paper must situate the analysis around the provisions of the recently

[1](1972) All E.R 475
[2] ibid
[3] (1994) Lloyd's Rep 75
[4] 2012 (Amended from the 2003 version)
[5] 2013 (Amended from the 2011 version)

passed Administration of Justice Act[6]; which made clear provisions that accommodated the peculiarities of juristic persons.

It is clear that the Nigerian laws, particularly in the areas of money laundering and terrorism financing prosecution, have recognized that companies though lack the attributes of natural persons, can be culpable in the same extent as the natural persons. In many ways this recognition had to surmount the difficulty in ascribing a guilty mind to a company without converting it to a natural person. The Nigerian jurisdictions have fallen back on the common law reliance on the alter ego doctrine to attribute acts of natural persons to the company based on whether they actually reflect the 'soul' of the company. This is clearly evident in the provisions of the Money Laundering (Prohibition) Act and the Terrorism (Prevention) Act in the setting of culpability and offences. More so the Nigerian Courts have been guided by the common law doctrine with linear influence from UK Courts. This indicates that there are similarities but they have not exhausted possible avenues of divergence between the two jurisdictions.According to Samson and Daud[7] there has been a growing trend in Nigeria to subject companies to severe punishments outside the punishments prescribed for individuals who may have acted on the company's stead. They cited the Failed Banks (Recovery of Debt) and Financial Malpractices Decree 1995 as a good illustration of a deliberate focus to hold companies criminally liable for acts of their employees, managers and directors. Their postulation tallies with the position of the Court in *Yakubu Lekjo and others v EFCC*[8]; where it held that all ventures set up for business purpose are within the contemplation of the Money Laundering Act; the Court was even specific on Section 24 of the 2004 version of the Act. Therefore there is a harmony of conclusions that Nigerian companies are within the provisions of the Act regulating money laundering.

The Nigerian jurisdiction has no filial relationship with US jurisprudence but a comparison will be necessary to look at the approach of that jurisdiction to corporate criminal liability; this will provide a more detailed understanding of the two dominant influences. The US has relied on the doctrine of respondeat superior to determine corporate criminal liability and there are conceptual similarities with the doctrine of alter ego, with the divergence in the details. Therefore a comparison with the Nigerian jurisdiction will highlight the necessity for an approach to corporate criminal liability with the doctrinal approach serving as a means and not as a replicate of the concept itself. It is quite clear that money laundering can generate enormous profits for companies whether they benefit as part of corporate strategy or due to a lack of awareness of that risk in their operations; yet this behavior can only flourish in countries with weak laws, ineffective regulatory frameworks and minimal corporate governance processes. A rear view of the evolution of money laundering as a serious offence will lead us to the formation of the Financial Action Taskforce (FATF) by the G7 under the auspices of the Organization of Economic Co-operation and Development (OECD) in 1989. J.O Sharman[9] in an article he wrote in 2008 on money laundering stated that twenty years before then 'not a single country has a policy against money laundering'[10] because he said 'before 1986 money laundering was not a crime anywhere in the world'[11]. That situation is quite different now with a global drive to control the issue; particularly in developing countries. Therefore every company operating in Nigeria faces these risks with possible impact on its relationship with stronger regulators in other countries.

The Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA)issued a Report[12] in May 2012 that discovered minimal awareness of international Anti-Money laundering protocols 'even among high-echelon functionaries of agencies and bodies (public and private) responsible for the prevention and control of money-laundering'[13]. Another vital outcome of GIABA's assessment of the West African region 'observed weak level of organizational compliance with extant anti-money laundering provisions'[14] by entities that have that form of exposure to money laundering and terrorism financing risks. A good illustration of the issue of money laundering in Nigeria is one of the typologies used in the assessment of West Africa by GIABA in 2014[15], the case involves the offence of money laundering and stealing against James Ibori, who was the governor of Delta State in Nigeria between 1999 and 2007[16]. The investigation found

[6] 2015
[7] Samson Erhaze and Daud Momodu, Corporate Criminal Liability: Call for a New Legal Regime in Nigeria (2015) *Journal of Law and Criminal Justice Vol. 3, No. 2, 63-72*
[8] FHC/KD/CS/117/2009
[9] J.C. Sharman, "Power, Discourse and Policy Diffusion: Anti-Money Laundering in Developing States," *International Studies Quarterly* 52 (September 2008), 635-656.
[10] ibid
[11] ibid
[12] GIABA Typologies Report on Tax Crimes and Money Laundering in West Africa 2012
[13] ibid
[14] ibid
[15] GIABA Annual Report 2014
[16] Ibori was released from a UK Prison late last year after serving half his prison term for money laundering

Governor Ibori to have used three companies (Sagicon Nigeria Limited, Bainenox Limited and MER Engineering Limited) to aid his money laundering activities. The amount involved includes N165million which he illegally withdrew from the Delta State government account to offset a loan granted by United Bank of Africa (UBA) PLC to MER Engineering and Bainenox Limited at different times between 2006 and 2007. The case was investigated by the EFCC. Incidentally this highlight the use of companies as both vehicles and fronts for money laundering by public officials. This in many ways explains why companies are mostly co-accused to money laundering trials of public officials in Nigeria.

The first attempt at enacting a comprehensive Anti-Money Laundering legislation in Nigeria was in 1995[17], it was restricted to drug trafficking and the outcomes of implementation of that were quite unimpressive compared to the number of drug offences handled. In Nigeria conviction for predicate offence is not required before the commencement of money laundering prosecution or eventual conviction in the courts. The current legal regime was set out by the Money Laundering Prohibition Act in 2003 that expanded the scope of the investigation and prosecution of money laundering related cases. The Act has gone through two amendments and is currently awaiting another review before the 8th Nigerian National Assembly. Therefore the Nigerian criminal justice system has gradually but firmly established a strong enforcement culture in relation to the investigation and prosecution of money laundering in the country. This has set the ground for the entrenchment of a legal framework for the prosecution of money laundering in the country.

The rise in terrorist activities in the West African sub-region since 2010 has made the geographical zone vulnerable to not just violence but further exposes companies to risk of terrorism financing. In an observation at the Financial Action Taskforce (FATF)/United Nation Office of Drug Control (UNODC) Joint Experts meeting in 2016[18] there were conclusions on the reliance of the Boko Haram terrorist group on business enterprises to generate and hide funds. The meeting also stated that the group may have been using 'slightly larger corporations'[19] that are involved in haulage, transportation and those dealing in telecommunication accessories. More worrisome is the meeting's opinion on possible ownership of Bureau De Changes (BDCs)[20] by the group; which has exposed legitimate enterprises to a high risk of joining the value chain of terrorism financing. This makes an indepth research on wilful blindness in relation to terrorism financing a necessity and its outcome a much needed guide for both law enforcement and legitimate business enterprises. Furthermore we cannot ignore corporate criminal liability in discussing the investigation and prosecution of terrorists financing operations.

This Paper will look at three national jurisdictions in projecting the different approaches to corporate criminal liability. This will in many ways sign post any further study of the determination principles across different jurisdictions; the focal point being the approach in Nigeria. Although corporate criminal liability is now accepted as part of the criminal justice system of most countries, there are divergence on approach and the doctrinal principles that guide its application.

Comparative Review of Corporate Criminal Liability under Nigerian Law and the United Kingdom

Due to historical links the Nigerian legal system derives most of its foundational principles from the United Kingdom (UK); this enormous influence also tilted the country's position on corporate criminal liability towards the same direction. Therefore the alter ego doctrine drives the country's approach to corporate criminal liability as adopted by English jurists and courts. A foremost Nigerian Jurist, Aniagolu JSC alluded to the influence of other jurisdictions on the evolution of the Nigerian legal system; he was in particular referring to the nature of relationship between Nigeria and the UK. In *Trenco (Nigeria) Limited v African Real Estate Limited*[21] Aniagolu JSC was of the opinion that the direction taken by Nigerian Courts on corporate criminal liability is indicative of the direction of courts across several jurisdictions. Hence the similarities between the UK and Nigeria. Though this Paper focuses on corporate criminal liability in relation to money laundering and terrorism financing; there are other laws in Nigeria that recognize the principles of corporate criminal liability. The Food and Drugs Act[22] and the Standards Organization of Nigeria Act[23] have made clear provisions encompassing the principles of corporate criminal liability.

Corporate criminal liability has grown into an important segment of criminal law in the United Kingdom and the courts have made clear decisions on the applicability of the concept. In *Lennard's Carrying Company v Asiatic Petroleum Company Limited*[24] the court was clear that in determining corporate criminal

[17] This Law was enacted after the ratification of the UN Convention Against Illicit Drugs and Psychotropic Substances 1988
[18] UNODC/FATF Experts Meeting Report 2016
[19] ibid
[20] Money service Businesses that engage in currency exchange
[21] (1978) 1 LRN 146 at 153
[22] Cap N1 L.F.N 2004
[23] Act 14 2015
[24] (1915) AC 705 at 75

liability it must look beyond the abstract qualities of the company and review the activities of its 'directing minds' who are influential enough to be referred to as its '*alter ego'*. This clearly lays the foundation for looking beyond the veil of incorporation in order to determine the acts of natural persons; taking into consideration the status and position such persons.The UK courts have gradually developed an approach to corporate criminal liability through precedence over the years The direction taken by UK Courts on the issue of corporate criminal liability can be attributed to a case in 1944; in *Director of Public Prosecutions v Kent and Sussex Contractors Limited*[25]though the court agreed that a 'corporation can only have knowledge and form an intention through its human agents' due to its nature but a review of its liability in relation to such actions can be situated within the acts of natural persons acting on its behalf. The Court emphatically stated that 'circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate' as if the company acts itself. In The *Queen v. Great North of England's Railway Company*[26]Lord Denman held that companies can be guilty of malfeasance and other courts also toed this line by relying on the doctrine of '*alter ego'.* This doctrine attributes actions of directors and officers of a company to its corporate personality and clears away the obstruction of corporate abstraction that affects the gauging of its mens rea and even the actus reus.

Yet it is the case of *Tesco Supermarkets Ltd v Nattrass*[27]thatthe House of Lords clarified the basis for corporate criminal liability in the UK. The Court was also of the opinion that that to arrive at the point of determination it mustascribe acts of natural persons to the company because the Company itself is abstract and cannot perform acts that may be evaluated for mens rea and actus reus. The courts divided the natural persons in the company into two groups of those it classified as 'hands' that only act as they are instructed and the second set of those that are the 'directing minds and will' of the company. The second set are considered the alter egos and their actions can be ascribed to the company in determining criminal liability. We need to dwell on the *Tesco Supermarkets Ltd v Nattrass* case because the House of Lords provided guidance on how to approach the determination of corporate criminal liability in the UK. The Court drew a distinction between the superior officers who are to be regarded as the 'directing minds and brain of the company'[28] and the ordinary servants who are to be regarded as 'hands'. Lord Reid stated that the Board of Directors, the managing Director and other senior officers can be considered the 'directing minds' of the company[29]. Though this position was a departure from the decision of another English court[30] a year earlier which held that a company will be criminally liable where an agent (not 'directing minds') while in employment of the company utilizes corporate powers for the benefit of the company while acting within the scope of his employment. Hence anyone considered as acting as an agent of the company can make it liable for criminal acts committed on its behalf. The second case seems to have made a sweeping and broad classification of the liability points that seem to mirror more of the US approach based on the respondeat superior doctrine. The alter ego doctrine provides only a narrow classification that pays attention only to the acts of senior managers or board members and not every employee..

A further review of two other caseswill shed more light on the established position of UK Courts to the reliance on the alter ego doctrine to determine corporate criminal liability. In *Attorney General s Reference (No.2 of 1999)*[31]though the Court argued that there is no fixed criteria to determine who is in a position to be considered an alter ego of a company; nonetheless it concluded that such persons are easily recognized because their acts mirrors the internal behavior in the company. The same approach was articulated in *Rowley v DPP*[32], where the Court gave a restrictive interpretation to parametres to be used in determining the type of persons whose *mens rea* and *actus reus* reflects that of the company in a manner as to ascribe it to it. In essence there must be a clear criteria for determination of persons whose *mens rea* could be attributed to the company for purposes of criminal liability and such persons must reflect a dominant behavioral pattern of the company. It is worthy to note that the Court in *Tesco v Nattrass* gives a more restrictive criteria by limiting the alter ego to an individual(s) who sit atop the management pyramid. Though a latter case of the same Court expanded this restriction. In *H.L. Bolton (Engineering) Co. Ltd*[33], the Court recognized managers of the company who were in charge of the daily running of the company as being persons whose mental state can be attributed to the company without minding their position on the corporate pyramid.

It is clear that certain natural persons embody the company in such a manner that their state of mind and acts can be attributed to the company. This in many ways infers that the state of mind of natural persons in vintage and principal status within the company can be considered weighty enough to become the 'directing will'

[25] (1944) KB 146
[26]*US Eng. Rep*. 1294 (Q.B 1846)
[27] (1909) 21 U.S 481
[28] ibid
[29] ibid
[30] Commonwealth v Beneficial Finance Company (1971) 275 N.E 33
[31] (2000) 2 cr app R 207
[32] (2003) EWHC 693
[33] (1957) 1 QB 159

of the company itself. This conclusion is better understood when we refer to the immortal words of Viscount Haldane LC in *Learnard Carrying Company Limited v Asiatic Petroleum Limited*[34] where he states that a company is an abstraction that 'has no mind of its own' that cannot be evaluated in isolation; hence in his view 'its active and directing will must consequently be sought in the person of somebody' that acts as its agent[35]. He concluded by stating that such a person will be considered 'the directing mind and will of the corporation' who is at the centre of its actions and an embodiment of its intentions. It is important to acknowledge that the often cited case of *Tesco Supermarket* ended with the company escaping liability because the court concluded that a store manager is far below the ladder to be considered a 'directing mind' that acted in a way that imposes liability on the company itself. This in many ways indicate that the test for determining the 'directing mind' is subject to a criteria that determines the position of the person in question.

The UK Courts have also accepted wilful blindness as a form of mens rea in determining corporate criminal liability; in *Regina v Sleep*[36] a UK court referred to instances where the defendant 'wilfully shuts his eyes to that fact' in determining the scope of his intention in committing a crime of possessing stolen goods. In two other cases the Courts in the UK have moved towards that direction in determining criminal liability; in *Bosley v Davies*[37] and *Redgate v Haynes*[38]; the courts suggested that actual knowledge is even unnecessary where it could be shown that a defendant wilfully blinded himself to facts and refused to ascertain facts. Hence in looking at acts of 'directing minds and will' we must be conscious that even where there are no confirmation of actual intentions the court can look at avenues where the natural persons driving a company were 'wilfully blind'.

In Nigeria the focus in determining corporate criminal liability is hinged on the doctrine of *alter ego* which is the adopted approach to determining actual intentions and corporate mens rea. This aligns with the position in the UK and tallies with the umbilical connection between the Nigerian legal system and UK jurisprudence. More so when assessing the applicability of the 'sub-layer' of wilful blindness as a form of assessing the actual intentions of those that are the 'directing minds and will' of the company as contemplated in the *Leanard's Carrying* case, the Nigerian courts have also relied on the alter ego doctrine. In *Orji Uzor Kalu v FRN*[39] the Court of Appeal made that conclusion when called upon to determine corporate criminal liability by stating that the Appellant, who is the first Accused in the case at the Federal High Court is the alter ego of the second Accused Slok Nigeria Limited and remained its directing mind even while he was the governor of a State. The same direction was taken by another panel of the Court of Appeal in *Romrig Nigeria Limited v FRN*[40] where it held that another Accused person who is a Director of Romrig Nigeria Limited was its alter ego and his absence at a key meeting with the Prosecutor meant that the Company was not part of the discussions at that crucial meeting.

O Okonkwo[41], a leading light of the study of criminal law in Nigeria explained the concept of legal personality as it applies to criminal law in Nigeria and in particular its applicability to corporate criminal liability. In his evaluation[42] the Criminal Code, a key statute that sets out crimes in Nigeria, makes no special provisions concerning the criminal liability of companies (as distinct from the individual liability of members comprising the company) and this to Okonkwo casted doubt on the applicability of the concept. He further stated[43] that there is no 'special reason why in principle a corporation should not be committed under the Criminal Code' because in his own conclusions every offence in the code starts with 'Any Person....' and it is trite law that a company is a 'person'.It is clear from judicial authorities that companies in Nigeria can be prosecuted for crimes either alone or alongside their agents, officers and directors. A well-documented judicial confirmation of corporate criminal liability in Nigeria can be deduced from the position of the Supreme Court in the case of *Abacha v Attorney General of the Federation*[44] when the court was called upon to determine whether a company can be prosecuted for a crime, the court emphatically held that a company can be prosecuted as if it is a natural person. The court stated that by virtue of *Section 65* of *Companies and Allied Matters Act 1990* a company may be liable in crime to the same extent as a natural person and it can be prosecuted for the common law offence of conspiracy to defraud; even though *mens rea* is an important ingredient of that offence.

[34] supra
[35] ibid
[36] (1861) Eng. Rep. 1296
[37] (1875) 1 Q B 84
[38] (1876) 1 Q B 89
[39] supra
[40] supra
[41] Professor Okonkwo is foremost authority on criminal law and his book 'Criminal Law in Nigeria' has been a major reference point for about three decades
[42] C. O Okonkwo, Criminal Law in Nigeria (2nd Edition, Spectrum Law Series , 2012)
[43] ibid
[44] (2014) 18 NWLR Pt 1438 , 21

In the *Tesco case* the House of Lords compared the company to a human body and provided guidance using anatomic functions; citing different organs and the functions they perform in the human body and ascribe it to the fictive personality of the company. They likened directors and managers of the company to the brain, intelligence and willpower of the company; whilst other employees were ascribed with status of other non-vital organs. Remarkably this still represents the approach in the UK as well as the direction taken by Nigerian courts. This departs from the broad classification of all employees as agent of the company without any hierarchical or functional relevance as being done in the US under the respondeat superior doctrine. It is clear that the alter ego doctrine recognizes the need to review the status of the natural persons before transferring the import of their act to a company that may not have sanctioned their conducts.

It is quite clear that the Nigerian approach to corporate criminal liability is in tandem with the direction taken in the UK and the doctrinal affinity has indicated that the jurisprudence in Nigeria as well as its Jurists have taken a stand. Therefore a comparative analysis of the two jurisdictions will only highlight the similarities and even if it finds any divergence it will be on approach and methods rather than any doctrinal shift or misalignment. The only area where these similarities are not well cut out is in determination of the principles of wilful blindness as a sub-layer of corporate criminal liability. It is clear that the Nigerian jurisdiction is still at the formative stages of charting a path on how it will approach the application of wilful blindness. Instructively in both the UK and the US the general principles that outline the approach to determination of corporate criminal liability also form the core part in determination of wilful blindness. Hence there are indications that the Nigerian jurisdiction will still take the path the UK took in building an approach to determination of wilful blindness.

Comparative Review of Corporate Criminal Liability Under Nigerian Law and the United States

Historically, the respondeat superior doctrine was applied in master-servant and employer-employee relationships to determine the vicarious liability between them[45]. When an employee or a servant commits a civil wrong against a third party, the employer or master could be liable for the acts of the servant or employee when those acts are committed within the scope of the relationship. The third party could proceed against the servant and master, that is, the employee and employer. The action against the employee would be based on his conduct. The action against the employer is based on the theory of vicarious liability, a theory that places the blame of the acts of a person on another due to a- existing relationship. The employer-employee relationship is the most common area respondeat superior is applied, but the doctrine is also used in the agency relationship. In this agency set up the main principal acquires liability from actions of an agent although the main principal did not actually partake in the commission of such acts. There are three vital touch points in determining the applicability of such liability on a non-active party. First is to determine whether the acts in question fall within the boundaries of the agency relationship between the parties[46]. Secondly is to confirm whether the acts in question were committed are in line with the expectation of the acts to be committed by the agents as part of the relationship or of a general nature as to constitute an expectation. Lastly it is important to determine whether the agent was motivated to profit from those acts to the exclusion of the principal[47]. The determination of these three points will guide on whether the doctrine of respondeat superior can be applied to a situation. It is necessary to note that same principles applies when we are determining corporate criminal liability.

Clearly basic premise of corporate liability is *respondeat superior*. In 1909[48], the United States Supreme Court held that a corporation could be held criminally liable for the acts of its employees under the traditional civil doctrine of *respondeat superior*. The case did not set forth any standards for this extension of criminal liability; this has left the criminal courts with an open ended opportunity to develop the principles of corporate criminal liability in the US. There are indications that application of corporate liability for criminal conduct has been expanding in the US. It has become more common for prosecutors to charge or threaten to charge corporations for serious crimes even though they arise out of regulatory matters and previously were handled administratively. Given the seriousness of criminal prosecution or the threat of prosecution to corporations, the liability of corporations should be clearly circumscribed. Yet, as noted above, the courts have not clearly delimited one of the primary principles of liability, *respondeat superior.* The United States Supreme Court addressed the availability of *respondeat superior* as a theory of corporate liability in the case of *New York Central & Hudson River Railroad v. United States*[49]. But that case, again, indicated that *respondeat superior* may be applied in criminal cases but it did not define under what circumstances.

As stated above in the United States the approach to corporate criminal liability is better understood when we look at the decision of the US Supreme Court in *New York Central & Hudson River Railroad Co. v.*

[45] Beale S.S (2014) The Development and Evolution of the US Law of Corporate Criminal Liability
[46] ibid
[47] ibid
[48] New York Central Case
[49] supra

United States; the US Supreme Court explained that it applied the civil law doctrine of *respondeat superior* to a criminal case 'in the interest of public policy' and to allow it 'effectively enforce the provisions of a statute'. The Court also rejected claims that corporations should be immune from criminal prosecution because doing so "would virtually take away the only means of effectually controlling the subject-matter [interstate commercial transactions] and correcting the abuses aimed at [it]."[50] This decision laid the foundation to the unfettered application of the principles of corporate criminal liability within the US.A review of the decision in *New York Central & Hudson River Railroad v. United States* provides an insight into the thinking of the US Courts. New York Central Railroad Company had been convicted of bribery because an assistant traffic manager working for it gave "rebates" on railroad rates to certain railroad users. These rebates affected the effective shipping rate for some users making it less than the mandated rates; this violated the Elkins Act, which imposed criminal sanctions. In affirming the conviction of New York Central the Supreme Court applied the respondeat superior standard, holding that since an agent of New York Central committed a crime while carrying out his duties, New York Central was liable. The Court applied this broad standard to New York Central with almost no analysis of whether respondeat superior was an appropriate standard for assessing criminal intent. The Court noted that the principle of respondeat superior was well established in civil tort law, then simply stated that "every reason in public policy[51]" justified "go[ing] only a step farther"[52] and applying respondeat superior to criminal law. There are indications that other American courts have followed the lead of *New York Central*, in *Egan v United States*[53] that Court was of the opinion that 'there is no longer any distinction in essence between the civil and criminal liability of corporation, based upon the element of intent or wrongful purposes'[54].

The decision in *New York Central* and those that subsequently aligned with it have been criticized as failing to appreciate the inherently different nature of civil and criminal liability, failing to consider civil alternatives to imposing corporate criminal liability, and failing to examine alternative standards for imposing criminal liability on companies[55]. More so there is no effort to assess corporate intent since even the most compliant company can be infected by the liability acquired by its agent; who may have exposed the company to criminal liability. But it must be acknowledged that in most criminal cases intent and acts are key ingredients; in fact Intent to violate the law is an essential element of almost every crime. Criminal prosecutions are pursued precisely because of their deterrent impact. The stigma and shame of a criminal conviction, coupled with the disabilities a conviction carries, helps conveys this impact. In short, while the notion of respondeat superior is well suited to torts, it is anathema to the criminal law; but it remains the best alternative in the US to holding companies to account. In *United States v George Fish Inc*.[56] the Court , while affirming the conviction of the company, states that failure to impose corporate criminal liability will lead to a situation that will 'immunize the offender who really benefits and open wide the door of evasion'[57].

In another pace setting case; *United States v. Hilton Hotels Corporation*[58], the Court relied on a broad interpretation of the Respondeat Superior doctrine in arriving at its decision. 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 assistant manager of the hotel testified that they specifically told the purchasing agent not to threaten suppliers. Nevertheless, the court convicted Hilton Hotel Corporation of antitrust violations under the respondeat superior standard because to outsiders, the assistant manager appeared to be acting on behalf of the corporation. Although the respondeat superior test was applied in *Hilton Hotels*, the issue of a wayward employee arises and whether his singular action defines the corporate culture. In another case , *United States v. Sun-Diamond Growers of California*[59], the court explained its holding by noting the policy justification for holding corporations criminally liable for acts of their agents: "to increase incentives for corporations to monitor and prevent illegal employee conduct"[60]. This analysis is typical of judicial creation and application of corporate criminal liability. The court relied upon a utilitarian rationale with no discussion of whether corporate liability for crimes is consistent with principles of criminal law. The doctrine of Respondeat Superior allows courts to find intent on the part of a corporation even when it is

[50] ibid
[51] ibid
[52] ibid
[53] (1897) 16 U.S 188
[54] ibid
[55] Beale S.S (2014) The Development and Evolution of the US Law of Corporate Criminal Liability
[56] (1946) 798 F.2d
[57] ibid
[58] (1976) 467 F.2d 1000
[59] (1999) 526 U S 398
[60] ibid

not possible to identify a corporate agent with criminal intent; in *United States v. Bank of New England*[61], while acknowledging that under applicable law a corporation's criminal intent is imputed from an agent's intent, the bank argued that it was not liable because there was no bank employee with sufficient criminal intent to violate the reporting requirements. According to the bank, the teller who conducted the transactions did not know that the law required the filing of the reports in the circumstance presented by the customer; the bank employee who knew of the reporting requirements did not know of the customer's transactions. Thus argued the bank, there was no single bank employee with sufficient *mens rea* to impute to the corporation. These cases point to a shaky entrenchment of the respondeat superior doctrine as a single lane expressway to a uniform determination of corporate criminal liability in the US. The Court disagreed with the bank and relied on the 'aggregation theory' to impute the combined acts of the employees on the company.

In most recent times US courts have reaffirmed the position of respondeat superior as outlined in the *New York case* by giving a broad and wide justification for determining corporate criminal liability. In *Arthur Andersen LLP v US*[62]the Court is of the opinion that making companies liable for crimes is part of an important 'public policy bargain'. The Court's position was expounded by Richard Gruner[63] who states that the bargain balances privileges to the company from its recognition as a single corporate form that limits liability of shareholders and provides a veil to protect them. In return the bargain requires the 'single corporate form' to comply with the law and its managers must ensure it has crime prevention processes in place[64]. Yet the worrying part in the bargain referred to is the width of application of the respondeat superior doctrine. In *U.S v Gold*[65]and *U.S v Automatic Medical Laboratories*[66] the courts held that a company can be found criminally liable for the acts of any employee and not only the acts of its managers; this is worrisome because the parametre is quite broad. Another US court in *U.S v American Radiatorand Standard Corporation*[67] went further to hold that under the respondeat superior doctrine the company will be criminally liable for as long as the acts of the said employee 'directly related to the performance of the type of duties the employee has general authority to perform'[68]. In fact another court went extreme and concluded that it is sufficient that the employees' acts within a situation that can be perceived as having an apparent authority[69]. E. Wise[70] believes it does not matter that the acts in question were ultra vires or unauthorized or contrary to public policy or even contrary to specific instructions given to an agent or employee. According to C. Harding[71] the alter ego theory was developed by the English Law by importing the concept from civil law of tort ; the theory considers that the acts of a sufficiently high ranking corporate member is adequate to classify it as the act of the company itself. Therefore the emphasis is on the ranking of the person rather than merely determining his employment status as enunciated under the respondeat superior doctrine. Therefore Harding believes the alter ego doctrine seems narrow enough to target only senior managers and not too broad as to include any employee.

Furthermore in the US Wilful blindness falls under the criminal law doctrine of conscious avoidance and in *United States v Goffer*[72] the court concluded that wilful blindness is enough as a *mens rea* to convict for wilful misconduct. But the subjective test for wilful blindness in the US was set in *Global Tech Appliances Inc. v SEB S.A*[73] where the court set a standard of two component parts. First the defendant must 'subjectively believe that there is a high probability that a fact exists' and secondly he must have taken deliberate steps and actions 'to avoid learning of that fact'. Importantly the court concluded that a defendant who meets these conditions is as culpable as those who have actual knowledge.

The position in Nigeria is different in both form and substance from the direction taken by the US legal system. The position in Nigeria is made in the image of the UK approach that is based on the alter ego doctrine. The Nigerian courts have held the position that companies can be criminally liable to the exclusion of natural persons where the same natural persons act as its alter ego. In *R v Zik's Press Ltd*[74]and *R v African Press Ltd*[75]the court held companies liable for seditious activities of the natural persons acting on its behest because of

[61] (1987) 921 F.2d 844
[62] (2005) 544 U S 696
[63] Richard Gruner, Corporate Criminal Liability and Prevention (20005) *Law Journal Press*
[64] ibid
[65] (1984) 737 F.2d 800
[66] (1985) 770 F.2d 399
[67] (1970) 433 F.2d 204
[68] ibid
[69] U S v Bank of New England (1987) 821 F.2d 844
[70]E . Wise, Criminal Liability of Corporations (1996) Kluwer Law International 383
[71] C. Harding, Criminal Liability and Corporations – United Kingdom (1996) Kluwer Law International 369
[72] (2013) 721, F.3d, 128
[73] (2011) 131 S.Ct 2060
[74] (1847) 12 W.A.C.A 202
[75] (1952) 14 W.A.C.A 57

their positions in the companies. In yet another case *A G (Eastern Region) v Amalgamated Press Ltd*[76] Ainley C.J was of the opinion that where a newspaper publishes falsehood it will be criminally liable as much as its 'directing minds; will be as well. Therefore the Nigerian courts are not relying on respondeat superior as the US courts but rather on the alter ego doctrine. This departure from the US approach is further accentuated in *Kurubo v Zech-Motison Nigeria Limited*[77], where Tobi JCA (as he then was) was of the view that the liability of a company is dependent on the action of its human drivers and such natural persons will incur liabilities on its behalf. In this instance Tobi JCA refers to 'drivers' as the main persons that manage and make decisions for the company

The broad nature of the approach by the United States makes it easier to call companies to account but it also leaves a lot of exposures that will make it more difficult to narrow down acts of each and every employee to the company when assessing its criminal liability. The Identification approach taken by Nigeria that relies on first determining the status and position of natural persons before even ascribing his acts to the company is more pragmatic and certainly better streamlined to pinpoint criminal liability. As it is now the Nigerian approach to corporate criminal liability is different from what is obtainable in the US as it has followed the path treaded by the UK.

II. CONCLUSION

The difference between the respondeat superior and alter ego doctrines lies in the parametre they rely on to determine corporate culpability. The respondeat superior is broad and acts of any employee of a company can be attributed to that company; this wide parametre means a rogue or wayward employee can make the company criminally liable for his reckless acts. Whilst the alter ego doctrine is hinged on whether the person whose act is under review is in a senior position as to be considered a 'directing mind' of the company. The alter ego doctrine considers other employees 'hands' and their acts are not considered that of the company in determining its criminal liability.

Another major difference between the position in the UK and the US in relation to corporate criminal liability, in the US it is not necessary to identify the specific individuals who committed the crime; it is sufficient to prove that one or more agents of the corporation must have committed it. The US approach also went a step further in outlining another angle of liability based on the act of one employee as adequate to hold the company itself culpable. Another major departure from the approach in the UK is the aggregation sub-theory that states that while no single employee had sufficient information necessary to have the required mens rea of the offense, if multiple individuals within the corporation possessed the elements of such knowledge collectively, their aggregate knowledge can be attributed to the company. Therefore, in some situations companies will be liable when no employee is personally liable, because it is necessary that the employee acted on behalf of the company. Hence the employee must act with intent to benefit the company, but the company does not have to actually derive a benefit from the employee's act. If the employee intended to benefit only himself or a third party, the company is not liable except for strict liability offenses. Although if the employee intended to benefit both himself and the company, the company is held criminally liable.

In spite of the advantages and clarity of the alter ego doctrine approach adopted in the UK and Nigeria it has its downside. Some Scholars are worried that the requirement that for companies to be criminally liable the crimes must have been committed by a high ranking officer or manager constitutes an impediment in combating corporate crime because most companies will avoid liability by empowering lower level employees to make decisions or act on its behalf. The Tesco case readily comes to mind where the House of Lords concluded that a store manager is far below the ladder to be considered an alter ego. The UK system presents another disadvantage when requiring the identification of the individual who committed the act as a prelude to determine corporate criminal liability. The identification of the individual who committed the crime is often times impossible. Although the alter ego doctrine has the advantages of being clear, predictable, and consistent with the general principles of criminal law, it still leaves a gaping hole in matters of general fairness and efficiency. The US approach via the respondeat superior establishes a wide system of corporate criminal liability that promotes general fairness and deterrence but lacks the focus on clarity and precision associated with the alter ego doctrine. The US doctrine's adoption of the aggregation theory and the fact that any employee can engage the criminal liability of corporations has the advantage of making it easier for the prosecution of companies as against the single lane approach of the alter ego doctrine.

Despite the availability of the doctrine of respondeat superior in determining corporate criminal liability, US criminal law does not impose crippling criminal penalties whenever a rogue or wayward employee engages in criminal conduct. The practice of corporate criminal liability has evolved in ways that address the

[76] (1957) 1 E.R.L.R 12
[77] (1992) 5 NWLR Pt 239 , 102

principal critiques of respondeat superior. Prosecutorial discretion focuses on corporate culpability and cooperation, and these factors also guide organizational sentencing. However, as the US federal system now operates, the breadth of potential liability generates significant pressure to cooperate at the investigative stage, and to settle when wrongdoing is uncovered. Accordingly, critics now call for procedural reforms as well as changes in the doctrine of corporate liability. The persistence of the doctrine of respondeat-superior-based corporate criminal liability and its limitation in practice shed light on three key aspects federal criminal law. First, the Sentencing Guidelines have served as a more limited substitute for comprehensive criminal code reform. Second, the federal justice system lacks the resources to process the vast majority of cases falling under the criminal code, and prosecutorial discretion is relied upon to select a small fraction of cases for prosecution. Finally, like corporations, all defendants receive incentives for cooperation that may effectively compel them to plead guilty and/or assist in the investigation and prosecution of others. Like corporate criminal liability, the entire federal criminal code has long been the subject of harsh criticism and calls for comprehensive code reform.

The comparative analysis between the doctrines of respondeat superior and alter ego is a good way to show why there are divergence areas. But it is also necessary to acknowledge that both doctrines have their roots in civil law and they were merely deployed to the criminal law arena because of the awkward nature of corporate criminal liability. There is that difficulty in actually ascribing the acts of a natural person to a juristic set up and only such allegory between civil law concepts and criminal law principles will have created the much needed bridge. The two doctrines have provided an easy way out using old concepts to arrive at an approach that transfers liabilities across realm without scarifying basic requisites such as mens rea of a crime as with the premise for criminal liability. The comparison has also shown that the same challenges were resolved through different strategies; without leaving behind the principles that determine corporate criminal liability.

The growing application of wilful blindness as a part of corporate criminal liability is gradually giving it a stand of its own; as a tool for prosecution and a basis for ascribing cats of natural persons to a company. Though the issue of wilful blindness is still being nurtured and may not have acquired the certainty of a form or approach for determining criminal culpability, it still has that potential. In both the US and the UK jurisdictions the courts have accepted wilful blindness as a mens rea and not as a replacement or a substitute; hence in Nigeria there are indications that the same approach will be used to pinpoint the ingredients of its application. This Paper is therefore an opportunity to look at an uncharted issue in order to build an approach as well as highlight the risks to companies. There is a risk that most companies in Nigeria are dwelling on traditional corporate liabilities with zero mitigation of wilful blindness; a possible mens rea for acts of its alter ego that can be ascribed to the company.

The Nigerian legal system is still within its colonial legacies and the alter ego doctrine fits into the existing reliance on common law principles by its operators and jurists. In many ways this simple connection explain away why determination of corporate criminal liability in Nigeria has been seamless and most courts have agreed with the general principles that makes companies vulnerable to acts of their directors and senior managements. Likewise the deepening of the application of money laundering laws and regulations in the country will provide a breeding ground for the growth of wilful blindness as an intent or mens rea for most of the offences captured under the laws. Nigerian legal system must therefore sail through these formative stages and ensure there are coherent approaches to not just determination of corporate criminal liability but further to the liabilities growing out of wilful blindness.

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