LIMITING CORPORATE CRIMINAL LIABILITY: A STRATEGIC STUDY ON THE METHODS OF LIMITING CORPORATE CRIMINAL LIABILITY

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ABSTRACT

The principle of an individual corporate personality is the bedrock of modern corporate law, allowing companies to stay distinct from stakeholders and directors and ensuring that there are no ethical challenges to the corporate form. In cases of vicarious liability in cross border establishments, this doctrine shields the parent company for being held accountable for that of the subsidiary's actions.

The complexity arises in the case of Multi-National Corporations. MNCs face significant challenges with regard to criminal liability, due to its transnational nature. The main complexities arise from the lack of uniformity in jurisdiction and compliance. Popularly, MNCs function in countries with weak law enforcement creating a risk of amnesty.

Implementing a uniformed manner of compliance and governance in par with international standards would help not only avoid double jeopardy but also hold the subsidiary company or particularly the person responsible and hold them alone liable. Parent companies should not be held liable especially if the crime committed was not foreseeable. Many international cases had laid down the standards for attribution of the company with relation to actions and liability and should be held liable under "special rules of attribution" set by the court.

Such modern approaches which are tailored to each case help in providing the best possible verdict which will benefit the company and its employees from damages. This article proposes to present possible legal changes and adoptions of international standards for such situations.

Keywords: Criminal liability, corporate personality, Cross border liability, attribution, multinational corporations

INTRODUCTION:

Objective:

The objective of the paper is to understand the different governance methods around limiting corporate criminal liability from subsidiary company to parent company. This deep dives into attribution, necessity and reform techniques.

Research question:

Should parent/holding companies be held liable for the criminal actions of the subsidiary company as per the current legal provisions governing company attribution of liability?

I: LIKELIHOOD OF IMPUNITY IN CONFLICT RIDDEN ZONES:

Pertaining to MNCs, vicarious liability stays true to its definition by holding the parent company accountable for the actions of the company, even if they had not directly played a part in it. This stems from the assumption that the senior management would have had knowledge of or consented to the crime committed. However, in cases of subsidiary companies in countries where impunity is more likely, the author proposes that parent companies should not be held liable as not every decision made by the subsidiary company may be consented by the parent company.

In terms of establishing vicarious liability for parent companies, transnational companies find it complex to determine exactly to which extent of control they have over the subsidiary companies especially in countries with weak governance and compliance laws and where the likelihood of exposure to impunity is more. A crucial question which remains unanswered till today, is if the parent company should bear the brunt of the subsidiary company's liabilities. The author identifies several factors increasing the likelihood of impunity by subsidiary companies in countries with weak governance and compliance structures namely;

1. **Regulatory Inconsistency and Fragmentation:**

   As the name suggests, MNCs are established in several countries where no two jurisdictions are alike. While one particular tax law may exist in the USA, it may not exist in India. This creates a lapse in governance throughout the branches of the

company, making overall compliance a challenge.

2. **High Corruption and poor Rule of Law:**

   Countries such as South Sudan, Haiti, Venezuela etc, have poor Rule of Law and high corruption rates, making the likelihood of impunity by subsidiary companies higher. This poses as a complexity for the parent company to track the decisions made by the subsidiary company.

3. **Limited governance capacity:**

   In countries with withering law enforcement structures and governance filled with loopholes, the likelihood of impunity increases. Parent companies in such cases cannot establish dominance over the subsidiary overriding domestic law or risk withdrawal of investment.

The lapse between local governance and international compliance is large at best, causing an allegation of vicarious liability to be built on a weak foundation. Geopolitical tensions and instability in a country's governance can amount to unnecessary risks for a subsidiary company. If a subsidiary company subjects to actions which would lead to criminal liability such as financial crimes, illegal funding to local terrorist groups, labour law violations etc.

Lord Reed in the case of Cox v. Ministry of Justice, had put forth three interrelated incidents to establish vicarious liability namely- [1]

1. Activity undertaken on behalf of the defendant.
2. Part of the business activity.
3. Risk created by the defendant.

These factors were used time and time again in UK courts to truly establish a strong assertion of vicarious liability and not just a blanket approach linking the subsidiary company and the parent company.

[1] Cox v Ministry of Justice [2016] UKSC 10, [2016] AC 660.

As subsidiary companies are subject to domestic law compliance, the likelihood of impunity is more especially in high conflict areas, countries with weak governance and compliance models and legal challenges. Countries like South Sudan, Cambodia, Bangladesh, Paraguay etc have weak law enforcement systems in which the likelihood of committing crimes are more.

This action can be driven either through coercion from local governments or through voluntary movement of the management in the subsidiary company. Either way, the damage caused to the parent company should be minimal as the operations are mostly handled by the subsidiary companies. Subsidiary companies are not entirely distinct from the parent company however the proposal being made here is that the concept of vicarious liability extending up to the parent company should be limited and heavily scrutinized especially in situations where the likelihood of impunity is high.

The likelihood of impunity is a persistent criterion in determining to which extent liability can be established. In a country where criminal activity is high, law enforcement is weak, and there are insufficient laws guarding crimes related to MNCs, subsidiary companies are given a platform to act out of a more personal interest instead of making actions on behalf of the parent company. The lack of stringent governance and compliance for the subsidiary companies without considering the domestic laws and its enforcement leaves space for large legal loopholes within which the subsidiary companies can play along.

In the situation of holding the entire company liable; apart from sufficient investigations holding a few employees liable, the subsidiary company eventually is also held liable due to the concept of vicarious liability and furthermore, the parent company. This is what the author would like to refer to as 'Ripple Effect' which operates in such a way that the liability does not stop with just one single faction. This affects not only the directors but every other employee of the company. The falter of the subsidiary company implies that the liability is taken upon by the parent company as well. When the parent company is affected, the following subsidiary companies in subsequent countries would get affected in terms of funding, governance and carrying out operations. This Ripple Effect can be avoided to a certain extent if the concept of vicarious liability is applied carefully rather than blindly.

Vicarious Liability is a concept of Tort which implements tortious liability not only to the tortfeasor but also the master/employer of the tortfeasor. Courts have relied on this concept often implementing a blanket approach in the literal interpretation rather than analysing the

selective application of the concept. The Tom-Reck Test is a test courts follow to determine company liability in terms of criminal cases which was established in the case of Tom Reck Security Services Pte Ltd vs PP1. It states that a director or employee's acts can be attributed to the company if they can be envisioned an 'embodiment of the company'. This factor is highly scrutinized in courts to establish the extent to which the attribution is admissible. [2]

However, in the case of Public Prosecutor v. China Railway Tunnel Group Co Ltd (Singapore branch), the Young Independent Counsel ("YIC") had brought in fresh perspective with respect to attribution of liability. When the courts were taking into consideration the Tom Reck Test, the YIC stated- "while the Tom Reck Test helps in attribution of criminal liability to the company, courts must adopt a different approach to attribution based on Meridian." The reliance on Meridian gave an amalgamation of what seemed like a conservative approach to attribution of liability to companies in the Tom Reck Test and a relaxed approach in Meridian to result in a tailored perspective pertaining to the case alone. In the case of Meridian Global Funds v. New Zealand Securities Commission (1995), the 'rules of attribution' were deemed to be "context specific" and that on the contrary, statutory purpose determines whose acts counts as the company's. This is indicative that the rules of attribution are custom to each case and its facts and issues noted by the court.[3] [4]

II. OVERCRIMINALISATION OF CORPORATE GROUPS:

"Is he so important that his acts committed in the ordinary routine of his business must be held to affect his employers with criminal liability?"

As articulated by R.S. Welsh in the Law Quarterly Review referencing Lord Caldecott's ruling on the case of Moore v. Bresler Ltd. To reiterate, Welsh here emphasises that the act committed should be attributed to the wrongdoer alone, as laid down in our justice system. Carrying the liability upward does not amount to anything particular other than the Ripple Effect. [5]

In this section, the author wishes to discuss the consequences of the overcriminalisation of corporate groups. In the case of parent companies facing criminal exposure for subsidiary

[2] Tom Reck Security Services Pte Ltd v PP [2005] 3 SLR(R) 1 (Singapore High Court).
[3] Public Prosecutor v China Railway Tunnel Group Co Ltd [2017] SGDC 84 (Singapore District Court).
[4] Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 (PC).
[5] Moore v Bresler Ltd [1944] 2 All ER 515 (KB); R S Welsh, 'Criminal Liability of Corporations' (1946) 62 LQR 345, 346.

conduct, it not only overrides subsidiary compliance but also makes MNCs avoid incorporating subsidiaries in slightly risky jurisdictions which would in turn result in a withdrawal of investments in places that need it the most. The establishment of an MNC in an underdeveloped area is a harbour of benefits for the locals. With the setting up of an MNC there is foreign investment, which means funding of government activities, involvement of locals such as employment opportunities and eventually the upliftment of the society. This is an established fact which has led to the steadfast development of cross border relations of MNCs and overall compliance.

The overcriminalisation and upward movement of criminal liability would result in parent companies withdrawing capital and investment in that area, leaving thousands jobless and lack of funding for development and infrastructure. However, if the liability is attributed to the subsidiary company alone and specifically targeting the wrongdoer alone, can ensure the smooth running of the parent and the rest of the subsidiary company. Criminal conviction of the parent affects not just the Directors and senior management but also the shareholders, mid-scale employees and helping staff, many of whom live pay check-to-pay check. The liability would also extend to the parent's contractual counterparties, creditors and investors.

A criminal conviction is not like a fine. It carries a reputational shotgun which can backfire severe consequences such as the stigma and damage to reputation which are irreparable and is severely disproportionate to a regulatory penalty. For a parent company, this movement triggers an immediate exclusion from the eyes of the consumer base. Once embossed in their minds, the decision is made. It is almost impossible to convince them otherwise. Investments are withdrawn, clients walk away and core members of the business question the progression of the company. In regulated industries such as banking and defence, the effect is more grave leading to a revocation of license, making it almost impossible for the business to thrive ever again, thus marking the tombstone of the business.

A Material Adverse Change clause (MAC) is present in every commercial contract. A criminal conviction to the company would unequivocally break up all those agreements, leading the company barren; without an investment or crucial business partnerships. Although under certain conditions such as acts of war, terrorism or industry wide changes the MAC clause wouldn't carry much weight, there is no provision which states that the companies are protected during a criminal conviction; for obvious reasons.

However, in situations such as these, if the parent company had not carried the liability of the subsidiary, then this situation is completely avoidable.

It goes without saying that we would be quick to detest a situation where we are one among a class full of students who get punished for the wrongdoings of one student alone. Similarly, the collateral damage here would be innocent stakeholders in the company who had no knowledge or participation in the conduct of the subsidiary and the outcomes. Many of those affected constitute of ordinary citizens depend on the pension funds running through these MNCs, it is evident that overcriminalisation taxes the innocent. Furthermore, a criminal conviction could trigger a cross-default clause which could result in the parent's debt structure to crumble down and plunge the company into insolvency.

III. THE ARTHUR ANDERSEN EFFECT; LESSONS LEARNT:

A criminal indictment, not even a conviction, was enough to topple the empire of Arthur Andersen LLP, in the Enron scandal. This made the firm disintegrate and leave more than 85,000 employees around the world to be instantly jobless. The mismanagement of the firm led to the fall of its subsequent branches across the world, when it could have been avoided had the wrongdoer alone been liable for his actions. The indictment alone, even without a conviction, made clients flee, partners to resign and the whole firm to collapse. Although the Supreme Court's decision was unanimously reversed, the criminal process itself was enough to cause enough damage. Similarly, when applied in MNCs, the indictment of one subsidiary could cause the parent company to bear the brunt and furthermore a group-wide collapse of functions and governance.[6]

However, the Arthur Andersen effect resulted in the implementation of the Sarbanes-Oxley Act 2002 which held clear rules and regulations for the attribution for criminal liability to the parent companies. Criminal liability cannot be insured against unlike in civil cases. Hence the seriousness in taking action and clear attribution is evident.[7]

Furthermore, in high-risk areas, local governments may usurp the subsidiaries to establish dominance over decision making in parent companies. However, if the line drawn between the parent and subsidiary is clearly emphasized, then the effects of local politics cannot have

[6] Arthur Andersen LLP v United States, 544 US 696 (2005).
[7] Sarbanes-Oxley Act of 2002, Pub L No 107-204, 116 Stat 745.

declining effect on the parent companies and thus corporate compliance cannot be weaponised.

Ultimately, the intention behind US prosecutors was to avoid indicting large corporations as criminal law had become too blunt a tool to use but rather get accustomed to the usage of an indictment merely as a threat.

IV. SAVING THE BODY:

The metaphor as a legal principle points to the corporate structures which inherently anticipate risk compartmentalisation. In this case, subsidiaries are not extended additions to the organisation but rather are deliberate liability buffers.

Here, the 'arm' is the subsidiary and the 'body' is the parent. Rather than a complete amputation, the author suggests cutting out the infected part first and then go for an amputation if absolutely necessary. The 'infected part' in this analogy is the specific wrongdoer. Chopping the arm off in extreme cases still doesn't affect the body, legally or commercially.

The legal mechanism of amputation or winding up the subsidiary involves the parent initiating the process of the winding up the subsidiary under insolvency law. However, the parent loses the equity investment in the subsidiary. This is the price to pay when moving directly for an amputation i.e. when the effect of criminal liability cannot be handled by neither subsidiary nor parent. Apart from cutting off the corporate vehicle which facilitated such a crime to be committed, the thousands of employees who would lose their jobs, withdrawal of investment are a few of the downsides of an amputation. This does not pose as a proportionate decision for neither parent nor subsidiary.

The next strategic move would be to cut of the infected issue alone with the intention to save the rest of the arm. Cutting out the guilty personnel and ensuring the rest of the company goes unaffected works like a charm. By complying to investigation procedures, handing over the guilty personnels and ensuring compliance and preventative measures, the parent company can reduce the Ripple Effect and ensure smooth functioning amongst the parent and subsequent subsidiaries.

Section 7 of the UK Bribery Act 2010 states that a company avoids liability if it had adequate procedures to prevent the offence. It also rewards parent companies which genuinely invest in compliance and cross border corporate structuring. The compliance defence shifts the inquiry

from the power distribution and strict liability between parent and subsidiary to what the parent company actually consented to. This way the process of attribution of liability is much clearer rather than a blanket approach or a Ripple Effect which would affect the parent company and the subsequent subsidiaries.[8]

Another effective measure to limit criminal liability attribution is through Deferred Prosecution Agreements (DPAs). This allows prosecution authorities to hold companies accountable without a criminal conviction. They are legally enforceable agreements between prosecutors and corporate entities allowing for the suspension of certain economic and financial crimes. This was first introduced in 2014 to encourage companies to self-report crimes and wrongdoings to the necessary authorities in order to cut the spread and escalation of liability to the parent company.[9]

One of the key features of the DPA is that they allow the company to make full reparation of their crimes without having the harmful infliction of a criminal conviction. A few examples of large MNCs held to account without parent conviction are Airbus and Rolls Royce. For instance, Rolls Royce had admittedly gotten into a DPA with the UK Serious Fraud Office where they had complied with all the requirements of the SFO by paying the penalty. But this reverts back to the initial point of the penalty being in the ballpark figure of a few trillions. Everyone from employees to shareholders would be deeply affected due to the actions of a few. Although DPAs are often a healthy alternative, to avoid the damage caused by the stigma of a criminal conviction, the pecuniary penalty is still inevitable.[10]

However, a common criticism regarding this relief option would be that this gives a platform for companies to act corruptly. This poses as more of an enforcement issue rather than a conclusive argument to move attribution upward. In spite of there being a DPA, the concerned authorities should hold the specific company responsible rather than attributing the liability upwards to the parent company to bear the brunt.

CONCLUSION:

The question of corporate criminal liability within multinational group structures is not simply

[8] Bribery Act 2010 (UK) s 7.
[9] Crime and Courts Act 2013 (UK) sch 17 (introducing deferred prosecution agreements).
[10] Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc (Deferred Prosecution Agreement) [2017] Lloyd's Rep FC 249 (Crown Court).

a doctrinal puzzle rather it is a question about what criminal law is fundamentally *for*. Criminal sanction exists to punish the guilty, deter future wrongdoing, and vindicate the rule of law. When extended indiscriminately upward through a corporate group, it does none of these things well, and does considerable harm along the way.

The separate legal personality principle, the high threshold for veil piercing, the identification doctrine refined through *Tesco v Nattrass*[11] and *Meridian Global Funds*[12], and the mens rea requirement collectively form a coherent and justified architecture for limiting criminal attribution to parent companies. These are not technicalities designed to shield wrongdoers. However, they are the considered product of centuries of common law development, reflecting the principle that criminal liability must track culpability with precision.

Where subsidiaries operate in conflict zones under weak enforcement regimes, the resulting impunity is a consequence of jurisdictional failure and enforcement collapse and not of gaps in the upward attribution rules. Reforming attribution doctrine to compensate for dysfunctional host state enforcement would be to use the wrong tool for the wrong problem, at enormous cost to the integrity of corporate law and to the innocent stakeholders of parent companies.

The "amputation" model captures the appropriate legal response: the offending subsidiary is wound up, the guilty personnel are dismissed and exposed to individual criminal prosecution, and the corporate group is preserved. This is not impunity rather it is proportionate, targeted accountability that punishes the wrongdoer through the most legally sound mechanism available while protecting the innocent body of the group from collective punishment.

Overcriminalisation of parent companies, by contrast, produces a cascade of consequences that undermine the very goals it purports to serve. It destroys innocent stakeholders, chills legitimate investment in the jurisdictions that most need it, distorts foundational criminal law doctrine, and ultimately strengthens the hand of the largest MNCs who can negotiate their way out of indictment while smaller groups face existential exposure. The Arthur Andersen precedent remains the starkest reminder that in corporate criminal law, the process can be the punishment.

The more productive reform agenda lies not in collapsing corporate separateness but in

[11] Tesco Supermarkets Ltd v Nattrass [1972] AC 153 (HL).
[12] Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 (PC).

strengthening the mechanisms that surround it through mandatory civil due diligence obligations, robust individual criminal accountability for directing officers, civil disgorgement of profits derived from subsidiary wrongdoing, and enhanced international cooperation to address the enforcement vacuum in conflict-affected jurisdictions. Instruments like the UK Bribery Act's adequate procedures defence and the DPA framework point in this direction: accountability through calibrated, targeted legal tools rather than the blunt instrument of parent company criminalisation.

Limiting corporate criminal liability, properly understood, is not a concession to corporate power. It is a commitment to doctrinal integrity, proportionality, and the principle that the law punishes those who are by the book guilty.

"A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability"[13]

[13] HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159, 172 (CA) (Denning LJ).