Imputation of Criminal Liability on Corporate Bodies in Cameroon

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Abstract: **With the rise in corporate crimes in the world today, the question has been whether a corporate body can be held liable for corporate crimes or not. The paper answers in the affirmative that a corporate body can be subject to criminal prosecution and liability for crimes occurring within the corporation. In Cameroon for instance, criminal liability is imputed when there is violation of the provisions of criminal law, that is, when there is commission of an act prohibited by the law such as invasion of privacy, publication of inaccurate financial statement, tax evasion, accounting and financial fraud, manslaughter, corruption and embezzlement. This excludes those crimes that cannot be committed by corporate bodies such as bigamy, incest, perjury and rape. Considering that a corporate body cannot be imprisoned, or punished like an individual, there are ways to punish a corporation. A corporate body may be fined, ban, closed placed under judicial supervision for a specified period of time. With this in mind, the paper analyses the concept of corporate criminal liability with specific regards to corporate capacity, the basis upon which such liability attaches to a corporation and sanctions with the aim of illustrating the weaknesses of the different aspects trundled-out above.**

Keywords: **Imputation, Criminal, Liability, Corporate entity, Cameroon**

I. INTRODUCTION

Recently, there has been an increased focus on corporate criminal liability. This is due to the rise in corporate crimes ranging from accounting and financial fraud, tax evasion, embezzlement, bribery and corruption. The most recent and prominent case in Cameroon is the Eseka train crash of October 2016, in which the negligence of the managing organs of the company in charge of railway transport resulted in great, loses of money, jobs, and even lives.[1] With the rise in corporate crimes in the world today, the question has been whether a corporate body can be held liable for corporate crimes or not. The paper answers in the affirmative that a corporate body can be prosecuted and held liability for crimes occurring within the corporation. Several jurisdictions have accepted and applied the concept of corporate criminal liability under various models;[2] some legal systems do not recognise any form of corporate criminal liability;[3] while others have imposed only administrative penalties on corporations for the criminal liability of certain employees.[4]

The countries that do recognize the concept have in a harmonious fashion given it a statutory status. Cameroon for instance, has amended its criminal law to introduce the concept of corporate criminal liability in order to punish corporate bodies for wrongdoing occurring within the corporation.[5] The introduction of the concept demonstrates the country's political will and appetite among other countries to bring corporations to account under the criminal law. Under the New Penal Code, criminal liability is imputed when there is violation of the law, that is, when there is commission of an act prohibited by the law by organs or representatives of the corporation save crimes that cannot be committed by corporate bodies such as bigamy, incest, perjury and rape. Section 74-1(a) (b) of the New Penal Code exists for the purpose of punishing corporate bodies for crimes committed on its behalf. Considering that a corporate body cannot be imprisoned, or punished like an individual, there are ways to punish a corporation. A corporate body can be fined, ban, closed and placed under judicial supervision for a specified period of time.[6]

In light of the above, the paper analyses the concept of corporate criminal liability with specific regards to corporate capacity, the basis upon which such liability attaches to a corporation and sanctions with the aim of illustrating the weaknesses of the different aspects trundled-out above.

II. CORPORATE CRIMINAL LIABILITY AND ITS APPLICABILITY

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[1] Elvis Teke 'Eseka train accident: Names of 744 victims published" available at: www.crtv.cm, 6 august 2019.

[2] The United Kingdom and Canada adopted the identification model, the United States and South Africa have adopted the vicarious liability approach while Austria adopted the organizational approach; see Allen Arthur Robinson 'Corporate Culture' As a Basis for the Criminal liability of Corporations' prepared for the United Nations Special Representatives of the Secretary –General on Human Rights and Business, February 2008, p4)

[3] These countries include Brazil, Bulgaria, Luxemburg, and the Slovak Republic)

[4] They are Germany, Greece, Hungary, Mexico and Sweden.

[5] The Old Penal Code of 1965 was amended by Law No.2016/007 of 12 July 2016 relating to the Penal Code (hereinafter referred to as New Penal Code.

[6] Sections 18 and 19 of Cameroon New Penal Code.

Like France, Cameroon established for the first time a set of corporate criminal liability principles and sanctions providing in Section 74-1(a) (b) of the New Penal Code that with the exception of the state and its agencies, "Corporate bodies shall be criminally responsible for offences committed on their behalf by their organs or representatives."[7] Since then, Cameroon has had little practice. In determining the applicability of corporate criminal liability, it is otiose to delineate the types of corporate bodies that it applies to and the types of crimes for which a corporation can be liable.

As regards the types of corporate bodies, Section 74-1 (a) of Cameroon's New Penal Code assures us of the predictability of the Penal Code by individualizing the entities that cannot be assimilated to juristic persons or corporate bodies. The legislators have held that with the exception of the state and its agencies, corporate bodies shall be criminally responsible for offences committed on their behalf.[8] As a signatory to the treaty relating to the Organisation for the Harmonisation of Business Law in Africa (OHADA treaty), corporate bodies here include all commercial companies which are incorporated or unincorporated in the region.[9] Due to the difficulty of circumscribing the boundaries between a company and a partnership, the French term "société commercial", that is, commercial companies, is used.[10] In terms of Article 4 of the Companies Act, a commercial company is a "contract between two or more persons who agree to assign assets in kind or cash to an activity for the purpose of sharing profits or to contribute to losses that may result from the contract".[11] This definition is misleading because the OHADA's legislator has not sufficiently maintained the distinction between a company and a partnership.

Nonetheless, the new framework offers a wide range of business structures through which commercial activities can be conducted – private unlimited, sleeping partnership, private limited, public limited, joint venture, de facto partnership companies, and economic interest groups.[12] With the exception of the joint venture and de facto company, every company is required to apply for registration at the competent court within whose jurisdiction it carries out its principal activities.[13] The concept of incorporation does not extinguish the corporate criminal liability meaning corporate bodies which include partnerships, incorporated joint ventures and de facto company shall be criminally responsible for offences committed on their behalf except the state and its agencies.

As concerns the types of crimes for which a corporation can be liable, Cameroon like England, Netherlands, Belgium and Canada adopted the general liability system[14] under which a corporation is liable for any type of crime except those that cannot be committed by corporations such as treason, bigamy, incest, murder and rape, that is, those that it cannot be imprisoned or punished like an individual.[15] Essentially, a corporate body can be prosecuted for invasion of privacy, accounting and financial fraud, tax evasion, embezzlement, bribery and corruption and manslaughter with the most recent and prominent case in Cameroon being the Eseka train crash of October 2016, in which the negligence of the managing organs of the company in charge of railway transport resulted in great, loses of money, jobs, and even lives (manslaughter).[16]

For prosecutors to convict a corporate body for a crime committed, they must establish beyond reasonable doubts the quilt of the company. In so doing, prosecutors must establish that an act or omission has been done which is forbidden by the law and has been done with a guilty mind.[17] While the prohibited act (*actus reus*) can be attributed to a corporate entity, the real difficulty arises in relation with the mental element (*mens rea*) and in making the corporation appears before the judge. The reasoning behind this is that a corporation is an artificial person. As an artificial person, it is important to ask the question: who is responsible for corporate wrongdoing? The answer is that "corporate bodies shall be criminally responsible for offences committed on their behalf by their organs or representatives."[18] Section 74-1 (a) brings to light the direct liability of a corporation for the acts of its organs or representatives. Bearing this in mind, one may ask the question: who constitutes the organs or representatives of a company?

2.1 Corporate capacity: Organs or representatives of a company

In law, when a company is incorporated,[19] it acquires a separate legal personality with rights and obligations as if it

[7] See (n 5) above.

[8] Section 74-1(a) of the New Penal Code of July 2016 provides "Corporate bodies shall be criminally responsible for offences committed on their behalf by their organs or representatives."

[9] Uniform Act on Commercial Companies and Economic Interest Group (hereafter referred to as the Companies Act), 14th May 2014.

[10] The French Companies Act 1 August 1967.

[11] Art 4 Companies Act is a blueprint of art 1832 of the French Civil Code 1985.

[12] Oumar and Mamadou *Guide practique: Des* sociétés *commerciales et du* groupement d'intérêt économique *(GIE)* (2008) 1-2157 (translated as *Practical guide: Commercial Companies and economic intérêts groups*).

[13] See arts 20-68 *General Commercial Law.* In Cameroon, the President of the CFI is empowered to register companies and security rights in the country. This is by virtue of Decree 2002/302 of 3December 2002; Asuagbor "The uniform act on general commercial law: Access to and exercise of trading profession" 11 (2004, unpublished and on file with author) (hereinafter referred to as Asuagbor).

[14] Anca IP, Corporate *liability of Corporations – A Comparative Jurisprudence*, submitted in partial fulfillment of the requirements of the King Scholar Program, Michigan State University College of Law, Spring 2006, p21.

[15] See (n 6) above.

[16] Elvis Teke 'Eseka train accident: Names of 744 victims published" available at: www.crtv.cm, 6 august 2019.

[17] Section 74 (2) of Law No. 2016/007 of 12 July 2016 relating to the Penal Code provides that "criminal liability shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it".

[18] (n13) above.

[19] Registration is effected by the registrar of the competent High Court within whose jurisdiction the principal place of business of the trader is located or the place where it conducts its administrative and financial services.

were a human being.[20] This Principle was established by the House of Lords in the English case of *Solomon v Solomon & Co Ltd*.[21] As a legal person, a company has the right to own property;[22] to sue and be sued, and to be liable for its debts. Thus if Boraine and Marvel form a registered company, the separate legal personality will be granted to Boraine and Marvel Ltd. Boraine and Marvel can be appointed managers of the company making contracts on behalf of Boraine and Marvel Ltd as its agents. Rights and duties under the contract will belong to the company and not Boraine and Marvel. The company has the capacity to act and in acting, it attributes its actions to organs or representatives of the company. While there is no definition of 'organ' and 'representative', the term 'organ' is understood to encompass directors, officers, members of the board[23] and shareholders in general meeting;[24] both of which constitute the two main organs of the company while the term 'representative' encompasses individuals empowered to act on behalf of the company such as the managing director, a receiver etc.

The organs or representatives are considered the egos or 'directing minds and will' of the company and whatever they say or do is considered to have been done by the company itself. As agents acting on behalf of a company, the organs or representatives owe a fiduciary duty to act in good faith/bona fide in the best interest of the company. To know whether organs of a company have the status and authority in law to make their acts the acts of the company, it is necessary to look at the company's Articles of Association (AA) and the Companies Act. The Companies Act vests management powers in the management body, officers and board of directors[25] to commit the company with respect to 3rd parties without having to show prove of any instrument granting such powers.[26] Managers are responsible for the day to day management of a company. This includes but not limited to the keeping of a day book in which daily transactions are recorded, a general ledger, general summary balance and an inventory book;[27] to prepare an annual summary financial statements and management report describing the situation of the company during the last financial year, prospects for continued company activity, the evolution of the cash situation and the financing plan.[28]

As agents acting on behalf of a company, directors owe a fiduciary duty to act in good faith/bona fide in the best interest of the company. In exercising their management functions, shareholders cannot interfere or exercise any supervisory authority over the directors. This is because the corporate framework does not provide for a two-tier system of governance[29] but the two-tier board option,[30]with management either in the hands of the board of directors (*conseild'administration*) presided over by a chairperson or a sole managing director (*administrateur générale*) acting as chief executive officer (CEO).[31] Whether in the hands of the board or a managing director, there is no separation of the role of a chairperson from that of the CEO.[32] These provisions add flexibility in the corporate form and attract foreign investment.

The AA may limit the powers of the directors but such limitation is not binding on a third party acting in good faith, unless it can be proven that the third party was aware of this fact and could not ignored it in the given circumstances.[33] This is in fact saying that the organs or representatives' powers are not limited to the object (s) with which the company was registered. In fact, an organ or representative with authority may carry out any transaction not connected with the company's registered object (s) or act outside their and the company would not be considered to have acted *ultra vire*s. For instance, if a company is formed to manufacture leather bags and along the line it decides to produce shoes which is not one of it objects, such transaction cannot be challenged on the grounds that the company has acted over its registered object because the company has full powers to act.[34] Though the power of corporate organs or representative to act is not limited by its AA or any law in the country, the organs or representatives do not have the power to commit a crime. Therefore, any wrongdoing or misconduct is necessarily a crime for which the company will be prosecuted.

2.2 Basis of corporate criminal liability

A snapshot of the Penal Code and other statutory provisions concerning corporate liability[35] reveals the fact that a corporate body would be criminally liable for offences committed by its organs provided it can be established that the offences were committed on behalf of the company.[36] For such liability to be considered, it is sufficient that the organ must have committed the offence in the name and account of the company in the exercise of its duties or in the course of pursuing or undertaking task which are required by virtue of its position. This leads us to the conclusion that criminal liability of corporate bodies depends on that of its agents, that

[20] Art 98 *Companies Act.*
[21] (1897) AC 22.
[22]*See Macaura v Northern Assurance*, [1925] AC 619.
[23] Art 121, Companies Act.
[24] The shareholders can only act when exercising default powers, that is, when the directors cannot act.
[25] Ibid, art 122.
[26] Art 121of the Companies Act.
[27] Art 13 UA on General Commercial Law.
[28] Art 138 Companies Act.
[29] The splitting of the board into a supervisory board and a management board.
[30] Articles 494, *OHADA Companies Act*.
[31] Ibid, Articles 414.
[32]Ibid, Articles 429-43. The authors discussed the role of the President (chairman), Director General (CEO) and the President Director General.
[33] Art 122, Companies Act.
[34] Ibid, art 122.
[35] See art 4 (3) of Law No. 89/02 of 29 December 1989 on Toxic and Dangerous Waste; art 64 (1) of Law No. 2010/012 of 21 December 2010 relating to Cyber Security and Cyber Criminality and Law No. 05/015 of 29 December 2005 on the Fight against Child Trafficking.
[36] See (n8).

is, its organs or representatives.[37] To convict the company, the prosecutor as earlier mentioned, must establish beyond reasonable doubts the quilt of the organs or representatives considered the 'directing mind' or whose actions are said to be that of the company itself. The million dollar question is whether a corporation can be prosecuted in the absence of its directing mind. In *R V A Ltd* and others,[38] The English court of Appeal endorsed the prosecution of a company in the absence of its 'directing mind'.

The court's underlying argument was that "in reality, however, a corporation can only operate through its directing mind (s) and their knowledge is, and must remain, the knowledge of the corporation. The presence or otherwise of a directing mind at the trial is irrelevant because as the judge observed had the director died, become incapacitated, or his attendance could not be secured would it not be possible to prosecute the corporation however egregious the conduct." Unlike the UK, corporation cannot be held liable in the absence of its directing mind because its criminal intent is established through the criminal intent of the individual who committed the offence even if they lack intent. Notwithstanding the statutory provisions, a corporate body and its organs may be prosecuted for the same crime if the organs were accomplices in the wrongdoing.[39]

While a corporate body and its agents are jointly liable for acts committed against third parties,[40] a corporate body shall not be liable for offences and torts committed by its organs and representatives in their individual capacity.[41] With this, one may conclude that Cameroon adopted the United Kingdom (UK)'s identification model which according to Alun Milford, general counsel of the UK serious fraud, is an inadequate model for attribution to a corporation of criminal liability. Unfair in its application, unhelpful in its impacts, and it underpins a law of corporate liability, that is, unprincipled in scope".[42]

Having discussed the liability of corporate entities, it is appropriate to consider the issue of sanctions which has been the subject of doctrinal debates, and often times, the argument for rejecting corporate criminal liability.

III. SANCTIONS

The fact remains that when a corporation is held liable, it is punished and punishment includes a variety of sanctions. The issue of sanctions is today the subject of doctrinal debates, and often times, the argument for rejecting corporate criminal liability. For some critics, CCL should be rejected because criminal responsibility is individual in character and not corporate. This is in fact saying that in sanctioning a corporation, all its members are sanctioned regardless of whether they participated in the criminal offence.[43] It has equally been argued that CCL would result in double sentencing of both the corporation and its members for the same offence. On the other hand are those who uphold the doctrine of CCL. To them, CCL does not conflict with the individual character of criminal responsibility because the only person suffering the direct effects of a criminal sanction is the company whose property is separated from its members who assumed to risk their contributions to the corporation when they are reckless or act in their personal capacity. [44] Put differently, members cannot avoid legal penalties that would result from their actions as members. In spite of the divergent views discussed above, Cameroon has adopted a comprehensive sentencing system for individuals and corporate entities.

Like the French Penal Code, the Cameroon Penal Code has listed the sanctions that can be applied to individuals and corporations alike with the most common sanction being the fine which is applicable to all types of offences.[45] Fines[46] being the most appropriate sanction affects the corporation greatly in that once imposed, it may have an indirect diminishing effect on stockholders incomes and even reduced the number of employees.

It is trite law that no punishment shall be imposed without a lawfully defined crime. This is the embodiment of section 17 of the Penal Code which states that "no penalty or measure may be imposed unless provided by law, and except in respect of an offence lawfully defined. This principle originated from the latin maxim "*nolum crimen nola peona sine lige"* meaning no crime no punishment without a text. Therefore if an individual commits a lawfully defined crime and is found guilty, he may be sentenced to death,[47] imprisoned or fine. Alternatively, he may be subjected to a community service or reparatory sentence.[48] Due to the artificial nature of a corporation, it cannot be imprisoned or sentenced to death, but can be fined, dissolved.[49] The death penalty has been replaced with the penalty of corporate dissolution. Though the Penal Code and Companies Act[50] do not define the term "dissolution", it is a legal procedure in which a corporation

[37] Kwanga CF "Corporate Criminal Liability in Cameroon: The Dawn of a New Era" Commonwealth Law Review Journal (CLR), vol, 4, 2018, 278.
[38] (2016) EWCA Crim. 469.
[39] An accomplice or co-offender "is a person who, in agreement with another, takes part with him in the commission of an offence", section 96, New Pena Code. See, sections 64 (2) of the Law relating to Cyber Security and Cyber Criminality and 74-1 (c) the New Penal Code.
[40] Art 165 Companies Act
[41] Ibid.
[42] Arnold and Kaye P "Development in Corporate Criminal liability", Corporate Fraud and Corruption, Special Report, February 2017, Financier Worldwide Magazine.
[43] Anca (n14) above.
[44] Ibid, 37.
[45] Section 17, Cameroon Penal Code.
[46] Fines on defaulting corporate bodies shall be "fine of from 5000000 to 50 000 000CFA francs". See Section 64 (1) (3) of the Law relating to Cyber Security and Cyber Criminality 2010.
[47] Sections 22 Cameroon Penal Code. For fear of violation of human rights, Cameroon has applied a de factor moratorium on the death penalty since 1977 but has never been made official.
[48] Ibid, sections 18 (a) and 18-1.
[49] Ibid, section 18 (b).
[50] Uniform Act on Commercial Companies and Economic Interest Group of 30th January 2014 (otherwise called the Companies Act).

effectively ceases its existence. One may be tempted to say that dissolution and liquidation are synonymous. The terms are not to be confused as the latter is the consequence of the first. The decision to dissolve a solvent company can be made because of different reasons, such as a decrease in the economic activity, a misunderstanding between the members, or because the shareholders no longer wish to continue the activity.[51]

Alternatively, a corporate entity may be ban, closed and placed under judicial supervision for a specified period of time.[52] Unfortunately, the Penal code has not specified the time period for which a corporation can ban, closed or placed under judicial supervision. With reference to art 64 (1) of the Law relating to Cyber Security and Cyber Criminality,[53]

- Dissolution shall be for a period of three years and above and this is where the corporate body has departed from its declared object to aid and abet the incriminating act;
- Definitive Prohibition or temporary prohibition for a period not less than 5years, from directly or indirectly carrying out one or more professional or corporate activities;
- Temporary closure for a period of not less than 5 years under the conditions lay down in section 34 of the penal code[54] of the establishment or one or more establishments of the company that used to commit the incriminating acts.[55]

The sentence of placing a corporate body under court supervision is provided in section 34-1 of the penal code. Judicial representative otherwise called legal representative is a court appointed official with knowledge and experience in corporate activities. Art 4 of the Revised Uniform Act on Collective Proceedings and Wiping off Debts[56] gives each OHADA state the right to adopt rules of application relating to the regulation and supervision of legal representatives. Member states equally have the right to control the exercise of the functions of legal representatives and to supplement the conditions for the appointment of legal representatives whose mission and period are prescribed by the court in respect only of the activity of which the offence was committed.[57]

IV. CONCLUSION

Due to the dangerous nature of the activities of corporations and the menace they present to the society, many countries including Cameroon have embraced the concept of corporate criminal liability. Corporate criminal liability means the liability of a corporate body for crimes it commits. Many approaches have been adopted and Cameroons settles for the identification approach practiced in the United Kingdom wherein a corporate body shall be held liable for crimes committed on its behalf by its organs or representatives. In spite the rejection of corporate sentencing, Cameroon has adopted a comprehensive sentencing system for individuals and corporate entities. Under the system, an individual can be fine, sentenced to death and imprisoned while a corporate body is fined, ban, closed or paced under judicial supervision giving way to one difference between individual criminal liability and corporate criminal liability.

[51] Ibid, articles 20-35.
[52] Ibid, section 19 (b).
[53] Law No. 2010/012 of 21 December 2010.
[54] Section 34 of the Cameroon Penal Code provides "where the competent court orders the closure of a business or industrial establishment or any premises devoted to gainful activity, which was used for the commission of an offence, such closure shall imply a ban on the exercise of the same business or industry or activity in the same premise, whether by the offended or by any other to whom he may sell, transfer or et the establishment or premises".
[55] Section 64(1)(4), Cyber Security and Cyber Criminality.
[56] The OHADA Revised Insolvency Act 10 September 2015.
[57] Section 34-1 (2), Penal Code.