



CORPORATE CRIMINAL LIABILITY IN NIGERIA: LESSONS FROM SOUTH AFRICA, AUSTRALIA AND UNITED STATES OF AMERICA

Oreluwa Ojo Solomon & David Eyongndi***

Abstract

The propriety of corporate criminal liability is a controversial theme. Some expressed views appeared to have whittled down the efficacy of the artificial legal personality conferred on companies. One view argues that; a company cannot itself be said to have perpetrated a crime when in fact, the said act had been executed by its human actors. Another view canvassed that; if the company can legally be entitled to participate in the corporate benefits accruable to natural person, it should not be absolved of criminal liability thereof. This article adopts a doctrinal methodology in appraising corporate criminal liability in

Nigeria, South Africa, Australia and United States of America with a view to drawing lessons for Nigeria. It discusses theories adopted in the ascription of a guilty mind (mens rea) which is a sine quanon for criminal culpability as well as the inadequacies of these theories. The article finds that; the law has over time found a balance between these two arguments, by simultaneously holding the company and its human actors liable for their criminal conducts. The article caters also for the inadequacy of sentencing options under the law.

Key words:

Corporations, Crimes, Criminal Liability, Vicarious liability, Sanctions

1. INTRODUCTION

Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief and are less amenable to disgrace or punishment. They neither feel shame, remorse gratitude nor goodwill.

Hazlitt, W.

The law as established in the case of *Salomon v. Salomon Co Ltd*¹ which possesses universal recognition, is the unequivocal legal personality vested on every company upon incorporation. The immediate effect of this is that, the company is a distinct entity, from those who founded it,² and also vested with the capacity of a natural person of full legal capacity.³ Notwithstanding this legal façade, the court in *HL Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons Ltd*⁴ as well as the provision of section 85 of the Companies and Allied Matters Act (CAMA),⁵ have recognized the limitations of the company to act by itself, and its ability to act through a class of natural persons known as the Board of Directors and the Members of the Company, collectively referred to as the Organs of the Company.

The simultaneous understanding that in law a company is a separate person from its founders as well as its ability to act through its organs, are the facts that gave rise to debates as to corporate criminal liability. Criminal law as established in judicial decisions provides that a crime

is only committed when the conduct of the defendant exhibits both the intention to do the incriminating act as well as the actual performance of the incriminating act. Hence, the question often confronted by the court is the determination of who bears the liability in corporate crimes i.e. should the burden be on the company (the principal) or its organs (the agent)?, what factors would be considered by the courts in the determination of who bears the liability and the manner in which the punishment is met?

This article is divided into seven parts, which starts with the general introduction in section one. Section two explores the meaning and scope of corporate crimes and corporate criminal liability. Section three discusses the diverse theories on corporate criminal liability and in section four the Nigerian position on corporate criminal liability is evaluated. Section five, gives a comparative overview on the position of the law on corporate criminal liability in some select jurisdictions and in section six the lessons that Nigerian Jurisprudence may garner therewith are expounded. Section seven contains the conclusion and recommendations.

2. CORPORATE CRIMINAL LIABILITY AND CORPORATE CRIMES

A crime is defined under the Criminal Code Act as an act or omission which makes the person doing the act or making the omission liable to an offence under the law,⁶ hence, the commission of a crime infers criminal liability. The basic principle of criminal liability is contained in the Latin maxim, *actus non facit reum, nisi mens sit rea*, meaning that criminal liability can only be imposed when a crime has been committed with the intention to do so.⁷ Therefore, there

6 Section 2 of the Criminal code Act, CAP C38 LFN 2004.

7 Singhvi J. 'Corporate Crime and Sentencing in India: Required Amendments in Law'. *International Journal of Criminal Justice Sciences* (2006); 4-5.

1 *LL.B (Hons) Bowen, BL, Assistant Lecturer, College of Law, Bowen University, Iwo, Osun State. oreoluwaajosolomon@gmail.com. Telephone: +2348156180014.

**LL.B (Hons) Calabar, LL.M (Ibadan), BL, Lecturer, Department of Private and Commercial Law, College of Law, Bowen University, Iwo, Osun State, Nigeria. Email: david.eyongndi@yahoo.com eyongndidavid@gmail.com Telephone: +2347033252212.

1897 AC.22.

2 Section 42 of the Companies and Allied Matters Act (CAMA) 2020 CAP. C20 Laws of the Federation of Nigeria 2004.

3 *Ibid* Section 100.

4 1957 1QB 159.

5 2020 CAP C20 LFN 2004.

is no criminal liability in the absence of both a criminal act and a criminal mind, which are expressed in the Latin words *actus reus*⁸ and *mens rea*⁹ respectively. It is in respect to this that the law on corporate criminal liability developed through a rough patch and is yet clouded with many uncertainties.

Wells, defined corporate crimes as those corporate activities which are perceived to involve a transgression of some aspect of criminal law.¹⁰ They are defined as, illegal acts, omissions or commissions by corporate organizations themselves, social or legal entities or by officials or employees of the corporations acting in accordance with the operative goals or standard, operating procedures and cultural norms of the organization, intended to benefit the corporations themselves.¹¹

The quagmire in the principle of corporate criminal liability is exhibited in the existence of several debates on its efficacy and propriety. On one part, a school of thought is of the opinion that the general notion of corporate personality is only a legal façade hence, as an artificial entity, a corporation lacks the moral turpitude necessary for the commission of a crime.¹² It is contended that it would be wholly baseless, to treat a corporation as if it had a blameworthy state of mind which, by definition, it can neither have nor come to possess.¹³ According to Smith and Hogan, “Since a corporation is a creature of law, it can only do such acts as it is legally empowered to do, so that any crime is necessarily *ultra vires* and the corporation having neither body nor mind, cannot perform the acts or form

the intent which are prerequisite of criminal liability.”¹⁴

This school of thought further contends that the notion of corporate criminal liability is unsustainable, because of the legal impossibility to enforce imprisonment when a crime is said to have been committed by a corporation,¹⁵ rather the burden of sanction is often borne by the employees as well as the principal organs of the company.¹⁶

Hence, it foils any attempt to attain the goals of deterrence, punishment and rehabilitation, as pursued by penal sanctions.¹⁷

On the other side of the debate the supporters of the principle of corporate criminal liability, argue that the principle of corporate legal personality, is not a legal fiction, and that a corporation has a distinct personality from its actors, therefore, if the law recognizes the ability of the company to discharge legal functions, it will only be appropriate that the law recognizes its ability to function illegally.¹⁸ The writers of this article, align with the argument of the supporters of the notion of corporate criminal liability, and further argue that the goal of criminal sanctions is not restricted only to retribution but also spans to restoration, and it is in the latter that true equilibrium in the justice system may be found. Hence, while a corporation may not be capable of being imprisoned, the imposition of fines, and even more stringent punishments such as the revocation of licenses as well the winding up of the company constitutes sufficient justification for the existence of corporate criminal liability.

8 Meaning criminal act.

9 Meaning criminal intention.

10 Wells C, *Corporations and Criminal Responsibility* (2nd ed., New York, Oxford UP, 2001); 28.

11 Krame R, ‘Corporate Criminality: The Development of an Idea’ in Hochstedler (ed), *Corporate as Criminals*. (Beverly Hills, Sage Publication, 1984) 126.

12 Manjeet K, ‘Criminal Liability of Corporations: An Indian Perspective’ (2009) <<https://ssrn.com/abstract=2192308>> accessed 20 September, 2021; 17.

13 *Ibid.*

14 Smith, J. & Hogan B, *Criminal Law: Cases and Materials*. (8th ed., London, Butterworths, 2002); 248.

15 Osagie O, ‘Imposing Corporate Criminal Liability: A Comparative Analysis’ (2019) <https://www.academia.edu/40136307/IMPOSING_CORPORATE_CRIMINAL_LIABILITY_A_COMPARATIVE_ANALYSIS_BY_OLIVER_OMOREDIA_OSAGIE&ved=2ahUKewirjvOzqlzAhUOCGMBHejxA7gQFnoECAMQAQ&usq=AoVvaw2jYXz_Du2z1YVWKNiCk6fe> accessed 10 September 2021.

16 *Ibid.*

17 Manjeet (n 12).

18 Osagie (n 15).

3. THEORIES OF CORPORATE CRIMINAL LIABILITY

The contention with corporate criminal liability was not in the actual act which constitutes the offence but in the determination of the criminal intention, which an artificial entity does not possess. The theories of corporate criminal liability are the different standards or legal grounds utilized by the courts, in the evaluation and consequent determination of whether there will be corporate criminal liability.¹⁹ Overtime, the law had determined cases of corporate criminal liability using these preexisting legal yardsticks and they include the following:

3.1 Vicarious Liability

This is otherwise known as the agency theory and is based on the principle of *Respondet Superior* which means let the master answer.²⁰ The principle of Vicarious Liability has its roots under the law of tort, and it is the principle of law that extends the liability for the acts of an agent to the principal, when such act is done in the course of the agent's authorized duties.²¹ In the case of *Ifeanyi Chukwu v. Soleh Boneh (Nig) Ltd*,²² the court defined vicarious liability as the case of one person taking the place of another in so far as liability is concerned.

In the determination of whether or not vicarious liability may be imputed, there must be the subsistence of an agency relationship,²³ and the agent must have been acting within the scope of his authority.²⁴ Traditionally, at

common law, a corporation can only be liable for strict liability welfare offenses where the requirement to prove a criminal intention is not of necessity, and the practicable penalty was often a fine, which the company could easily pay off.²⁵ The law also had a place for non feaseance and misfeaseance crimes, hence, where the corporation is vested with a legal obligation, and fails to discharge such an obligation, the company may be found criminally liable, or where it unlawfully exercises a lawful authority.²⁶

However, in *Moussell Bros. Ltd v. London and North-Western Ry. Co*,²⁷ the court recognized the application of vicarious liability to corporate criminal liability. Hence, a company will be criminally liable for the criminal acts of its employees done in the course of their employment. This application was at variance with the general principle of criminal liability which did not recognize the ability of a person to be criminally liable for the activities of another, and this is because criminal law is addressed through a personal perspective, and a person is only guilty of his own acts or omission and not that of others.²⁸

The limitation with this theory is that there is no personal liability of the company. Rather, the company is liable only by virtue of the personal liability of another.²⁹ Thus, the corporation cannot be convicted of crimes of personal nature such as manslaughter or stealing.³⁰ It also became contentious as to whether the company could indeed be liable vicariously in the absence of a criminal intention; a key element for a criminal conviction.³¹

19 Oraegbunamn, K.E, Ozioko, M.V & Adeyemi, A.E, 'An Appraisal of Corporate Criminal Liability in Nigeria' (2019) *International Journal of Innovative Legal and Political Studies*; 39.

20 Mrabure K & Abhulimhen-Iyoha A., 'A comparative analysis of Corporate Criminal Liability in Nigeria and other jurisdiction' (2020). <<https://doi.org/10.4236/blr.2020.112027>> accessed 10 September 10, 2021; 15.

21 Laski J, 'The Basis for Vicarious Liability' (1916) 26(2) *Yale Law Journal*, 110-114.

22 2000 LPELR-142. See also the case of *Launchbury v Morgan* (1971) 2QB, 245.

23 *Bello v Dadah and Ors* (2016) LPELR-40337.

24 *Ibid.* see also, *SPDC (Nig) Ltd & Anor v Addico & Anor* (2015) LPELR-25785.

25 Oraegbunamn, (n 19).

26 *Ibid.*

27 1917] 2 K.B. 836. See the case of *DPP v Kent and Sussex Contractors* [1944] 1 K.B. 146 and *R v ICR Haulage Contractors Co Ltd* [1944] K.B. 551.

28 Namusasi M, 'Corporate Criminal Liability in Kenya' (LLM thesis, Submitted to MOI University, Kenya 2011) 18.

29 Osagie (n 15).

30 See *E. v Cory Bros. & Co. Ltd.* [1927] 1 K.B. 810.

31 Osagie (n 15); see also the case of *DPP v Kent and Sussex Contractors* [1944] 1 K.B. 146 and *R v ICR Haulage Contractors Co Ltd* [1944] K.B. 551.

3.2 Identification Theory

As the law evolved, the courts found a new approach for the determination of the criminal intentions of a company, and this development is encapsulated in two dictum of the court under common law. In the case of *Leonard Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*³², Viscounts Haldane held that; “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 some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation.”³³

It is the understanding that some members represent the controlling will of the company and are responsible for the actions and decisions of the company that informed the decision of the court in the case of *HL Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons Ltd.*³⁴In that case, the court held that; “A company may in many ways be likened to a human body. It has a brain and a 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 do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will, of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.” Therefore, in the determination

of the controlling mind of the company, the courts will have recourse to the intentions of the Board of Directors and the Members in General Meeting.

Hence, corporate criminal liability at common law evolved from the recognition of only strict liability offenses and non feasant crimes, to the extension of corporate crimes to misfeasance offenses, and the acceptance of the intentions of the controlling mind of the company as being tantamount to that of the company and finally reckoning with the ability of the company to be guilty of assault, manslaughter, rape and other perceived personal crimes, although subject to limitations.

4. THE NIGERIAN APPROACH TO CORPORATE CRIMINAL LIABILITY

Nigeria, being a common law jurisdiction, had its law on corporate criminal liability evolve in the same path as England. Thus, corporate criminal liability was unaccepted in the Nigeria Jurisprudence, until the landmark decision of *R v Attorneys for Anglo-Nigeria Tin Mines Ltd.*³⁵where Berkley J. stated that; *in modern times, certain statutes have come in force, which render corporate bodies liable to penalties in certain events.* The provision of section 42 of the CAMA,³⁶ provides that “as from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold hand, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the

32 [1915] A.C 705 P.713.

33 *Ibid.*

34 [1957] 1QB 159 at P. 172.

35 [1926] 10 NLR 69.

36 2020 CAP C20 LFN 2004.

assets of the company in the event of its being wound up as mentioned in this Act.”

This section is considered as the legal justification for the corporate legal personality of a company in Nigeria. The Companies and Allied Matters Act, which is the Nigerian bible on corporate law provides that; “A company shall act through its members in general meeting or its board of directors or through officers or agents appointed by or under the authority derived from the members in general meeting or the board of directors.”³⁷ It further provides that any act of the members in general meeting, the board of directors, or 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 is criminally and civilly liable to the same extent as if it were a natural person.³⁸ However, the acts of any officer or agent of a company shall not be deemed to be acts of the company, unless the company, acting through its members in general meeting, board of directors, or managing director, shall have expressly or impliedly authorized such officer or agent to act in the matter; or the company shall have represented the officer or agent as having its authority to act in the matter.³⁹ This authority may be conferred prior to the said act or may be subsequently ratified by the company.⁴⁰ However, although the said act may not be deemed to be the act of the company, the company shall not be exempted from its vicarious liability for the act of its servants while acting within the scope of their authority.⁴¹

The Nigerian approach to corporate criminal liability balances between the vicarious liability theory and the identification theory.⁴²

37 Section 85(1) CAMA 2020.

38 *Ibid.* Section 89.

39 *Ibid.* Section 90 (1).

40 *Ibid.* Section 90(2).

41 *Ibid.* Section 90(3).

42 Suleh-Yusuf M, ‘Corporate Criminal Liability in Money Laundering and Terrorism Financing Prosecution in Nigeria, United Kingdom and United States: A comparative Review’

Hence, the law recognizes the liability of the company for the criminal acts or omissions of its employees done in the course of their employment while also imputing the state of mind of the company’s alter ego as the state of mind of the company itself for the purpose of criminal liability.⁴³ The problem with this however, is that where the act or omission had been done by a junior employee within the company, the company will be exempted from liability, and this lacuna in the law may be exploited by corporations for continuous breaches of the law.

There are a plethora of statutes recognizing diverse crimes for which a company may be found guilty, among which are the Economic and Financial Crimes Commission Act⁴⁴, Money Laundering (Prohibition) Act⁴⁵, the Companies Income Tax Act⁴⁶, Companies and Allied Matters Act⁴⁷, Trade Malpractices (Miscellaneous Offenses) Act⁴⁸ etc. However, the limitation of these statutes is not in the provision of sanctions, but in the provision of appropriate sanctions for a corporate entity. Many of these statutes make provision for imprisonment for the commission of an offence defined by the law, while it is clear of all contention, that it is wholly impossible for a company to serve a prison sentence.

The validity of a criminal law under the Nigerian Legal system, hinges on many factors, one of which is that it must be contained in writing.⁴⁹ However, while the Criminal and Penal Acts, are contained in writing, and recognize that a crime is only committed by a ‘person’, there is no express definition of a person is under these laws.⁵⁰ However, a cursory look at the provision of

(2017) 6(7) *International Journal of Humanities and Social Science Invention*; 15-25.

43 Mrabure and Abhulimhen-Iyoha (n 20).

44 CAP E7 LFN 2004.

45 2011 CAP F 34 LFN 2004.

46 CAP C21 LFN 2004.

47 2020 CAP C20 LFN 2004.

48 CAP T 12 LFN 2004.

49 Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 CAP C23 LFN 2004.

50 Mrabure and Abhulimhen-Iyoha (n 20).

the Interpretation Act elucidates this gray area, by providing that a person is defined as a body of persons whether corporate or unincorporated.

Another contention with corporate criminal liability in Nigeria is on the determination of who bears the liability and the criteria for such determination. Hence, the courts have to determine whether the company or its officers should be solely liable for the *actus reus* or whether the liability should be shared among both parties.⁵¹ It is important to state that in Nigeria, Corporate Criminal Liability is shared both between the company and the officers of the company. Hence, depending on the provision of the law, the liability for an offence may vest solely on the officer of the company; or vest solely on the Company, or balanced evenly or unevenly between the company and the officer.

5. CORPORATE CRIMINAL LIABILITY IN OTHER JURISDICTIONS

This section of the article, critically appraises the quagmire of corporate criminal liability in selected jurisdictions such as South Africa, Australia, and the United States of America in comparison to Nigeria with a view to drawing lessons for Nigeria.

5.1 South Africa

The provision of section 332(1) of the South African Criminal Procedure Act⁵² provides that, for the purpose of imposing upon a corporate body, criminal liability for an offence, whether under any law or at common law:

- a) Any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that

51 Ekundayo E, Orisakwe O & Lalude O, 'An Analysis of Corporate Criminal Liability in Nigeria' (2020) 11(2) *The Gravitas Review of Business and Property Law*; 47-57.

52 No 51 Of 1977.

corporate body; and

- b) The omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

In the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavoring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body).⁵³

South Africa's approach to corporate criminal liability as exhibited in this provision of the law is known as the 'derivative approach'.⁵⁴ Hence, unlike the vicarious liability approach, the liability of the company is not limited to the acts of the employee which falls within the scope of his employment, but it also extends to acts which are outside the scope of the employee's employment, so long as the employees intended to further the interests of the employer when he acted.⁵⁵

Again, the act or omission need not have been committed by a principal officer of the company, but it is also sufficient that the criminal act or omission is done by junior staffers of the company. Therefore, unlike the dictum of the courts in *Bolton Engineering v Graham and sons*,⁵⁶ the state of mind of the junior staff may be imputed as the state of mind of the company.

53 *Ibid.*

54 Farisani D, 'The Regulation of Corporate Criminal Liability in South Africa: A close Look' (2006) 27(2) *Obiter*; 270 <<https://journals.co.za/doi/pdf/10.10520/EJC85186>> accessed 15 September 2021.

55 Dzinotyiweyi T, 'Corporate Criminal Liability in South Africa: Why Section 332 of the Criminal Procedure Act May not be the Most Effective Way to Regulate Corporate Crimes in South Africa' (LL.M Thesis. Submitted to University of Witwatersrand, 2012) 14.

56 1957 1QB 159.

5.2 Australia

Australia's laws on corporate criminal liability are unarguably the most sophisticated model of corporate criminal liability in the world.⁵⁷ The laws on corporate criminal liability within this jurisdiction have evolved from the application of the principles of vicarious liability to the identification approach and finally to what is currently known as 'organizational liability.' It is important to state that, Australia operates a federal system of government whereby the Commonwealth⁵⁸ constitutionally only has legislative powers in respect of certain specified matters, and these matters do not include general criminal law.⁵⁹ Consequently, most criminal laws are state laws and the federal criminal offenses are confined to those enacted in relation to matters in which the Commonwealth has legislative powers.⁶⁰ As a result of this structure, some Australian states have a comprehensive criminal code and others rely upon a combination of statutes and the common law.⁶¹

A system of organizational liability is one that is focused squarely on the liability of the corporation in its own right.⁶² Hence, it is concerned with corporate policies, procedures, practices and attitudes; deficient chains of command and oversight, as well as corporate cultures that tolerate or encourage criminal offenses.⁶³ Australia veered in the path of organizational liability after the final report of the Model Criminal Code Officers Committee (MCCOC) concluded that "the identification approach was no longer appropriate as a basis of corporate criminal

liability given the flatter structures and greater delegation to relatively junior officers in modern corporations".

By the provision of section 12 of the Australian Criminal Code Amendment (Application) Act⁶⁴ (CCA), where an employee, agent or officer of a body corporate, acting within the actual or apparent scope of their employment or within the actual or apparent authority, commits the physical element of an offence, the physical element of the offence must be attributed to the body corporate.⁶⁵ Subsection 3, paragraph 1 of the section, further states that, if intention, knowledge, recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to the body corporate, if that body corporate expressly, tacitly or impliedly authorized or permitted the commission of the offence.

Authorization for the commission of an offence may be established on the four bases which are set out in Paragraph 2 of the subsection as follows:

1. The body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or
2. A high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or
3. A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the non-compliance; or
4. The body corporate failed to create and maintain a corporate culture that required compliance.

57 Robinson A, 'Corporate Culture as a Basis for the Criminal Liability of Corporations' <<https://media.business-humanrights.org/media/documents/f726334fd87adfd3d31a22f5f4b931502678a764.pdf>> accessed 25 September 2021.

58 The Commonwealth refers to the Federal Government.

59 Robinson (n 53).

60 *Ibid.*

61 Diskant, E, 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Procedure' (2008) 118(126) *The Yale Law Journal*; 128-172.

62 *Ibid.*

63 *Ibid.*

64 No 4, 2000.

65 Section 12(2) of the Australian Criminal Code Amendment (Application) Act No 4, 2000.

From the provisions of these sections, it is evident that a corporation within Australia and which is subject to the federal laws of the country will be criminally liable for the authorized acts of its employees irrespective of their cadre in the company's employment. In addition to this, however, where the corporate culture of the organization, is such that facilitates the commission of an offence, then whether or not there is an express or implied authorization to execute the wrongful act or omission, the company will yet be liable.

Corporate culture is defined as “an attitude, policy, and rule, course of conduct or practices existing within the body corporate generally or in the part of the body corporate in which all relevant activities take place.”⁶⁶ Thus, where the culture of the organization requires a level of productivity, which cannot be attained by the employees without a breach of the law, the company will be found liable notwithstanding whether the act was expressly or impliedly authorized.

5.3 United States of America

In similitude to Australia, the United States also operates a Federal system of Government. Thus, it has criminal laws at both the state and federal levels, although the majority of prosecutions are brought under state criminal laws.⁶⁷ The liability of corporations under federal laws is based on the doctrine of *respondeat superior* or vicarious liability. Thus, a corporation may be criminally liable for the illegal acts of officers, employees or agents where:

1. The individual's actions were within the scope of their duties or
2. The individual's actions were intended, at least in part, to benefit the corporation.⁶⁸

However, despite the apparent simplified approach to corporate criminal liability at the federal level, the US Government has a more developed sentencing regime than most countries, including Australia and Nigeria. Unlike the difficulty experienced in Nigeria and Australia where the courts are plagued with the need to determine the applicable sentence, for a corporation when the statutorily imposed sentence is imprisonment, Chapter 8 of the Federal Sentencing Manual⁶⁹ sets out extremely detailed guidelines for the sentencing of organizations convicted of federal felonies and class A misdemeanors and in so far as is clearly intended to foster reform of the corporate culture of defendants.⁷⁰ Corporate culture considerations are also taken into account in the assessment of appropriate fines and other orders to be imposed on corporate defendants.⁷¹ Thus, the absence of an effective compliance and ethics program is considered to be an aggravating factor in the determination of a company's culpability score.⁷² There is a rebuttable presumption that an organization does not have an effective compliance and ethics program if an individual:

1. With high-level personnel or an organization having fewer than 200 employees; or
2. Within substantial authority personnel, but not within high-level personnel, or any organization, participated in, condoned or was willfully ignorant of the offence.

The provision of the law empowers the court, to order a company to a probationary term, for a period not exceeding five years, where doing so, is necessary to ensure that changes are made within the organization, to reduce

66 Robinson (n 53).

67 *Ibid.*

68 Diskant (n 57) 172.

69 3E1.1 November 2012.

70 *Ibid.*

71 Mrabure and Abhulimhen-Iyoha (n 20).

72 Robinson (n 53).

the likelihood of future criminal conduct.⁷³ Probation terms may include the requirement to develop and submit to the court an effective compliance and ethics program, make periodic reports as to compliance with the program and submit to audits and interviews of employees, conducted at the corporation's expense by the probation officer or court appointed experts.⁷⁴

Within the country, state criminal laws vary in their approach to corporate criminal liability. Hence, some states have provisions that are based on the Model Penal Code, which while preserving a mechanism for imputing liability that is very similar to the vicarious liability model existing in federal criminal law, also allows the corporation to be convicted of an offence if the offence was; *authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or a high managerial agent acting on behalf of the corporation within the scope of his office or employment.*⁷⁵

6.0 LESSONS FOR NIGERIA FROM THE PRACTICE IN THE SELECTED JURISDICTIONS

Corporations are increasingly being used in the perpetration of crimes, which defeats the express provisions of the law as contained under section 18(3) of the Companies and Allied Matters Act 2020, which provides that a corporation shall not be formed for the purpose of executing a crime. The complexities that entwine the artificial legal personality of a corporation are the factors upon which the dilemmas of the courts are invigorated. However, the law should have the propensity of evolving to meet the needs of those who rely on it and not simply remain buried in doctrines and principles.

73 Section 8(d).

74 Robinson (n 53).

75 Mrabure and Abhulimhen-Iyoha (n 20).

The steps which have been taken in the jurisdictions considered in this article are cues to the Nigerian Legislators that there is more work yet to be done with respect to corporate criminal liability in the country. The criminal code Act, which is the principal statute on criminal law within the country, needs a substantial redrafting to meet the tides in other jurisdictions. The law should expressly reflect that a company is a person as contemplated under the statute. Also, while a company may not be vested with the capacity to serve an imprisonment term, there are other more effective and efficient sanctions that guarantee deterrence that can be imposed on the company, among which is the probation sanction as seen in the United States, suspension of license among others.

The presumption that only the state of mind of the principal officers of the company can be attributed to the company for the purpose of criminal convictions will only encourage corporations to device other means for the willful execution of criminal conduct, and among which is the utilization of the junior staffs for the perpetration of crimes. In the jurisdictions considered in this article, the laws have recognized this lacuna and as such the state of mind of junior officers of the company may be attributed to the company so long as the act or omission occurred in the employee's course of employment or in the furtherance of the company's goals.

Corporate Social Responsibility remains a matter of ethics under the Nigerian Company Law. Hence, failure to be socially responsible comes with little to zero legal sanctions. Therefore, employees of the company are comfortable with doing just enough to secure their employment even when this comes with the infraction of the law. Taking a cue from what is obtainable in Australia as well as in the United States Nigeria can take the next step away from the identification approach to that

of organizational liability. Thus, where the corporate culture in an organization, is such as to encourage or facilitate the commission of a crime, or where this is not the case, but the company had taken no step to dissuade the propensity of its staffers to breach the law in the discharge of their duties or in the furtherance of the company's objectives, then the company should be made to bear the consequential criminal liability arising therefrom.

7.0 CONCLUSION

The doctrine of vicarious liability is the premise on which corporate criminal liability

was invigorated in common law jurisdictions and it is beyond all doubts that it met the needs of the time. However, laws should be revolutionary, constantly evolving to meet the needs of the time. Corporations have overtime exploited the weakness of the law in escaping culpability for crimes executed. The identification approach to corporate criminal liability in Nigeria has its limits and it is only appropriate that the law be used in mending the bridge by an adaptation of practices which has strengthened the legal framework on corporate criminal liability in other jurisdictions.