

CORPORATE CRIMINAL LIABILITY IN CAMEROON: THE DAWN OF A NEW ERA

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ABSTRACT

This article examines the current state of Cameroonian law with respect to corporate criminal liability for negligent or reckless acts and omissions in the conduct of their businesses. This paper analysis the legal framework for corporate criminal liability with specific regards to the amended Penal Code provisions with specific focuses on what constitute corporate crimes as spelt out in the amended Penal Code of 12 July 2016. The paper hails the incorporation of corporate criminal liability into the law. However, the paper upholds that the law poses some theoretical challenges in the attribution of corporate criminal liability and practical problems linked with the procedure of applying sanctions. The paper calls for a review of the criminal procedure code to suite the amendment of the criminal code and the effective implementation of the new law by the courts so as to achieve deterrence.

Keywords: *Corporate Crime, corporations, criminal liability, Cameroon.*

INTRODUCTION

Corporate criminal liability is on the rise in Cameroon.¹ It is for this reason that the lawmakers, in 2016, decided to introduce for the first time into the Cameroonian legal system, the liability of corporate bodies.² Following this amendment, companies and other legal entities are directly liable for crimes committed on their behalf. The Cameroonian penal code which was enacted in 1965 and came into force on 12 June 1967, did not take into consideration, corporate criminal

¹ It would be noted that various financial institutions in Cameroon are being liquidated due to accounting and fraud scandals; The Eseka train crash of October 2016 is an example of a corporate crime due to the negligence of the managing organs of the company in charge of railway transport in Cameroon.

² Corporations are known for environmental pollution, corruption, tax evasion, mismanagement of funds, embezzlement, production of defective goods, money laundering, market manipulation, labour exploitation etc. In a globalized world where corporations are much larger, operate worldwide and make use of different laws to evade public regulation, to evade taxes, elude public regulation and commit corporate wrongdoings which are detrimental to the public, the need to impose liability on corporate behavior becomes pressing; See D. Brodowski & al. *Regulating Corporate Criminal Liability*, Springer International Publishing, Switzerland, 2014, p 2.

liability but only the criminal liability of physical persons.³ It maintained the old position of the common law and civil law rules that were inherited from the colonial masters.⁴ The paper traces the inability of the courts to properly sentence guilty corporations because of the limitations of the law. Most often, courts had no legal backing to hold corporations liable. Only administrative sanctions were imposed on corporations.⁵ This situation has changed with the integration of corporate criminal liability into the Cameroonian Penal Code.⁶ The question which remains is; whether the forms of punishment previewed by the amended Penal Code can achieve the real purpose of criminal punishment which is ‘retribution’ and ‘deterrence’. The article, therefore, seeks to critically analyse the issues, and challenges related to criminal liability of corporations, focusing attention on the identification of those responsible for corporate crimes from the legal perspective and the extent to which corporations could be held liable under the revised Cameroonian Penal Code.

DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN CAMEROON

Corporate crimes are defined as “illegal acts, omissions or commissions by corporate organizations themselves as social or legal entities or by officials or employees of the corporations, acting in accordance with operative goals or standard operating procedures and cultural norms of the organization, intended to benefit the corporations themselves.”⁷ The notion that lawbreaking deserves punishment is of a fundamental nature to the establishment of law and order in any society. Punishment helps to regulate moral behavior and prevent reoccurrence of crime in the future. As such, the same reasons for retribution and deterrence which are applicable to individuals are equally valid for corporations.⁸

Corporate personality and imposition of criminal liability has been of great burden to lawmakers. It has been a long-standing problematic question of whether corporations can be

³ Article 74 (2) of the penal Code of 1965 provided that “*criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the results which completes it.*”

⁴ In the past in both the Common Law and Civil law jurisdictions, it was inconceivable that a corporation could be held criminally liable. The argument advanced was that a corporation as an artificial person had no physical existence and could therefore not be subject to prescribed penalties attached to the offences. See C.M.W. Clarkson, “Kicking Corporate bodies and Damming their Souls”, M.L.R. VOL 59, (1996), P1.

⁵ Administrative sanctions are not effective in deterring corporations from committing crimes. This is because they are mostly based on fines and administrative trials are not public.

⁶ Article 18 (b), 18 (1) (b), 19 (b) and 20 (b) of Law No.2016/007 of 12 July 2016, amending the Penal Code.

⁷ See Garner B.A., Black’s Law Dictionary, 7th ed. West Group, st. Paul Minn, 1999, p 377.

⁸ D. Brodowski & al. *Regulating Corporate Criminal Liability*, Springer International Publishing, Switzerland, 2014, p 36.

held guilty or not. This is because as a general rule, only human beings can commit offences.⁹ The basic rule on criminal liability is based on the Latin maxim *actus non facit reum, nisi mens sit rea*. This means; to make one liable, it must be shown that an act or omission has been done which is forbidden by law and has been done with a guilty mind. The reasoning behind this is that corporations are artificial persons distinct in identity from those who formed them and as such, the imposition of criminal liability might defeat its purpose.¹⁰ The exception is that corporate bodies can also be liable for corporate crimes, despite the absence of unlawful conduct and mens rea.¹¹

With the facilitation of investment¹² and growing influence of multinational companies coupled with the profit-driven motives of such corporations, there is a great concern about the accountability of corporations. Corporations have been known to be “*profligate than individuals because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither fear shame, remorse, gratitude nor goodwill.*”¹³ Generally speaking, one form in which accountability can be achieved is through criminal liability. Corporate activities sometimes produce grave consequences to the society such as environmental pollution, injury, death, deceiving, defrauding of the population and even the misappropriation of funds.¹⁴ This calls for the need for corporations to be held criminally liable for their actions. A corporate body is a bearer of rights and is answerable for its liabilities.¹⁵ This principle was brought out in *Salomon v Salomon and Co Ltd*¹⁶ where the House of Lords held that Salomon the majority shareholder in a company was not personally liable for the debts of the company.

⁹ Chioma E.E. & al, “A New Dawn of Corporate Criminal Liability Law in the United Kingdom, Lessons for Nigeria”, African Journal of Law and Criminology, Vol. 2, No. 1, (2012), pp 86-98, p 86.

¹⁰ Chioma E.E. & al, “A New Dawn of Corporate Criminal Liability Law in the United Kingdom, Lessons for Nigeria”, African Journal of Law and Criminology, Vol. 2, No. 1, (2012), pp 86-98, p 86.

¹¹ Guilty Mind; C. R. Synman, *Criminal Law*, 4th ed., Butterworths, U.K., 2002, p 249.

¹² The Organisation for the Harmonisation of Business Law in Africa (OHADA) by 17 member states has as aim to bring out legislation that will instil confidence in the legal environment and as such facilitate investment in the sub region. Such facilitation of investment should not go without the criminal law aspect being taken into consideration.

¹³ C. Wells, *Corporations and Criminal Responsibility*, Oxford University Press, U.K. 2nd ed. 2001, quoting W. Hazlitt, table talk, Men and Manners, (world Classics, published in 1821-2, 1901)

¹⁴ See the Case of Banks in Cameroon such as the Cameroon Bank and Amity Bank are good examples where the savings of individuals have been misappropriated, the banks liquidated and the customers of the bank have to suffer all the consequences. Also the case of the ESeka train accident in October 2016 where more than 100 people died and many wounded.

¹⁵ C. R. Synman, op. cit.

¹⁶ [1897] AC 22, 66 LJCh 35, [1895-99] All ER 33

At first, Corporations were considered as a mere collection of individuals, having no independent metaphysical existence of its own and therefore incapable of incurring culpability in terms of criminal law.¹⁷ According to Smith and Horgan, “*Since a corporation is a creature of law, it can only carry out such acts as it is legally empowered to, so that any crime is necessarily ultra vires and the corporation having neither body nor mind cannot perform the acts of form or intent which are the prerequisites of criminal liability.*”¹⁸

This is because the question of Mens rea is a very difficult one in imputing liability on a corporate body because of their artificial and fictive nature. As such, it was believed that corporations did not have the moral blameworthiness to commit crimes of intent. Corporations were mostly held liable in civil law under the theory of vicarious liability which determines the liability of the corporation by attributing liability of the natural person to the corporation.¹⁹ For any criminal liability to stand firm, there must be elements of mens rea and actus reus which gives it a perfectly good sense when applied to individuals but do not translate easily to an inanimate fictional entity such as a corporation.²⁰ Another reason why it was difficult to bring corporations to answer for their crimes is that, according to criminal procedure, judges required the person to be brought before the court which was not possible with corporations.

However, this position has evolved and corporations are now believed to be identifiable entities and morally responsible agents.²¹ The OHADA Uniform Act on Commercial Companies and Economic Interest Groups to which Cameroon is a member defines companies as “*An association of two or more persons that come together to carry out a certain activity and such persons must be bound by contract with the objective of sharing the profits that accrue from*

¹⁷ Corporations were considered as artificial persons that had no physical existence and therefore could not be convicted and imprisoned. This is because crimes were fundamental in nature such as theft, robbery, witchcraft and were clearly the crimes of individuals. See E.N. Ngwafor, *Corporate Criminal Responsibility*, Star Printers and Publishers Ltd. U.K., 1989, p1.

¹⁸ J.Coplan, R. Weisberg, G. Binder, *Criminal Law Cases and Materials*, Butterworth, 7th ed. 2012, p 149, quoting Smith and Hogan in *Texts, Cases and materials*; See also Chioma EZE Emem and Amadi Prince Uche, “A New Dawn of Corporate Criminal Liability Law In The United Kingdom: Lessons For Nigeria”, *African Journal of Law and Criminology*, Vol. 2, No.1, 2012, pp86-98, p87.

¹⁹ Vicarious liability is an exception to the general rule in that it allows a principal to become automatically liable for the wrongs committed by his officers, employees and agents acting within the scope of their authority or employment.

²⁰ J. Gobert, M. Punch, *Rethinking Corporate Crime*, Butterworths, U.K., 2003, P 10; Section 74 (2) provides: “*criminal responsibility shall be in him who intentionally commits each of the ingredients, acts or omissions of an offence with the intention of causing the result which completes it.*”

²¹ Incorporation gives the company a personality and in Cameroon incorporation is done by registering the company with the Commerce Register (RCCM) as provided in Article 97 of the OHADA Uniform Act on Companies and Economic Interest Groups.

*such activities.*²² It must be noted that in the quest for profits, corporations should not go against the state prohibitions particularly when it concerns public safety and welfare.²³ Thus, the traditional position has changed and today it is believed that corporations operate as real entities in ways that are not reducible to propositions about individuals.²⁴ Many countries especially developed countries the world over²⁵ and Cameroon; recently, have adopted the idea of corporate criminal liability due to some of the dangerous nature of the activities of corporations and the menace they represent, to the general interest of the society.²⁶ The *gravity of the consequences of negligence, management, systemic failures, and recklessness of corporations* has brought to the forefront, the important issue of corporate criminal liability.²⁷

Corporate criminal liability in Cameroon is still at a nascent stage with the revision of the penal code in 2016.²⁸ In the 1960s when Cameroon gained its independence, the concept of corporate criminal liability was not applicable.²⁹ At first, it was very remotely handled and in most cases neglected or forgotten. The reasons for such lukewarmness are that: first, the notion of a distinct corporate personality posed a big problem. The 1967 Penal Code did not make mention of the criminal liability of corporations, as such, it was difficult to determine the exact extent of such liability and criminalization. There was no section in the penal code regulating sanctions that could be applied when a legal person was convicted. It had to be deduced from the nature of the criminal sanction, whether such a sanction could be given in effect to a moral person.³⁰ Second, just from gaining independence, there was the need for industrial and

²² Article 4, of the OHADA Uniform Act on Commercial Companies and Economic Interest Groups.

²³ Such prohibitions can be found in the Cameroonian Penal Code of 1967, in the consumer protection legal Framework of 2011.

²⁴ This view is of the realist theories of corporate legal personality, which argue that organizations comprise not only in individuals but also institutionalized relationship amongst the individuals.

²⁵ England introduced Corporate Criminal Liability for legal persons in 1842, the Netherlands 1952, the Nordic countries 1990, France 1994, Belgium 1999, Switzerland 2003, Austria 2006, Portugal 2007, Spain 2010.

²⁶ Article 51 of the Netherlands Penal Code of 1976 has adopted corporate crime, The French penal code in its art 121-2 provides that “les personnes morales a l’exclusion de l’état, sont responsables pénalement...”, The Cameroonian penal code in its article 18 (b) and 19 (b) have brought out both principal penalties and accessory penalties for moral persons.

²⁷ The recent Eseka train derailment from Yaounde to Douala on the 21st of November 2016, Kenyan airline crash of 2007, the numerous road accidents that puts the national rate at 3,988 deaths per year in Cameroon, statistics of 2014 by the World Health Organisation, at worldlifeexpectancy.com, accessed 05 July 2017, has brought to the lime light the gravity of reckless and misconduct of certain corporations.

²⁸ Law No.2016/007 of 12 July 2016 on the Penal Code.

²⁹ Cameroon was a Mandatory and a Trusteeship territory to the French and the British after the First and Second World Wars and only gained independence in 1960 for French Cameroon and 1961 for British Cameroon.

³⁰ For example section 258 (1) & (2) on adulteration and falsification of food products where companies could be punished through fines, forfeiture, confiscation or destruction of property.

economic development, therefore, the introduction of corporate criminal liability could mean discouraging investment, industrial and economic development.

Also, crimes committed by companies were considered to be white collar crimes and the attitude or manner of criminalizing such offences was generally lukewarm and at times mostly administrative in nature. With the law no. 65/LF/24 of 12 November 1965, crimes were defined by the law however, corporate criminal liability was not actually taken into consideration in the way it needed to be done in an evolving economic society. The Penal Code neither mentioned the word corporations or corporate bodies or companies. It was only when a broad interpretation was given that the idea of companies could be considered and companies were punished based on such interpretations. For example, some of the provisions used to punish corporations were : Section 258 (1) and (2) of the Penal Code which provides that *“whoever” carries out the adulteration and falsification of food products and companies can be punished through fines, property forfeited, license cancelled, confiscation and destruction of property.* However, they could not be imprisoned. Also, contrary to actions of adulteration and dangerous activities where the intention is needed, there were other areas where intention was not needed. A company was punishable based on fault of negligence, imprudence or non-respect of rules and it depended on the outcome. Under such circumstances, Section 289 of the penal code provides that: *“Whoever by lack of due skill, carelessness, rashness or disregard of regulation who causes another’s death or such harm, sickness or incapacity as described in section 277³¹ or 280³² shall be given an imprisonment for from three months to five years or with a fine from ten thousand to five hundred thousand francs or with both imprisonment and fine”.*

Failure to take necessary precautions is itself evidence of creating a risk. A manufacturer or distributor commits an offence if he rashly manufactures and supplies medicines for example in a manner that may cause harm to the public. The manufacture and supply must have been done in a manner liable to cause harm to the consumer. The non-respect of rules could also lead to the harm and injury on the consumer. In this case, it is difficult to differentiate the material element from the moral element. The fault was presumed so as to punish those who

³¹Section 277 is on grievous harm and it holds that *“ whoever permanently deprives the another of the use of the whole or part of any member, organ or sense shall be punished with imprisonment from ten to twenty years”*

³² Section 280 is on simple harm and states that *“whoever by force or interference causes intentionally or unintentionally to another any sickness or inability to work lasting for more than eight days or up to thirty days shall be punished shall be punished with imprisonment for from six days to two years or with a fine of from five thousand francs or with both imprisonment and fine.”*

had gone against safety rules. The only question that was asked was to know if the company in question violated the law and it was not necessary to state whether that moral person had the intention of violating the law.³³ Violation of the law led to presumption of fault on the part of the offender. The law talked of a person and not a moral person. This was the major statutes in this area that was devoid of the necessary legal aspects on corporate criminal liability.

THE DAWN OF A NEW ERA OF CORPORATE CRIMINAL LIABILITY

Cameroon with time gradually recognized the need for corporate criminal liability in specific areas of law.³⁴ Such limited and marginal acknowledgement of corporate criminal liability, became necessary due to the development of new forms of crime and the necessity to fight such new forms of crimes especially with the development of modern technics of information and technology, the need for the protection of the environment and the fight against terrorism as such lead to the multiplication of legal instruments consecrating the criminal liability of corporations.

A handful of national laws have admitted the criminal liability of the moral person. By bringing out numerous specific laws in the area of corporate criminal liability, the legislator finally saw a need for a general text that will govern the area of corporate criminal liability. This need has been fulfilled by consecrating criminal liability into the penal code. Before analyzing the general law on corporate criminal liability in Cameroon, it would be necessary to examine some pertinent aspects of the specific laws.

The multiplication of specific texts in the area of corporate criminal liability however, was not enough to bring out a general principle on corporate criminal liability. There was the need to insert corporate criminal liability in a general text which is the penal code for it to achieve the needed impact. With this the legislator had to introduce corporate criminal liability into the penal code in 2016. This change of position is a revolution in the area of corporate criminal liability; however there are some important observations that need our attention. If the

³³ Wrong doers are guilty of violating the law immediately there is discovery of adulteration or falsification of products.

³⁴ Law no.89/27 of 29 December 1989 on Toxic and Dangerous products,(article 4 (3)), Law no.94/01 of 10th January 1994 on Forest, Fauna and Fishing (article 150 (1)), Law no.99/015 of 22 December 1999 on the creation and organization of the Financial Market (article 35 (1)), Law no.05/015 of 29 December 2005 on the fight against child trafficking (article 7), Law no.2010/012 of 21 December 2010 relating to cyber Security and cyber criminality (article 64 (1)), Law No. 2014/028 of 23 December 2014 on the Repression of Acts of terrorism (article 6 (1)).

multiplication of specific laws in the area of criminal liability does not suffice to bring out a general principle in the area of corporate criminal liability, it has to an extent contributed in the insertion of corporate criminal liability into the penal code. As such it has made it possible for both physical and moral persons to become criminally liable. The most important question brought up about the recognition of corporate criminal liability by the legislator is to know if the fictitious nature of the corporate person has actually been considered given the fact that in pronouncing a penal sanction there is the need for the consideration of substantive and procedural rules or is it simply sufficient to legislate corporate criminal liability in specific texts so as to stop crimes committed by moral persons?

This question brings to lime light the delicate nature of the change of position and its influence on the Cameroonian our Criminal law. The interest here includes both theoretical and practical aspects of such a change. Theoretically, such a question makes us to reflect on the imperative to preserve the basic principles of the criminal law and the necessity to adjust certain general principles so as to adapt it to the new dawn. Criminal liability being at the heart of criminal law, it would be noted that it cannot be touched without touching the whole criminal law. At the practical or judicial level this study wishes to bring up some of the many challenges that might be faced in applying the Cameroonian criminal law on moral persons.

Specific Regimes of Corporate Criminal Liability

Patches of corporate criminal liability can be seen in various areas of law which cannot be exhaustively examined here, as such we are only going to examine the common points on the legal nature of such liability as it has been illuminated by the different specific texts.

From a detailed study of most of these specific laws, it would be noted that the criminal liability of the corporate body comes from the criminal liability of its managers. The moral person is punished in solidarity with its managers or representatives. It is considered as indirect liability. Law no.89/27 of 29 December 1989 on Toxic and Dangerous waste;³⁵ law no.05/015 of 29 December 2005 on the fight against child trafficking;³⁶ law no.2010/012 of 21 December 2010

³⁵Article 4 (3), provides that “When an offence is committed by a moral person, ...the moral person concerned is held jointly liable with those who have committed the offence for the payment of the fine...” personal translation with emphasis added.

³⁶ Article 7 provides that “Notwithstanding the criminal liability of their managers, moral persons can be held liable and asked to pay fines provided for if offences were committed by the managers in the exercise of their duties.”

relating to cyber Security and cyber criminality.³⁷ This various laws bring out the indirect character under which corporations are held liable for acts committed on their behalf by their managing organs or representatives. For such liability to be considered the manager must have committed such an offence either in the name or account of the moral person or during the exercise of their duties. This leads to the conclusion that the criminal liability of managers and representatives depends on that of the moral person.

Again as to what concerns sanctions, it is mostly fines and which can be complemented by the shutting down of the company depending on the gravity of the crime.³⁸ The scale of compensation has been brought out in the various laws, but the amount given is at the discretion of the judge who can vary it in order to suit the situation. In all the various circumstances, it is necessary for the amounts to be sufficiently high to effectively promote deterrence. The legislator has in certain areas provided for very severe sanctions.³⁹

It should be noted that the areas protected by specific laws are varied in nature. They range from the protection of the environment, protection of economic activities, protection of persons as well as the security and life of individuals.⁴⁰ From the various areas covered, it should be noted that moral persons have the tendency of committing diverse crimes. However, mention has to be made of the fact that criminal liability based on specific law is of a limited nature because it is only applicable to the area covered in the text. It is for this reason that there was the need for corporate criminal liability to be introduced into the penal code which has a general character.

General Application of the Penal Code

The Cameroonian penal code is the substantive criminal legislation in Cameroon adopted by law no.65/LF/24 of 12 November 1965, on the institution of the Penal Code which went effectively operational in 1967 and amended by Law no 2016/007 of 12 July 2016. This law applies to all those who have territorial relations in the country. Various crimes that are

³⁷ Article 64 stipulates that “Moral persons are criminally liable for offences committed on their account by their managing organs.”

³⁸ See article 5 (2) of law no.89/27 of 29 December 1989 on toxic and dangerous waste

³⁹ In the area of cyber security and cyber criminality the legislator has actually provided for a fine that ranges from 5000,000 to 50,000,000frs CFA, In the area of toxic and dangerous waste, the fine ranges from 5000,000 to 500,000,000frs as seen in article 5 (2) of law no.89/27 of 29 December 1989 on toxic and dangerous waste.

⁴⁰ Supra, foot note 34.

applicable to corporate bodies have been provided in article 18 (b), 18 (1) (b) and 19 (b) of law no.2016/007 of 12 July 2016.

With the amendment of the penal code in July 2016,⁴¹ corporate bodies can now be criminally sanctioned for their acts which can now promote dissuasion and deterrence. Herewith, the corporation and its agents can now be held responsible for negligence and recklessness.⁴² Part three of the criminal responsibility of natural persons and corporate bodies in its section 74 (1) (a) on criminal responsibility of corporate bodies states that; “*corporate bodies shall be criminally responsible for offences committed on their behalf by their organs or representatives.*”⁴³ When the code makes mention of organs or representatives, it means acts committed by decision makers may be attributed to the legal entity.⁴⁴ The corporation is held liable for failure to take due care if the act or omission has to fulfil the legal elements of the definition of a criminal offence,⁴⁵ the decision maker has to act unlawfully without any defenses and he or she has to act with individual culpability. Responsibility is determined by the conduct of the agent or representative. The faulty conduct of the agent or representative is on the basis of the presumption that the entity itself was reckless or negligent as such did not prevent criminal offences committed by its decision makers.⁴⁶ According to the general principle under Cameroonian law, a person can be held liable if he is the principal offender or an accomplice.⁴⁷

From the above, it would be said that criminal liability for corporate crimes have been generalized based on the material aspect and also on the quality of the moral person that has to respond to such acts. Materially it should be said the code covers every area as opposed to the specific laws that covered only specific areas. Here a moral person is liable for all kinds harm

⁴¹ Law No.2016/007 of July 2016 on the revised Penal Code.

⁴² Section 74 (1) (C). Penal Code of Law No.2016/007 of July 2016 amending Law No. 65/LF/24 of 12 November 1965.

⁴³ Section 74 (1) (a) of the Penal Code of Law No.2016/007 of July 2016 amending Law No. 65/LF/24 of 12 November 1965.

⁴⁴ It means Cameroon has taken into consideration the identification model, where liability is established on the behavior of the agent. The corporation is held liable for failure to take due and reasonable care. Failure of decision makers are attributed to the company. See D. Brodowski & Al, *Regulating Corporate Criminal Liability*, Springer, New York, USA, 2014, p 83.

⁴⁵ Actus reus and Mens rea.

⁴⁶ D. Brodowski & al, *Regulating Corporate Criminal Liability*, Springer, New York, 2014, p 83.

⁴⁷ Article 96, of the Penal law of 12 July 2016 defines accomplices or co-offenders as persons who in agreement with another takes part with him in the commission of an offence.

caused to the social values protected by the penal code.⁴⁸ As to those that have to be held liable by the code⁴⁹ the code has mentioned moral persons without any distinction as to the civil or commercial character, as to public or private character or as to foreign or national character. The only exception is the state, decentralized territorial collectivities and its agencies. Another question that is asked is to know if the moral person is applicable only to those corporations that have acquired the legal personality. According to Ntono Tsimi, the response to this question is affirmative based on the fact that the legislator has given an operative meaning that permits an efficient application.⁵⁰ In the writer's opinion, it would not be normal that only those who have actually acquired the legal personality by matriculation in the commerce register be liable; this is because certain moral persons should not hide behind the idea of non-matriculation to escape from criminal liability. Failure to register the company is already an offence on its own. The fact that the legislator has not defined moral person's means moral persons includes all categories apart from those that have been expressly mentioned in the law.⁵¹ Excluding moral persons that do not have the legal personality due to non-matriculation will be to distinguish where the law has not done so and by so doing weakening the efficacy of the law.

The law again is silent as to the case of a de facto manager who engages the liability of the company. It can be opined that a manager who has not been appointed by the company should not engage the liability of the company. This is based on the fact that the company at this stage is already a victim and as such it would not be normal that a manager who has not been statutorily appointed using his personal initiative engage the liability of the company. However, if the de facto manager acted in the management of the affairs of the company, in that case the company would be held liable based on the fact that it would no longer be a victim but a beneficiary to the management of the de facto manager. This is because the business Manager is a quasi-contract that profits the owner of the business. In such an instance acts carried out by the de facto manager has to be in the interest of the company. Judges are called to be vigilant when it comes to the business management.

⁴⁸ It should be noted that there are certain crimes committed by a physical person that a moral person cannot commit such as rape or witchcraft.

⁴⁹ Ratione Personae

⁵⁰ Ntono Tsimi, "Le Devenir de la Responsabilité Pénale des Personnes Morales en Droit Camerounais, des dispositions spéciales vers un énoncé General" *Juridique périodique* no.89, p87.

⁵¹ The state and its agencies. Article 74 (1) (b) of Law No.2016/007 of July 2016 amending Law No. 65/LF/24 of 12 November 1965 relating to the penal code.

Another question that is asked is to know if a manager who acts above his attributions can engage the criminal liability of the corporation. It would be considered that it would not be normal to hold the company liable for acts committed by the manager of the company that are above his attributions. However, the managing organ can engage the liability of the company on condition that going above the limits of their attributions does not go against the social objective of the company. A distinction has to be made between going above the attributions and going against the social objective. This is because going above attributions can still be within the limits of the social objective of the company. It is simply a violation of the limits of his statutory powers which can be opposable to third parties and as such would not be a reason for holding the corporation criminally liable. On the other hand, going against the social objective of the company means changing the social activity of the company according to its statutes which can lead to the criminal liability of the company.⁵² The legislator has made mention of going against the social objective of the company and not a bypass of the attributions of the managing organs.

The introduction of corporate criminal liability into the penal code has been applauded; however, there are certain difficulties that have been noticed which might hamper the effective implementation of the law.

Challenges of Application of the Law

The introduction of corporate criminal liability into the amended penal code of 12 July 2016 has made it possible for corporations to be held liable for their negligent and reckless acts.⁵³ However, it should not be considered that the new order in the code can solve all the eventual problems that might come up with such corporate criminal liability. Problems of application of the new rule on corporate criminal liability will seem a setback especially in the area of application of sanctions. Theoretically or practically, the legislator needs to take into consideration a certain number of parameters. Theoretically the question on the determination of responsibility will come up and practically that of the efficacy of sanctions.

⁵² In the area of cyber criminality the law of 2010 holds that the sanction applicable is the dissolution of the company in case the social objective of the company was changed in order to serve as a means of criminal activities. See article 64 (4) of law of 2010 on Cyber criminality.

⁵³ Article 74 (1) (a) of Law No.2016/007 of July 2016 amending Law No. 65/LF/24 of 12 November 1965.

Difficulty in Determination of the Guilty Mind of the Corporation

The moral person can be declared criminally liable for offences committed by its representative or by its managing organs acting in the exercise of their duties or in the exercise of their functions.⁵⁴ The criminal code has therefore considered the identification theory where corporations are held liable based on the high ranking employees i.e. the “brain area” of the corporation.⁵⁵ This rule implies that the responsibility of the moral person depends on that of the physical person that has acted on its behalf. The question therefore is to know if it is an indirect liability, a borrowed liability or shared liability. This question is of utmost importance because the defenses available to the physical person for a crime committed can affect the liability of the corporate body.⁵⁶ The different notions of determination of those responsible for corporate crime need to be explained.

The notion of indirect liability is mostly used to qualify the liability of the managing organs for crimes committed by its agents. The head of the enterprise is considered as the indirect person to the crime while the agent is the author of the crime. In this case the manager and the agent have committed a fault but it is not the same fault. The managing director is reproached for having failed in his obligation of control and supervision. The staff must have not acted culpably; the offence committed has to be against law or rules.⁵⁷ The offence must have been made possible or considerably easier due to the fact that the decision makers failed to apply due and reasonable care required in the respective circumstances.⁵⁸ Indirect liability is based on two conditions: an offence committed by the agent and the personal fault of the managing organ or representative taken into consideration. Each of them is considered to have committed a distinct fault and in certain circumstances the agent can bring up defenses that will liberate him from his liability. This is mostly in cases where he has simply conformed to the orders given him. The holding of the managing director the indirect author as such does not depend on the culpability of the agent the direct author of the crime. Such indirect liability can be narrowly linked to that of the moral person. The act is committed by somebody else than the

⁵⁴ Article 74 (1) (a) of law no.2016/007 of 12 July 2016 relating to the penal code.

⁵⁵ This based on the English Common system of holding corporations liable.

⁵⁶ See Article 78, 83, 84,85and 86 of law no. 2016/007 of 12 July 2016 relating to the Penal Code.

⁵⁷ For example, failure to wear work safety equipment.

⁵⁸ D. Brodowski & al (eds), *Regulating Corporate Criminal Liability*, Springer International Publishing, Switzerland, 2104, p79.

person that is being held liable. The person is not the author of the crime but is being sanctioned because the crime was of benefit to him.

However, it should be noted that the liability of the moral person is not different from that of indirect liability in that the fault that is blamed on the representative or on the managing organ is the same that is blamed on the corporation. They are liable on the same bases. Defenses based on personal reasons would not influence the liability of the other. Again it becomes complicated when we have to believe that for a corporation to be held liable, a physical person must be involved.

Another notion is that of borrowing of crime which is based on the idea of dependence which links the responsibility of the accomplice and that of the principal author. Here the liability of the accomplice is conditioned to that of the principal author. It supposes that the accomplice is liable as the principal author to whom he has helped in the preparation or commission of the crime. In this case, if the principal author is not sanctioned then the accomplice too will not be sanctioned.

In Cameroon the model retained is that of co-opting or borrowing of punishment which is different from that of borrowing of crime. Even if the corporation is not considered as an accomplice to its managing organ or representative, it is held that the corporation gives an adequate environment for the commission of crimes by individuals. There is a similarity between the criminal system and the penalty system. This is because in all the systems there is the need for a principal author and an accomplice in the same light like in corporate criminal liability, where there is the need for a physical representative for corporate crime to be considered. This is disturbing from a legal point of view because what needs to be taken into consideration is the crime rather than subtleties' of the human *substratum* that committed the crime. From the above it can be considered that criminal liability of a corporation has the characteristics of shared liability.

Liability is shared between the representative or the organ of the corporation and the corporation even if they are not subject to the same sanction. The fact that the representative or the organ can be dispensed from such liability does not remove the character of shared liability instead it admits it because the liability of the other is integrated into that of the other.

It would be stated that if the commission of an offence by a moral person needs the implication of an individual i.e. the representative or the organ, then it means the liability of the moral person is dependent on that of the agent or representative who can be dispensed from liability due to a subjective cause of criminal liability. But when the representative or organs are exonerated from liability due to an objective cause of liability, the moral person would not also be held liable.⁵⁹As such corporate criminal liability would not be effective.

Another challenge that needs to be avoided in the area of corporate criminal liability is the fact that the author of a crime needs to be identified for the corporation to be liable. It is but normal to hold that immediately an offence is committed by the representative or managing organ even if not identified, it is believed the company is involved. The diffused nature of the author of the crime should therefore not be an obstacle to holding the corporation liable. It should not also be an obstacle to holding the corporation liable if only one of its organs is involved in the commission of the crime meanwhile there are two or more organs. It should not be a pretext to hold that criminal law is of strict application and since it has simply mentioned that '*their organs and representatives*' it should be respected to its letter. In the case of the plurality of managing organs or representatives, the commission of an offence by one of them suffices that the liability of the corporation be taken into consideration. These theoretical considerations need to be handled along with practical issues.

Practical Challenges to the Effective Application of the Law

It is not only sufficient to hold a corporation liable but there is the need to know the applicable sanction. The moral person being an abstract and fictitious person, sanctions applicable to physical persons such as imprisonment cannot be applicable to it.⁶⁰ How can a fictitious person be imprisoned? The ineffectiveness of imprisonment as a sanction in regards to corporate criminal liability has been the heart of the argument for those who stood against corporate criminal liability. But giving the fact that imprisonment is not the sole criminal sanction, this argument of companies not having a personality to be imprisoned could not prosper. There are other sanctions that can be considered when taking into consideration the personality and nature

⁵⁹ H.Matsopolou, « La Généralisation de la Responsabilité pénale de Personnes Morales » Rev. Sociétés, no.57, 2004, p13.

⁶⁰ Article 24 of law no.2016/007 of 12 July 2016 defines imprisonment as “loss of liberty during which the offender shall be obliged to work, subject to any contrary order of the court for reasons to be recorded in the judgment.

of the person that has committed the crime. The classification of punishment is done as follows: principal punishment, accessory punishment and preventive measures.⁶¹ For companies, principal punishments are dissolution, temporal or final closure and fine. It would be noticed that such sanctions have both financial and non-financial consequences. Whether financial or non-financial, the application of the principal punishment envisaged for corporations have certain practical difficulties that may render such an amendment of the penal code to have no great implications.

Financial Sanctions

One of the principal punishments on the moral person is a fine and the fine here touches directly on the financial capacity of the company. A fine is actually adapted to the legal character of the moral person who most often is a commercial company. Sanctions are meant to serve as a punitive function so that the wrong doer can feel the pain of going against the law. As such paying a fine by the moral person is appropriate so as to make him feel the pain for committing a crime.

However, the payment of a fine by the moral person brings up two important problems. Firstly, the moral person can be condemned to pay a fine that is quite small as compared to his financial capacity and as such would not produce satisfactory results of deterrence. This is because if the amount is too small as to the financial capacity of the company, the fine will have no effect and as such no dissuasive or punitive impact. Contrarily when the amount of the fine is too high as to the financial capacity of the company, it can lead to insolvency and liquidation of the company which in turn might lead to other serious consequences such as the layoff of workers.

It would be said that in order to avoid such unfavorable circumstances, the judges are called upon to fix an amount that does not only take into account the gravity of the act but the financial capacity of the moral person concerned. This should be the same like in the case of the physical person where the personality of the one that has committed the act is taken into consideration.

Another problem brought about with the imposition of a fine is that of the recovery of the fine. This is a major problem as it is difficult and to an extent impossible to recover sums due from companies that are already insolvent. In order to close this gap the legislator while adopting

⁶¹ Article 18, 19 and 20 of law no.2016/007 of 12 July 2016 relating to the Penal Code.

the criminal procedure code made the recovery of fines to be executed immediately despite any appeals the payment of financial condemnations in exception to interest.⁶² With the difficulty involved with the recovery of fines, it would be necessary that the legislator should look for non-financial means to solve the difficulty of financial recovery.

Non-Financial Sanctions

The penal code in its article 18 (b) has provided for the dissolution of the moral person as a means of criminal sanction. The dissolution of the company in this case is different from that provided for in the OHADA uniform act due to insolvency.⁶³ The penal code has provided for dissolution due to the criminal liability of the corporation. Dissolution is different from final closure as regards to its effects. Dissolution means the coming to an end the existence of the corporation meanwhile final closure of the establishment means the end of operations of the activities of the corporation in a given place or locality. It can be opined that the person who is sanctioned, if he is not the owner of the place where his activities were carried out, he can change the name of the corporation or can go ahead to simply rename his company.

Due to the harshness of the sanction, dissolution and final closure have to be pronounced and implemented with a lot of reservations. It has to be pronounced only in extreme cases, mainly when the corporation was created to carry out illegal and illicit activities. In that case they have to be dissolved since by their activities they are a problem to public order. Dissolution and final closure plays a primordial role in the cleansing of the economic and social landscape.

Another problem which comes up with the sanction of dissolution and final closure is that it is difficult for the judge to order for immediate forceful execution of a decision on a moral person as it is the case with the physical person due to the fact that the decision remains suspended by the various delays for appeals.⁶⁴ Such decisions can be paralyzed for a very long time meanwhile the company continues with its illicit or illegal activities. If on the other hand the judge can order that the establishment be closed despite the appeal, it can be dangerous if the

⁶² Article 393 (1) (a) Criminal Procedure Code 2005.

⁶³ Here dissolution is due to the fact that the company's assets cannot longer cover up its liability and it is in a state of insolvency.

⁶⁴ A physical person who has been handed down a court decision for the payment of fine or imprisonment can immediately be locked up despite the fact that he has the opportunity to take the matter to appeal. It is a temporal measure of deprivation of liberty while waiting for the final decision. Such a rule cannot be applied to a moral person.

decision at appeal is reformed. This is because the closure of a company leads to loss of clients, market share, and deterioration of material and may finally lead to liquidation. At this stage it would be necessary for the criminal procedure code to introduce the prosecution of corporations from the investigation stage, follow up and sanctioning of crimes committed by moral persons.

CONCLUSION

Modern-day Corporations are believed to have a legal personality and are no longer fictitious, they exist and occupy an important place in the society and are capable of causing harm like all individuals. The Cameroonian criminal code that was conceived to handle only criminal liability of individuals became substantially and formally inadaptable and unable to effectively sanction moral persons who committed crimes. With the growth of corporate crime in the modern day society the Cameroonian legislator has seen the need for corporate criminal liability where corporations can be punished on the same grounds as individuals and has incorporated it into the penal code thus leading to the dawn of a new era in the area of corporate criminal liability in Cameroon. Corporations in Cameroon can now be held liable for various crimes with equal punishments meted out, ranging from fines to the dissolution and final closure of the Company. However, the introduction of corporate criminal liability into the Cameroonian Penal Code does not suffice to provide a coherent and logical repression of crimes committed by corporations to achieve deterrence. In effect the fictitious nature of companies makes it difficult for certain criminal rules that are effectively applicable to individuals to be applied to corporations. As such, it is normal that those rules that cannot be effectively applicable to corporations should be reconsidered. It is necessary that we should not only consider sanctions that can be meted out on corporations but also to make understandable the procedure to be followed in order for such sanctions to be applied. In order to make the criminal law effective there is the need for the legislator to bring up solutions to the numerous problems that have been posed. Despite the fact the criminal procedure code is relatively young; the legislator needs to readapt its criminal procedure code to the changes brought in by the penal code. The judiciary needs to take the bull by the horn and be proactive in effectively implementing the law of 12 July 2016, introducing corporate criminal liability in Cameroon despite the numerous difficulties.