Do Criminogenic Employment Practices Truly Reflect A Company's Liability for Non-Compliance?

Constantine Ntsanyu Nana*

Abstract

There is some consensus on the fact that evidence of accepted practices within a company that happen to be criminogenic may show that the company encouraged or tolerated non-compliance by its agents. This has been used as the basis for determining a company's liability in some jurisdictions. This paper enquires whether such stance is well grounded in logic because practices may be said to represent only a constituent element of a whole. However, it may be less of a metonymy to say that a company is liable because of criminogenic practices than the guilt of a single senior officer or a group of senior officers. That notwithstanding, the absence of established rules on how to determine whether practices have been adopted brings to mind the random aggregation of acts of employees under the collective knowledge doctrine enforced in the United States. It is submitted here that a safer approach may be to consider how the company collectivised reason by preventing "doctrinal paradoxes" in decision-making. The bearing of the practices adopted by the employees and the way the management collectivised reason may therefore be an indicator of whether the corporate entity encouraged or tolerated non-compliance.

* Ph. D candidate, Aberdeen Business School, The Robert Gordon University.

I. Introduction

Irrespective of the divergent opinions on the importance of imposing criminal sanctions on corporate entities rather than on the individuals behind the corporate veil it is established that companies are entitled to legal personality[1] and with this privilege comes a gamut of rights and duties including the duty not to breach the criminal law.[2] In fact, the concept of corporate regulation may be said to be as old as that of the company itself given that there is evidence that criminal sanctions were imposed on the ancestors of companies (*universitas* and *collegium*) before and during the Roman era.[3] There is much literature spanning over centuries on the arguments for and against regulating corporate activities using the criminal law and this paper will not consider these arguments. The focus here is on the problems confronted by criminal justice systems in establishing a clear legal proposition on the responsibility of companies. In other words, we will be looking at the problems encountered by courts and Parliament in devising mechanisms to manipulate companies and ensure compliance. These problems have grown in complexity over the centuries due to the increasing intricacy of the structure and functioning of companies. They are not only growing in size and stature but also are increasingly becoming amorphous and can easily circumvent the mechanisms put in place to hold them liable for the crimes committed by their agents.

The mechanisms employed in the United Kingdom to enforce offences that are not strict and absolute, that is offences that require proof of intent, are the identification doctrine and the senior management failure test.[4] It is trite knowledge that where Parliament deems it necessary for the prosecution to prove the accused's guilt by adducing evidence of her criminal state of mind it would be unfair to convict the latter without such evidence. However, if the accused is a company the evidence would be that of an employee's criminal state of mind and this would be tantamount to holding a master

[1] See *Salomon v Salomon* [1897] A.C. 22. See also *Macaura v Northern Assurance Co Ltd* [1925] A.C. 619 H.L. (Ir.); and *Lee v Lee's Air Farming Ltd* [1961] A.C. 12.

[2] See *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] 1 K.B. 146; *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153.

[3] See Mestre, 1899: 34; Valeur, 1931: 9-10.

[4] A strict liability offence requires the prosecution to prove only the *actus reus* of the offence and the accused company bears the onus of proving that it exercised all due diligence. An absolute liability offence concerns the performance of a prohibited act or the breach of an absolute duty. It has been argued that these forms of liability are best suited for large and complex corporate structures because they are more likely to elude the criminal justice system and strict and absolute duties would spur them on to ensuring that their activities do not harm public welfare or expose workers and local communities to unnecessary risks. See Wells 2001: 68.

liable for the criminal act of her agent or servant.[5] Rules of attribution such as the identification doctrine and senior management failure test are thus designed to enable the prosecutor to show that the company (and not its agent) committed the offence with the intent to achieve a result that amounted to the crime or was indifferent as to the consequence of its act which breached the law. The identification doctrine however requires evidence of the criminal state of mind of a senior officer that may be said to be the embodiment or the "directing mind" of the company.[6] The senior management failure test applies to the new offence of corporate manslaughter or corporate homicide and requires evidence that the group of persons that managed or organised the whole or a substantial part of the company's activities failed to meet acceptable standards and the failure caused the death of a person to whom the company owed a relevant duty to take care.[7]

The identification doctrine has been subjected to depleting criticisms over the years.[8] Courts and commentators have lamented the fact that the doctrine relies unduly on derivative liability and holds the company liable only for the actions of a few of its agents. With the growing complexity of the structure and functioning of companies, it has been difficult to identify any senior officer that entertained the relevant *mens rea* or even had knowledge of the risks of the corporate activities given that many senior officers are cut-off from routine operational management.[9] Thus, the identification doctrine ironically provides large companies with the opportunity to use something that is obvious in business as a legal defence.[10] It has also been pointed out that corporate offending is often not the result of a single agent's action but a combination of poorly formulated policies, casual implementation of directives from the corporate hierarchy, and careless supervision of the operational staff.[11] The unsuccessful prosecutions of companies for manslaughter and culpable homicide shed considerable light on these weaknesses[12] and spurred Parliament on to introducing the senior management failure test which is focused on the way in which the activities of the company are managed or organised by its senior management. Although this is a marked improvement upon the

[5] See Williams, 1961: 267; Khanna, 1996: 1480.
[6] See *Tesco v Nattrass* [1972] A.C. 153 at 170.
[7] Section 1(1) and (3) of the Corporate Manslaughter and Corporate Homicide Act 2007 hereafter referred to as CMCHA.
[8] See Stern, 1987; Wells, 1994, 2001; Minkes and Minkes, 2001; Field and Jorg, 2001; Hill, 2003; Gobert and Punch, 2003.
[9] See for example *R v P&O European Ferries (Dover) Ltd* (1991) 93 Crim. App. R. 72; and *Transco plc v HM Advocate (No 2)* (2004) S.C.C.R. 553.
[10] Gobert, 1994: 401.
[11] See Field and Jorg, 1991: 158-160; Gobert, 1994: 395.
[12] There have only been seven convictions of companies in the past eight years and all of them small and medium-sized companies. See http://www.corporateaccountability.org/manslaughter/cases/convictions.htm [Online] Accessed 05/August/2008.

identification doctrine,[13] the fact that a company's liability is still restricted to the acts of the senior managers remains problematic. It is logical that if corporate psychology is broader than the thoughts of an individual senior manager then it must equally be broader than the combined thoughts of all senior managers. The idea of combining the acts and thoughts of all senior managers or of looking at how they collectively managed or organised the activities of the company was certainly inspired by the collective knowledge doctrine that applies in the United States. However, courts in the United States do not only aggregate the acts and knowledge of senior managers but also of middle-level managers and operational staff, as well as the policies, systems, and practices existing within the company. This broad computation is based on the contention that a company is the sum of not only the acts and knowledge of its entire staff but also of the policies, systems, and practices (attitudes) that motivate them to further its interests. Thus, as said above, corporate crime is often the result of the combination of the acts and omissions of several employees and managers and the policies and practices that fomented these employees and managers.

It is important to note that the drafters of the CMCHA were equally aware of the importance of examining policies and practices existing within the accused company in addition to the actions of the senior management. Section 8(3) of the CMCHA directs the jury to consider how these policies and practices (also systems and attitudes) may have encouraged or tolerated the breach of any relevant health and safety legislation. Nonetheless, it is unclear whether this implies that where the breach of the Health and Safety at Work Act (HSWA) 1974 for example is established[14] and the breach is connected to the death of an employee or a third party, the company would be held liable for corporate manslaughter or corporate homicide on the ground that the breach was encouraged by existing policies and practices. In this case, the company's liability may be said not to be dependent on the acts of its senior managers as much as it is dependent on the link between its criminogenic policies or practices, the breach of the HSWA, and the death of the employee or third party. Although this interpretation on the CMCHA is very much subject to debate, the growing trend towards examining existing policies, systems, attitudes, and practices (in addition to the acts and knowledge of senior managers) reflects the progressive positions adopted in the last decade in jurisdictions such as Holland[15] and Australia.[16] Courts and Parliaments in these jurisdictions have readily adhered to the school of thought that employment practices, policies, and systems are a good reflection of whether companies are compliant with the law or not.

---

[13] The prosecution is not required to identify a single senior officer that is guilty.

[14] A good number of offences under the HSWA are strict liability offences and some are absolute liability offences, thus establishing breach has seldom proved to be challenging.

[15] See the *IJzerdraad* case, Hoge Raad, February 23, 1954, N.J. 1954, 378. This case is discussed succinctly by Field and Jorg, 1991.

[16] See section 12.6 of the Australian Criminal Code 1995.

This paper seeks to address the practical utility of this school of thought. Discussion here is premised on the contention that a company is a culpability-bearing agent (and deserving of punishment) and the objective of any law imposing criminal liability on a company is to determine whether its culpability may be proved by evidence of criminogenic practices and policies existing within the company. However, it must be noted that although the jury or judge is invariably required to examine both the practices and policies, the focus here will be on employment practices.[17] This is because unless in the most extreme of cases, the policies of companies will always be compliant with the law. A company's management will hardly issue directives or put a programme in place that specifically encourages the employees to breach the law.[18] Equally, where the policies and systems are poorly conceived, a company cannot be liable unless it can be shown that the policies and systems actually motivated the managers and employees to adopt a practice of infringing legal requirements and they would have motivated hypothetical managers and employees to act in a similar manner.[19] As such the centrepiece of the prosecutor's case should be the practices adopted by managers and employees and not the directives issued by the hierarchy or the systems officially put in place.[20]

II. The use of criminogenic practices to determine a company's liability

Although the term "practices" is certainly not amenable to a precise definition it is used here refer to the sum of the modes of carrying out particular activities adopted by workers and the attitudes of these workers to the acceptability of these modes by their managers and the company's hierarchy. The workers' attitudes on the acceptability of the modes may be influenced by many things including policies on promotions, pay

[17] Some commentators and the Australian legislature prefer to talk of "corporate culture" encompassing all these factors. Equally, Bucy (1991: 1121 n. 98) prefers the word "ethos" because she believes words such as "culture" invite too much metaphysical and anthropological dialectics. Although it is true that the word "ethos" is more unequivocal, it may also generate much dialectics if one sets out to ascertain a company's "ethos." The focus on "practices" adopted by the managers and employees therefore avoids the ordeal of finding an appropriate equivalent term for "intent" at the onset of addressing a company's criminal liability.

[18] See Huff, 1996: 1260. He also advances that the existence of a compliance programme should operate as a defence only when it is considered together with any other relevant evidence. He calls this the "Relevant Factor Approach" (Huff, 1996: 1283-1298).

[19] The question of hypothetical managers and employees is important because the latter could have been maverick agents seeking to further their own selfish interests at the company's detriment. It would certainly be unfair in such circumstance to hold the company liable.

[20] Although it may nonetheless be important to show a link between the practices and the policies or systems.

increases, and distribution of other benefits, as well as burdens. The employment practices thus concern both written and unwritten rules applicable in the company that may be ascertained by examining the feelings of workers about the modes they use to perform their tasks. Given that a practice presupposes a continuous activity it may be posited that unless in exceptional cases a company may not be liable for the one-off act of a maverick agent seeking to further her own selfish interests even though she acted within the course of her employment.[21] The practices may be said to be criminogenic where they provide the substructure for crimes to be committed by managers or employees. As such, evidence adduced by the prosecution should show that the agent's action that breached the criminal law did not deviate or vary from uniformity within the company. The above notwithstanding, there is no denying the fact that ascertaining what constitutes employment practices for the purposes of corporate liability may be remarkably ambitious. There is a plethora of underlying issues that require clarification. However, if we restrict discussion to the definition provided above we may discuss just three of these issues. They include, first, the question whether the criminogenic practice must be shown to have encouraged or tolerated the commission of an offence or simply the performance of one or several "innocent" acts that together amounted to an offence. Secondly, the question whether the senior management or persons delegated managerial functions must be shown to have known or been in a position where they ought to have known of the practices and were indulgent or indifferent as to the consequences. Thirdly, the question whether the attitude of one worker or a minority of workers or a relative majority of workers is sufficient to prove that a criminogenic practice existed within the company.

i. Is proof of the commission of an offence by an employee required?

CMCHA, the Australian Criminal Code 1995, and dictum of the Dutch Supreme Court cited above direct juries or judges to consider whether existing practices may have encouraged or tolerated non-compliance by the company's agents in order to determine whether liability should be imposed on the company or not.[22] They do not however

[21] This has been the subject of much controversy especially in jurisdictions where the agent literally acted within her scope of employment and the applicable rule of attributing acts of agents to companies is vicarious liability. See Huff, 1996: 1289-1292. This is equally a contentious issue in the United Kingdom where the identification doctrine applies and the maverick agent is a senior officer. Thus, in *Moore v I. Bresler* (1944) 2 All E.R. 515, a company was identified with two officers that defrauded it.

[22] It must be noted that the Australian Criminal Code directs the court to consider such practices only where the prosecution is unable to identity a "high managerial agent" at fault. As mentioned earlier, the CMCHA equally focuses on the failure of the company's senior management and directs the jury to consider such practices only as an indication of whether the senior management failure was below acceptable standards. As such, although the focus here is on the use of criminogenic practices by these statutes, the corporate liability mechanisms instituted in these jurisdictions are still very much focussed on the identification of senior officers at fault.

provide guidance as to whether the prosecution must show that the attitudes or general feelings of the workers for example specifically encouraged or tolerated the commission of an offence or it may suffice to show that the attitudes or feelings encouraged or tolerated the acts of several workers which do not amount to an offence when considered in isolation but whose combined effect is the offence. It may be problematic to hold a company liable in the second instance, as well as describing the existing practice as "criminogenic" given that no single employee has actually committed an offence. However, courts in the United States readily aggregate on the one hand, acts of certain employees that do not amount to the requisite *actus reus* when considered in isolation and on the other, knowledge of other employees that equally do not amount to the requisite *mens rea* when considered in isolation; and the sum of these "innocent" acts and intentions (and knowledge) is imputed to the company as the *actus reus* and *mens rea* of the offence.[23] Similarly, section 8 of the CMCHA directs the jury to consider the extent to which existing practices may have encouraged or tolerated the failure to comply with the relevant health and safety legislation and section 1 describes such failure as the management or organisation of the activities of the company that falls far below acceptable standards within the industry. This implies that it is not sufficient to show that the existing practices actually encouraged or tolerated the commission of *an offence* by a single employee but that they encouraged or tolerated a number of actions that when taken together constitute an offence. The Australian Code is less unambiguous. Section 12.3(1)(d) of the Code directs the court to impose liability simply where there is evidence of a criminogenic corporate culture irrespective of whether a link can be established between such criminogenic corporate culture and an offence committed by an employee.[24] It is therefore unclear whether the Australian Code endorses the imputation of a criminogenic corporate culture as *mens rea*[25] and the aggregation of the inappropriate modes of performing activities used by several employees as *actus reus*.

Although Parliament and courts in the United Kingdom are yet to approve of another meaning of the term "commission of an offence" by a company,[26] the willingness to aggregate the acts and knowledge of several employees and the increasing focus on the existence of criminogenic practices, systems, or policies are indicative of the desire to move away from models that are largely dependent on derivative liability such as the

[23] See *United States v New Bank of England* 821 F. 2d 844 (1st Cir. 1987); *United States v T.I.M.E.-D.C., Inc* 381 F. Supp. 730.
[24] See Gobert and Punch, 2003: 74.
[25] This would imply that the Australian Code criminalises the maintaining of a system that may foster the commission of crimes. This would certainly be draconian and unprincipled since it would be tantamount to treating the possibility of producing crime as actually producing crime. This may also be said to be as unfair as holding natural persons liable for entertaining the idea of committing an offence even though they have not in any way performed any act in that regard.
[26] That is, other than the commission of the offence by a senior officer or group of senior officers.

identification doctrine and vicarious liability to models that are based on collective or organisational liability. That is why following a number of high profile unsuccessful prosecutions (using the identification doctrine) for manslaughter and culpable homicide the CMCHA introduces the senior management failure test that is focused on the aggregation of the grossly negligent acts of senior managers that culminated in criminogenic practices or policies. Nonetheless, uncertainty still looms and the hope is that the inclination to adopt a progressive stance favours the opinion that the prosecution need not adduce evidence of the commission of an offence by any single individual.[27] As such, it may be sufficient to show that a practice existed within the accused company that was criminogenic because it tolerated or encouraged acts that amounted either individually or when taken together to the breach of the statutory or common law rule under consideration.[28]

ii. Is proof of the senior management's knowledge required?

It is also important to determine whether the prosecution is required to show that the senior management had knowledge or ought to have had knowledge of the modes of carrying out activities adopted by operational employees or of any morally reprehensible practice of distributing burdens or benefits for specific actions adopted by middle or operational managers. It is difficult to see how the prosecution would prove that any existing practice encouraged or tolerated the commission of an offence if they do not show that the senior management or their delegates knew or ought to have known of the practice and were indulgent or indifferent.[29] This is because the attitude of an employee that performs an activity is often a function of what she thinks or feels would be the reaction of the hierarchy in case she employs a particular mode of performing the task assigned to her. Thus, there is an underlying assumption that the senior management or their delegates would know not only of such task but also of the mode used to perform the task and they would either sanction the mode or would be indifferent as to the consequence of the employee using such mode.

However, there is a strong possibility that the requirement of the knowledge of the senior management may amount to a serious flaw in the enforcement process. If the term "senior manager" or "delegate" is given the same restrictive meaning as that given

[27] Showing that a single individual committed an offence may pose the same problem of having to dissect large and complex corporate structures to identify such individual.

[28] This follows from the argument that a crime committed by a company may not necessarily be the act of a single individual but the sum of the acts of several individuals and the policies that motivated them.

[29] That is why the Australian Code imposes a duty on companies to put an effective compliance programme in place. Several commentators have also recommended the adoption of corporate compliance programmes as a defence (though not an absolute defence). See Walsh and Pyrich, 1995; Huff, 1996. There are also several statutes in the United Kingdom that provide for a defence of due diligence.

by the House of Lords in *Tesco v Nattrass* with regard to the application of the identification doctrine[30] or as that of the term "senior management" provided for by the CMCHA as regards the application of the senior management failure test,[31] the prosecution would be required to dissect large and complex structures and examine piles of documents in order to adduce evidence of the knowledge of such senior officers. Thus, large and complex companies would seldom be prosecuted because such senior officers are usually remote from the activities of the operational staff. The silver lining is that courts in the United Kingdom increasingly adopt a progressive stance with regard to which officer can be identified with the company. In *El Ajou v Dollar Holdings plc,*[32] Nourse LJ espoused the contention that the question whether an agent is to be identified with the company should depend on whether she was delegated functions of management and control in relation to the acts in the matter under consideration by the court.[33] In *Meridian Global Funds Management Asia Ltd v Securities Commission*,[34] Lord Hoffmann stated that identifying an agent with a company should be a question of construction of the circumstances of each case. As such, if the prosecution is required to show that the senior management was aware or ought to have been aware of the existence of a criminogenic practice, it may be sufficient if the evidence adduced shows that the person that managed or organised the relevant transactions,[35] irrespective of her official position or title, knew or ought to have known of the existence of the criminogenic practice. Such person may be a head of the departmental store[36] or a site manager[37] or a transport manager.[38] However, what is important is the adduction of evidence showing that this person knew or ought to have known of the criminogenic practice and failed to report and/or take steps to ensure that no crime was committed.

iii. Is proof of the attitude of a single employee or a minority of employees sufficient?

[30] The House of Lords ordained that these include superior officers of the company that carry out functions of management and officers to whom the board have delegated management functions with full discretion to act independently of instruction. See *Tesco v Nattrass* [1972] A.C. 153 at 171 as per Lord Reid.
[31] Section 1(4)(c) of CMCHA provides that this term means persons who play significant roles in the making of decisions about how the whole or a substantial part of a company's activities are to be managed or organised or who actually manage or organise the whole or a substantial part of its activities.
[32] [1994] 2 All E.R. 685 at 696-697.
[33] See also *R v Andrews Weatherfoil Ltd* [1972] 1 All E.R. 65 at 70 per Eveleigh J.
[34] [1995] 2 A.C. 500 at 511.
[35] And not the whole or a substantial part of the company's transactions.
[36] See *R v Gateway Foodmarkets Ltd* [1997] 3 All E.R. 78.
[37] See *National Rivers Authority v Alfred McAlpine Homes East Ltd* [1994] 4 All E.R. 286.
[38] See *DPP v Kent and Sussex Contractors* [1944] 1 K.B. 146.

The third issue that requires clarification is that of the requisite percentage or proportion of workers whose attitudes or activities may be combined to determine whether a criminogenic practice existed within the company. It is uncertain whether the feeling or thought of one worker or a minority or even a relative majority of workers would be sufficient. If it is logical that the senior management or other person that had control over the relevant transaction must be shown to have had knowledge of the practice then it may also be advanced that the attitude or mode of performing an activity adopted by one worker or a minority of workers may be sufficient. This is because the prosecution would simply be required to show that manager A knew of the existence of a practice that was likely to motivate workers to breach the law and employee B breached that law based on the feeling that her act was approved or accepted by manager A. However, given that persons delegated managerial functions may include middle-level managers or even sometimes operational managers, then a practice may be said to exist within a company where it is observed only at the operational level and known to the person delegated managerial functions but unknown to the senior management or board of directors. In *R v Gateway Foodmarkets* for example, the company hierarchy issued directives to the various branches to always call lift contractors whenever there was a problem with the lifts of their stores. The management of one of the stores defied the directives and made it a practice of manually rectifying a persistent lift problem. This resulted in the section manager being killed in the shaft of the lift. The company was held liable for failing to ensure the health and safety of its employees. Although the court asserted that holding otherwise would have defeated the purpose of the statue,[39] it may be argued that the existence of the practice of rectifying the lift manually and not calling out the lift contractors was criminogenic because it tolerated the store manager's disregard of the safety of his subordinates. The fact that the criminogenic practice existed only within one store and was unknown to the senior management (and contrary to their directives) is irrelevant because the store manager who had control over the activity under consideration knew of the practice and failed to take steps to stop it.

As such, criminogenic practices may be established by evidence of the attitude of a single employee or a minority of employees or evidence of a single manager's customary way of distributing benefits and burdens within her department. However, it should logically be a question of the circumstance of each case. This is because there are instances where it may suffice to show that a single employee committed an offence because she felt that the mode she had adopted to perform her duty was approved by the managers or would subsequently be approved by the managers.[40] Equally, there are instances where the attitude or feeling of a single worker would not suffice. Where

[39] [1997] 3 All E.R. 78 at 83 per Evan L.J.

[40] If the managers had consistently rewarded the end result irrespective of the means employed by the workers, the latter may be pushed to commit acts which although illegal may enable them achieve the result desired by the managers.

the worker is for example a maverick acting to further her own selfish interests and not those of her corporate employer, it may be unfair to conclude that there was an existing practice that encouraged the worker's actions. However, where a worker acts in disregard of instructions but the driving compulsion of her action was to impress upon her managers and obtain an increase, she may be said to have been influenced by the existing policy of giving increases to assiduous workers to use a reprehensible mode to perform an acceptable activity.[41] Nonetheless, such policy or system must exist within the company and not only in the worker's mind.[42] This implies that the prosecution must show a connection between the employee's attitude or feeling and the directives or plan of action adopted by the senior management or her superior (provided that the superior had control over the relevant transactions). This takes us back to the contention that the approval of the worker's action by the senior management either tacitly or by implication and either ex-ante or ex post facto is also necessary.

Thus, where a statute prohibits the operation of motor vehicles by exhausted or ill drivers, if a driver that is taken ill continues to operate a motor vehicle because he feels that the company requires drivers to continue working even when taken ill, the company could be liable for violating the statute if the prosecution establishes a link between the driver's feeling and the instructions or policies of the company's management.[43] Equally, where drivers habitually distort their tachograph records because they feel that the company approves of their actions, the latter may be held liable where the prosecution establishes a link between the drivers' falsification and the omissions of the company's management to sanction the drivers.[44] However, in the first case, the court did not hold the company liable for the existence of a criminogenic practice of exerting pressure on ill drivers to continue operating vehicles but it aggregated the managers' knowledge of the requirements of the applicable statute and the knowledge of the driver's ailment obtained by two employees (dispatchers) and imputed the combined knowledge to the company. Equally, in the second case the company was not prosecuted for the existence of a criminogenic practice or system that tolerated the falsification of

[41] In such instance whether benefiting the company was only a remote objective of the employee's or whether her action actually benefited the company is irrelevant. See Huff, 1996: 1261-1262. The argument here is that although one cannot deny the fact that individual actors have independent motivations and judgments or are not simply "individual bees" that respond to stimuli in a reflex manner (See Pettit, 2007: 22-23), the fact that the individual would not have performed such act if she did not intend to further the company's interests (whether in part or not) implies that the company exercises (some degree of) control over the individual actor.

[42] Given that human beings are not physiologically exchangeable the operation of such a policy may not necessarily incite every worker or even a majority of workers to use an improper mode to perform their tasks. As such, it may be important for the court to consider whether such policy or practice would have encouraged a hypothetical worker to employ such improper mode in the circumstances.

[43] See *United States v T.I.M.E.-D.C., Inc* 381 F. Supp. 730.

[44] See *R v J.F.Alford Transport Ltd* (1997) 2 Cr. App. *R*. 326. It must nonetheless be pointed out that the company was acquitted in this case due to the misdirection of the jury by the judge.

tachograph records but for being art and part of the offence of its drivers.[45] These cases are indicative of the desirability of imposing liability directly on companies (via the collective knowledge doctrine and accessorial liability) by courts in the United States and the United Kingdom but also of the difficulty of devising a mechanism through which this may be done on a consistent basis. In imposing liability on the companies for the collective knowledge of agents or for being an accessory to a crime these courts may be faulted for failing to ascertain what constitutes the companies' intent (as distinguished from those of its agent) and why.

The identification doctrine although blighted by a number of flaws is less ambiguous and augurs well for consistency. It directs courts to refer to the intents of a senior officer. Vicarious liability may also be said to be less ambiguous as it directs courts to consider the criminal intent of any worker or agent. However, as shown above, these rules of attribution would result in the acquittal of the companies in several instances where the prosecution is unable to identify the senior officer or worker at fault. Also, the fact that these rules do not require the prosecution to establish the company's liability by adducing evidence of a criminal intent that is particular to the company implies that courts are unable to hold the accused company liable as a culpability-bearing agent that is deserving of punishment. The existence of a criminogenic practice or system may thus be held to be a more realistic rule reflecting the company's liability as opposed to that of its employees or agents. However, in many cases the policies or systems will not agree with the specific acts and omissions of employees and managers that breached the law. Nonetheless, the fact practices can be shown to have pushed the latter to act in order to further the company's interests shows that there was an "invisible hand" that directed the employees and managers in a rational and consistent manner. This reflects the contention that a company acts consistently in a rational and characteristic manner. As such, the practices that motivate employees to further the company's own interests[46] may therefore be said to constitute the properties of the company's mind[47] and may enable the prosecution and the court to determine acts and intents particular to a company (as opposed to those particular to its members and employees). As such, if the existence of practices is deemed a more realistic reflection of what was known within the company then its liability would stem from the fact that it did not act to prevent

[45] See also *R v Robert Millar (Contractors) Ltd and Robert Millar* [1970] 1 All E.R. 577 where a company was convicted for being an accessory to the offence of causing death by driving in a manner that was dangerous to the public.

[46] Whether they are incidentally in accord with the interests of the employees and society is not relevant here.

[47] This is because they are indicative of what the invisible company actually plans to do, as well as what the workers think or believe is expected of them by the company. In the words of Pettit (2007: 2), the workers "endorse certain goals and methods of reviewing goals, certain judgments and methods of updating judgments, and they follow procedures that enable them to pursue those goals in a manner that makes sense according to those judgments."

the crime in spite of the knowledge of the existing risk factors created by these practices.

However, given the fact that ascertaining whether a criminogenic practice existed within the accused company by reference to the actions and omissions of managers and employees would depend on the circumstances of each case, for purposes of consistency, it may be important to delineate the process by which the practice or policy (that would count as the company's mind) is formed. In other words, if companies ought to be held liable on a consistent basis for maintaining criminogenic practices that tolerated or encouraged non-compliance, it is important to determine what constitutes such practices. This is because judges and jurors would require a standard for determining the reasonableness of their decisions. In other words, they would have to be certain that any other judge or jury would equally hold that such practices existed after examining the evidence adduced. A number of issues merit discussion in this regard. Section 12 (6) of the Australian Criminal Code 1995 states that the criminogenic practice or policy may exist within the company generally or within a department where the "relevant" activities are performed; section 8 (3)(a) of the CMCHA simply states that the practices or polices may exist within the "organisation." It is uncertain whether the CMCHA concurs with the Australian position that the court may consider acts of employees both within the department that is concerned with the relevant transactions and within the company generally. Although, there is nothing stated in the CMCHA to suggest otherwise, it is imperative for Parliament and courts to clearly ascertain whether a company may be held to be the sum of the acts and/or omissions and knowledge of all employees of the department where the activities under consideration were performed or (simply) the sum of the acts and/or omissions and knowledge of all the employees of all departments of the company.[48]

The difficulty of determining what may constitute an existing practice is reminiscent of the difficulty encountered by courts in the United States in aggregating the acts and knowledge of employees and is a presage of what courts in the United Kingdom will encounter in determining what constitutes senior management failure. As such, determining what may constitute an existing practice may require providing an answer to the question of which employees' acts or omissions should be aggregated and why. This question has remained largely unanswered.[49] Where liability is determined by aggregation, companies feel hard done by in instances where they exercised all due

[48] The prosecution would be presented with a Herculean task if the practices are said to constitute acts, omissions and knowledge of all employees of all departments. This is because in cases where the company employs thousands of employees they would have to interview a cross-section of these and examine thousands of documents cataloguing their actions, omissions and knowledge even though a majority of the employees may not be concerned with the criminogenic practice or policy in question.

[49] See Gobert, 1994: 406. See also Clough and Mulhern, 2002: 107; Bucy, 1991: 1157; Gobert and Punch, 2003: 85.

diligence to ensure that their employees were compliant but courts nonetheless impose liability on them due to the compounding of the knowledge of one employee and the isolated act of another employee.[50] In such instance, it is uncertain whether the exercise of due diligence by the senior management and a majority of employees should absolve the company from liability or the company should nevertheless be incriminated by the sum of one employee's isolated activity and the knowledge of the risk of the activity obtained by another employee.[51] This takes us to the argument of the maverick employee. In such cases, there is a high probability that the single employee that was not compliant had a personal agenda and/or the employee (equally low-level) that had knowledge of the risk of the former's activity did not consider it worthwhile to report the activity.[52] It would be unfair to hold the corporation liable for the aggregation of the act and knowledge of these two employees. However, the fact that a cross-section of the employees and managers exercised due diligence should not always absolve the company since the single employee or minority of employees at fault may have been part of a summative collectivity whereby corporate action is based on the distributed input of all the employees.[53] Also, the fact they may have acted to further the company's interests cannot be ignored.[54]

It may be posited that in order to avoid the unfairness of imposing liability on a company (for a crime that is not strict or absolute) in circumstances where a majority of its managers and employees have exercised all due diligence and the crime (or part of it) was committed by an employee seeking to further her own selfish interests, it is important to establish that a criminogenic practice existed in spite of the compliance programme. One way of doing so is by giving determinable or measurable values to acts and omissions and knowledge of employees. In such instance, the prosecution would be able to show that a criminogenic practice existed by combining employee A's

[50] See Khanna, 1999: 375.

[51] This question also concerns the effective use of the defence of due diligence where it is provided for by a statute. In *Tesco v Nattrass*, the House of Lords held that the company will successfully invoke the defence of due diligence unless the act is that of a senior officer that can be identified with the company. Given that the Lords' definition of senior officer was quite restrictive, companies readily issued directives compliant with the law and excluded members of the board of directors and other senior managers from routine management in order to successfully invoke the defence of due diligence. This has provided more impetus to commentators that argue that the identification doctrine affirmed in *Tesco v Nattrass* does not have the sophistication required by a mechanism of determining corporate liability.

[52] As such, it should depend on the circumstances of each case whether the guilty employee was a maverick or not, as well as whether the corporation had information via one of its decision-makers or someone that had to report to one of its decision-makers.

[53] For discussion on summative collectivities, see Quinton, 1975; Goldman, 2004.

[54] Discussion on the importance of a compliance programme is often centred on its effectiveness with regard to the totality or majority of employees. It is important to note that even though the company adduces evidence of an effective compliance programme, courts may still impose liability on the company in order not to defeat the purpose of the statute. However, these decisions are unfortunately motivated by policy considerations rather than principle since the courts do not actually impose liability because the accused (company) is proved guilty as required by the statute they are applying.

act that was compliant with the law (which has zero value or is the smallest possible quantity) with the illegal acts of employees B and C (which are the largest possible quantities). We may consider the example of a security guard that has assiduously kept watch over a house for five months and then, on the first day of the sixth month decides to loosen the screws on the lock of the central door; and on the second day, breaks in and takes possession of the owner's jewellery. In delineating the *mens rea* of the crime, the prosecution would be required to determine which acts form part of the theft incident. It would examine a number of actions performed by the security guard before and after the theft and these actions would be aggregated in order to convince the court that she appropriated the owner's jewellery with the intention of permanently depriving the latter of its use. However, the exercise of her duty of keeping watch over the house (and the jewellery) for the first five months would be considered by the prosecution to be the lowest possible quantity. What the prosecution would confound are the acts of loosening the screws on the lock of the central door on the first day of the sixth month and breaking in and taking possession of the owner's jewellery on the second day. The jurors on the other hand may consider that the assiduous actions of the security guard during the first five months (prior to the theft) should not be the lowest possible quantities. This is where the latter's counsel convinces the jury that the theft was a one-off deviance of an exemplary employee. In such instance, the jury would be prepared to reduce the determinable value of the actions that constitute the theft. Their task would therefore consist of quantifying the security guard's previous exercise of her duties as well as the theft and determine which one has more value.

Such computation may be a lot more complex where the accused is a company and its actions constitute activities performed by several individuals, which may be either compliant or non-compliant. The jury would first of all determine whether the compliant or non-compliant acts of each individual has a high or low value and after an aggregation of acts at the level of the individuals, it would have to determine which acts of which employees should be aggregated at the collective level and which aggregation has a higher value.[55] Given the difficulty of such challenge courts may avoid referring to the existence of practices or policies altogether and stick to simple mechanisms such as the identification doctrine and vicarious liability, which require aggregation only at the individual level and subsequent imputation of the established individual's guilt to the company. However, as mentioned earlier, these mechanisms may present the criminal justice system with even bigger challenges as regards the fairness and justifiability of decisions. As such, there is need for scholarship on the delineation of criminogenic practices which may be held to be the equivalent for intent when a company is on trial.

[55] In a purely hierarchical collectivity (see definition below), the actions of the senior officers that were in control of the relevant transactions would certainly have a higher value because they influence their subordinates and are most likely to reflect the directives of the board of directors. However, in a summative collectivity, this may not always be the case.

A suggestion that will be discussed in the next section is that courts should employ the "doctrinal paradox" to aggregate the acts of employees at the collective level. This is because this concept elucidates (to a certain extent) how certain groups collectivise reason and how their identity and rationality emerge from the confluence of the acts or omissions of their members.

III. Using the "doctrinal paradox" to determine whether criminogenic practices existed

The "doctrinal paradox" was identified by Kornhauser and Sager.[56] They hold that the paradox arises from the opposite outcomes of two procedures that a panel of more than two judges may follow when deciding a case. These procedures involve the judges voting on each premise or on each conclusion and making a choice between adopting a conclusion-centred procedure or a premise-centred procedure. The conclusion-centred procedure involves the judges aggregating their votes on the conclusion and making a final decision based on the majority view of the conclusion and the premise-centred procedure involves the judges aggregating their votes on the premises and making a final decision based on the majority view on the premises. List and Pettit[57] however argue that it is preferable to talk of "discursive dilemma" rather than "doctrinal paradox" since there is almost always a conflict between procedures involving interrelated propositions and not only where there is a "background legal doctrine" as contended by Kornhauser and Sager. In other words, the paradox or dilemma does not only exist if there is legal doctrine or provision that determines which propositions or set of propositions are legitimate and should influence the choice. However, given that this paper is focused on how companies comply with the criminal law, I will prefer to talk of a "doctrinal paradox" since the criminal law in this case may be said to serve as the "background legal doctrine." Thus, the criminal law (that is effective) would make decisions about certain corporate activities reasons against making decisions on an outcome that involves breaching the criminal law. That notwithstanding, given that the "discursive dilemma" deals with group discourse in general and has been developed commendably, I will use both concepts interchangeably in order to show how courts may determine whether a criminogenic practice existed within the accused company.

Pettit[58] uses the "discursive dilemma" to show that some collective bodies are psychologically autonomous and act on independent impulses as intentional subjects. He contends that people tasked with making decisions within a purposive group or collective body will inevitably be faced with a dilemma or be confronted with the problem

[56] Kornhauser & Sager, 1986; 1993.
[57] 2005: 3.
[58] 2003.

of making difficult choices over a period of time. He further asserts that they will most likely bow to the pressure of collectivising reason and they will do so in accordance with the premise-centred procedure. As such the "discursive dilemma" focuses on the actions (decision-making) of purposive groups (of which companies are certainly part) that are organised to meet set targets.[59] That is why the "discursive dilemma" has also been used to facilitate our understanding of the concept of corporate personality.[60] As such, it may equally be advanced that the "doctrinal paradox" or "discursive dilemma" can facilitate our understanding of the collective processes by which employees or managers acting to further the interests of the company breach the criminal law. Given that when faced with a dilemma, the managers or employees (who have to make a choice between respecting orders and acting on their own initiatives) would rather collectivise reason, courts may examine the process of collectivisation in order to determine whether the actions and intentions (that constitute an existing practice or were influenced by an existing practice) are particular to the company or to its agents. In other words, where the employees or managers were seeking to further the interests of the company, courts should be able to distinguish between their individual preferences and those of the company by looking at how they resolved the paradoxes with regard to making decisions on the transactions that breached the law. As such, the "doctrinal paradox" could be used to determine whether a criminogenic practice existed within the accused company in a manner that is more rational and consistent with the company's nature as a collective body.

Pettit[61] also posits that any purposive group that ought to make a rational judgement will be confronted with a difficult choice between adopting inconsistent propositions (from different members) on the one hand, and imposing reason at the collective level on the other. In spite of the fact that a majority of the members or even all of them may not approve of the collective reason, it may be the preferred outcome because of the need to display or maintain "integrity."[62] Pettit thus advances that the group will likely impose reason at the collective level using the premise-centred procedure.[63] In order to show how this reasoning may help courts determine whether there was a criminogenic practice or system that tolerated or encouraged non-compliance, we may take the example of a company that was prosecuted and convicted for polluting a river. It had paper plant on the bank of the river and the pollution was the result of an effluent that overflowed from one of its tanks. The tank had pumps to prevent the overflow and they were inspected at regular intervals by the company's foreman. However, an inspector of the River Authority detected the pollution and even noted that brambles and leaves had

[59] See Pettit's (2003: 175) reference to the definition of purposive bodies following Stoljar (1973).
[60] See Rock, 2005.
[61] 2003: 175.
[62] The use of "integrity" is in line with its use by Dworkin (1986). See also List and Pettit, 2005.
[63] The reason why they will favour the premise-centred procedure is discussed below.

blocked the pumps. The company was held liable for causing and "knowingly" permitting the pollution of the river in accordance with section 2(1) of the Rivers (Prevention of Pollution) Act 1951.[64] Given that the House of Lords did not identify the foreman (or any other agent whose liability or failure was established) with the company in order to hold the latter liable, it is very much uncertain how they arrived at the conclusion that the accused corporate person in this case "caused" and "knowingly" permitted the pollution. It is submitted here that a more justifiable stance would have been to consider whether there was a criminogenic practice that encouraged or tolerated the foreman's failure to properly inspect the tanks or the failure of the foreman's superiors to ensure that he performed the task assigned to him.

Thus, if it is assumed that section 2(1) of the Rivers (Prevention of Pollution) Act 1951 required proof of intent to pollute ("caused" and "knowingly permitted") and as stated above, it would be unfair to convict the accused company without such evidence, then it may be contended that the prosecution ought to have shown that the company entertained such intention by adducing evidence establishing one of two things. Firstly, the process by which the company made decisions at both the levels of the board or senior management and any department that was concerned with the transaction under consideration led to the outcome. Or secondly, the outcome was caused by the failure of the monitoring system to ensure that the foreman inspected the tanks properly. In accordance with the reasoning underpinning the "doctrinal paradox," establishing either of both facts would depend on whether the accused company is a hierarchical collectivity or a summative collectivity. Following Goldman,[65] a hierarchical collectivity may be described as a group in which the decision-making process is concentrated within a designated unit or office. This is analogous to the centralised simple structure recognised by the criminal courts in the United Kingdom to the effect that the decision of a senior officer identified as the "directing mind" of the company is considered the decision of the corporation.[66] On the other hand, a summative collectivity may be described as a group whose decision is the culmination of the confluence of multiple decisions of diverse members. This is analogous to the divisionalised structure recognised by some criminal courts in the United States whereby the company is conceived as an assemblage of several autonomous persons or units.[67] In this case, a company is said to have knowledge of the full import of something of which different agents obtained information in a distributed manner.[68]

Given that the accused company could be either a hierarchical or a summative collectivity, it is important to show how the prosecution may use the "doctrinal paradox"

[64] *Alphacell Ltd v Woodward* [1972] A.C. 824 H.L.
[65] 2004: 9.
[66] See *Tesco v Nattrass*.
[67] See for example *United States v New Bank of England*.
[68] Goldman, 2004: 7-9.

to establish the company's guilt in both instances. If it was established that the company was a hierarchical collectivity, the prosecution may have had to show that its board or senior management knew or ought to have known of the requirements of the Rivers (Prevention of Pollution) Act 1951 and the importance of setting up an effective waste management system. This implies that the background legal doctrine in this case is the Rivers (Prevention of Pollution) Act 1951 that supports the proposition connecting the company's duty and liability under the Act. In order to establish that the company failed to perform its duty, it may be important to show that the senior management deliberated on the need of employing a competent person (if there was no such competence) to frequently inspect the tanks. Then the senior management delegated the power of employing the competent inspector to the human resources department. In this instance, both the human resources department and the inspector that was subsequently employed would be identified with the company for the purposes of determining the latter's liability. If the employment committee within the human resources department decided that there was no need to employ an inspector because the foreman had the requisite skills and experience and could carry out the inspections, then the prosecution may have argued that the decision to assign the task to the foreman was tolerated by sloppiness and avarice that existed within the company.[69] In this light, the prosecution would have been required to show that such decision was particular to the company and not to any of the individual members of the committee.[70] In order to show this, it would have been important to determine how the committee made such decision.

We may assume that the evidence showed that the committee was comprised of three persons, manager A, employee B, and employee C, that were required to decide on a set of propositions and they decided as follows:

- Manager A (departmental head) decided that the foreman was formally qualified for the task, had the requisite experience of performing similar tasks without supervision and should be assigned the task.

- Employee B decided that the foreman was formally qualified for the task but did not have the requisite experience of performing similar tasks without close supervision and so should not be assigned the task.

[69] In other words, the committee within the human resources department adopted an improper mode of performing the duty that was endorsed by the senior management either ex ante or ex post facto.

[70] The idea is that the company is the "invisible hand" that directs the employees and managers to act in a rational and consistent manner with regard to furthering its interests. Thus, the prosecution should have been required to show that the members of the committee made the decision to assign the task to the foreman without proper supervision in order to further the corporation's interests and not theirs; and the decision was not overruled because of the senior management's sloppiness.

- Employee C decided that the foreman was not formally qualified for the task but seemed to have reasonable experience of performing similar tasks without supervision. However, she thought it was not proper to assign the task to him.

In light of the depictions by Kornhauser and Sager, as well as Pettit and Lister, the decisions of the members of the committee can be shown as follows:

	Formally qualified?	Sufficient experience?	Should he be assigned the task?
A	Yes	Yes	Yes
B	Yes	No	No
C	No	Yes	No

If the committee decided based on a conclusion-centred procedure, the majority in the third column would have dictated the decision (two out of three managers were opposed to assigning the task to the foreman). However, if the committee decided based on a premise-centred procedure (voting separately on each of the premises and deciding based on such vote), the majority opinions in the first and second columns would have guided the decision. The committee would thus have been faced with a difficult choice because a majority of members thought that the foreman's qualifications and experience were sufficient and yet a majority was against assigning the task to him. This implies that there would have been a paradox (dilemma) because a majority supported both premises (reason-proposition) and a different majority supported the conclusion (outcome-proposition) and this paradox prevented the committee and consequently the corporation to speak with a common voice or show integrity.[71] But given that this committee had to comply with the background legal doctrine (Rivers (Prevention of Pollution) Act 1951), they would certainly have agreed that they were required to employ or assign the task to someone that was both qualified and experienced. As such, if the foreman was thought to be both experienced and qualified by the majority then it was logical that the task be assigned to him. In other words, the members of the committee would have considered the most rational thing to do in such instance which is to consider the interests of the corporation (to such extent that the background legal doctrine is not violated).[72] Thus, the decision would naturally have

[71] If the judgments on the premises were already on record, then the committee would have found itself in a difficult situation since the majority judgment on the outcome contradicted that which was already on record. See Pettit, 2007: 14.

[72] The only way the committee could act as a single group and in a consistent manner was to choose the set of propositions that furthered the company's interests.

been based on the reason-proposition or premise-centred procedure because the committee would have reasoned that the foreman was both qualified and experienced for the job.[73] In this light, committee would have decided by majority voting and on a conjunction of premises.[74]

However, if we return to the assumption that this was a hierarchical collectivity, then it is likely that the decision-making would have been centralised within the office of the head of the department. In this case, the corporation's decision would have been that of Manager A, which was to assign the task to the foreman. As such, in spite of the dissentions from the other members of the committee, the task would have been assigned to the foreman. As such, in aggregating the acts and knowledge of the employees or agents concerned with the relevant transaction (the employment of a competent inspector and the inspection of the tanks), the prosecutor would have ascribed a higher determinable or measurable value to the acts and knowledge of manager A, as opposed to those of employees B and C and the foreman. The prosecutor's would then have sought to establish the company's liability by showing that the failure of manager A to act upon the knowledge of the foreman's shortcomings given to her by employees B and C, as well as the assigning the task of inspecting the tanks to the foreman without routine supervision culminated in a practice that tolerated the foreman's subsequent incompetence or motivated his subsequent laxness. Equally, the fact that the decision was not overruled by the senior management in spite of the risk involved is indicative of the existence of a practice of tolerating such decisions.

On the other hand, if the company was a summative collectivity, it is likely that the majoritarian rationale would have prevailed and the decision would have been based on the majority vote on the premises.[75] In determining the company's liability, the prosecution would have attributed the same value to the acts of members of the committee and the foreman. It would then have established the company's liability by showing that the committee sought to make the company's judgment to correspond to

---

[73] Other extraneous constraints such as costs may have come into play. Thus, the members would have thought that it would be cheaper to assign the task to the foreman (who was both qualified and experienced) than to employ a new employee whose sole or major duty would be to either inspect the tanks or supervise the foreman. The fact that they opted for a cheaper option shows that they acted to further the company's interest; and also, the fact that their decision was not overruled shows that there was a practice of endorsing risky decisions.

[74] A "conjunction of premises" involves the concurrence of different considerations such as the agreement on which procedure (either step X or step Y) to follow in making a decision. Conversely, a "disjunction of premises" involves the rejection of one consideration in favour of the other such as whether the procedure would not involve one of step X or step Y. See Pettit, 2003: 168-170.

[75] As mentioned above, a majority vote on the conclusion would have required the employment of a new inspector although the foreman was both qualified and experienced. Thus, the fact that the majority vote on the premises did not violate the background legal doctrine (Rivers (Prevention of Pollution) Act 1951) implies that the cost-efficient and rational thing to do (as regards furthering the corporation's interest) was to assign the task to the foreman.

the judgment of the individual members (that were seeking to further its interests) and a decision was taken that fomented a practice that tolerated the foreman's subsequent incompetence or laxness.[76] In these scenarios, the company would have been held to have "caused" or "knowingly permitted" the pollution by creating and maintaining the practice that motivated the omission to prevent the overflow of the polluted effluent into the river. In other words, the practice of assigning the task of inspecting the tanks to an employee without ensuring adequate supervision pushed him to expediently perform the task or tolerated his laxness.[77]

As noted above, in order to show that the company entertained the intention to pollute, the prosecution ought to adduce evidence showing that the process by which the company made decisions led to the offence or that the offence was caused by the failure an employee and/or the inexistence or failure of the monitoring system that ought to have ensured that the employee performed her duty properly. The above examples show how this may be done in a complicated setting whereby the major decision-making body within the company delegates its duties to a committee within a sub-department that then decides either based on the judgement of the departmental head or the judgments (on the premises) of the majority of members of the committee.[78] In both instances, the rational and consistent thing was the making of decisions that furthered the interests of the company in the best possible way. As such, the invisible company actually directed the decision-making process in both instances and given that the decisions led to the creation of a criminogenic practice, it is only logical that it should bear the brunt. What we learn from the "doctrinal paradox" is that in a bid to display integrity and avoid this paradox, employees and managers will often turn towards the reason-based judgment (either of a "directing mind" or a majority of the members) and this would often trump the outcome-based judgement because the former (based on collective reason) is likely to further the company's interests.

IV. Conclusion

As stated in the introduction of this paper, the imposition of criminal sanctions upon institutions was recognised as far back as the Roman era and may be even prior to that.

[76] The foreman that was not cut out for the job was thus assigned the task without a good monitoring system in place.

[77] It may have also been important to ascertain the foreman's attitude on the acceptability of the mode he employed to carry out the inspections. However, the objective of using the "doctrinal paradox" is to show that the decision to assign the task to the foreman and the creation of a substructure for laxity and crime was particular to the company and not its agents.

[78] As noted above, corporate offending is often the result of a combination of poorly formulated policies, casual implementation of directives and careless supervision of staff.

However, the enforcement of crimes of intent has encountered a number of roadblocks including the requirement of proof of the artificial entity's intention of causing the result that completed the offence or acting in total disregard of such consequence. Although this paper is not focussed on the wherefore of the recognition of a company's separate personality and why crimes of intent should be enforced against companies it readily employs a concept that has been used by some commentators to demonstrate the independence of reason of collective bodies and also the existence of a corporate identity that is distinguished from that of its members and agents. This concept is the "doctrinal paradox" which is to the effect that when people within a group are tasked with making decisions they inevitably have to make choices (dilemma) and will most likely bow to the pressure of collectivising reason. The collective reason is that of the group and not of any of its constituent members although it may in certain circumstances concur with that of one individual of the group or may come in adjustment with that of the majority of the group.[79] It is submitted here that the prosecution and courts may refer to this process of collectivising reason within companies, as well as the collective reason itself in order to determine the intentions or choices made by companies as opposed to those made by their members and agents. This however is based on a number of assumptions. First, the members of the company tasked with making decisions must be seeking to further the interests of the company and not their own selfish interests. Secondly, there must be an agreement on how decisions are habitually made, whether by a conjunction or a disjunction of premises and whether in a majoritarian way or by referring to the "directing mind."[80] Although the members of the company or group may have gone through a similar process in order to arrive at a conclusion about how decisions would be made, it is also assumed that such initial process would not affect the outcome of the subsequent decision-making process.

As such, following Rock's[81] exposition of how the presence of a "discursive dilemma" defines a company's separate personality and Pettit's[82] illustration of how the concept may help in justifying the attribution of responsibility to certain groups such as companies, this paper has dwelled on how the evidence of such independence can be used in criminal law to establish the company's guilt (as a culpability-bearing agent).[83]

---

79 It is important to note that the "discursive dilemma" is employed to show that the decision of a collective is not necessarily that of the majority of members of the collective (See Pettit, 2007: 12) and not that the decision of the collective cannot be the same as that of the majority of members.

80 There may also have been an initial paradox or difficult choice of how decisions are to be made before the difficult choice of which decision in the case under consideration. This shows that this approach may nonetheless involve a fearsome complexity.

81 2005.

82 2007.

83 Contrary to these expositions, what this paper has attempted to show is how the "doctrinal paradox" can be used to establish the accused company's guilt and not to show why a company should be considered a responsible agent. The difference between both approaches is obvious in instances where

The contention here is that both the "doctrinal paradox" and the "discursive dilemma" can be used to determine whether criminogenic practices existed within the company. This follows from the argument that the existence of a practice that encouraged or tolerated non-compliance by agents is a better indication of whether a company entertained the relevant *mens rea* than evidence of the state of mind of a single senior officer (via the identification doctrine) or single employee (via vicarious liability) or a haphazard aggregation of the knowledge and actions of some or all employees (via the collective knowledge doctrine).[84] The shortcomings of these rules of attribution have been discussed in detail over the past decades and some prominent ones are pointed out here. As a result of these shortcomings, there has been a trend in the last decade towards organisational liability as opposed to derivative liability. Although the idea of organisational liability may itself be subject to an open-ended discussion, it is submitted here that the "doctrinal paradox" provides an appropriate means of focusing on the organisation's guilt (its criminal knowledge and intentions) beyond the metaphysical and in practical terms. There are no doubt a number of challenges that must be addressed. But that notwithstanding, it adumbrates an idea that may be developed into a comprehensive approach with the requisite structure and details.

References

Bucy P.H. "Corporate ethos: a standard for imposing corporate criminal liability" *Minnesota Law Review* (1991) 75: 1095.

Clough J. and Mulhern C. *The prosecution of corporations* Oxford University: Oxford 2002.

Dworkin R. *Law's empire* Harvard University Press: Cambridge1986.

Field S. and Jorg N. "Corporate liability and manslaughter: should we be going Dutch?" *Criminal Law Review* (2001): 156.

Gobert J. "Corporate liability: four models of fault" *Legal Studies* (1994) 14: 393.

---

the prosecutor seeks to establish the accused company's guilt irrespective of whether it can actually be responsible or not.

[84] Establishing evidence of a criminogenic practice would not be challenging due to a number of reasons. Firstly, as contended above, it may suffice to show that the practice encouraged or tolerated the commission of an offence or simply the performance of several acts that together amounted to the offence. Secondly, the attitude of one worker or a minority of workers may be sufficient to prove that a criminogenic practice existed. Thirdly, it is not necessary to show that the senior management knew or ought to have known of the practices or were indifferent as to the consequences. The knowledge of persons delegated managerial functions over the transactions under consideration should suffice.

Gobert J. and Punch M. *Rethinking corporate crime* Butterworths: London 2003

Goldman A. I. "Group knowledge versus group rationality: two approaches to social epistemology" (2004) Available online at http://personal/lse.ac.uk/list/doctrinalparadox.htm [Accessed 18/06/2008].

Hill J. "Corporate criminal liability in Australia: an evolving corporate governance technique" *Journal of Business Law* (2003): 1.

Huff K. B. "The role of corporate compliance programs in determining corporate criminal liability: a suggested approach" *Columbia Law Review* (1996) 96: 1252.

Khanna V.S. "Corporate Criminal Liability: What Purpose Does It Serve?" *Harvard Law Review* (1996) 109: 1477.

Khanna, V.S. "Is the notion of corporate fault a faulty notion?: the case of corporate mens rea" *Boston University Law Review* (1999) 79: 355.

Kornhauser L.A. and Sager L.G. "Unpacking the court" *Yale Law Journal* (1986) 96: 82.

Kornhauser L.A. and Sager L.G. "The one and the many: adjudication in collegial courts" *California Law Review* (1993) 81: 1.

List C. and Pettit P. "On the many as one" (2005) Available online at http://personal/lse.ac.uk/list/doctrinalparadox.htm [Accessed 18/06/2008].

Mestre A. *Les personnes morales et le problème de leur responsabilité pénale* Librairie Nouvelle de Droit et de Jurisprudence : Paris 1899.

Minkes J.P. and Minkes A.L. "Mays on corporate crime: a transdisciplinary perspective" The *Edinburgh Law Review (*2001*)* 5: 1.

Pettit P. "Groups with minds of their own" in Schmitt F. (ed) *Socializing Metaphysics* Rowan and Littlefield: Lanham (2003): 167.

Pettit P. "Responsibility incorporated" (2007) Available online at http://ssrn.com/abstract=1088249 [Accessed 09/8/2006].

Rock B. E. "The corporate form as a solution to a discursive dilemma" (2005) Available online at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1088&context=upenn/wps (Accessed 04/06/2008).

Stern Y.Z. "Corporate criminal liability – who is the corporation?" *The Journal of Corporate Law* (1987) 13: 125.

Stoljar S. J. *Groups and entities: an inquiry into corporate theory* (1973) Canberra: Australian National University Press

Quinton A. “Social objects” *Proceedings of the Aristotelian Society* (1975/76) 75: 1.

Valeur R. *La responsabilité pénale des personnes morales dans les droits français et anglo-américains* Marcel Giard 1931

Walsh C. and Pyrich A. "Corporate compliance programs as a defence to criminal liability: can a corporation save its soul” *Rutgers Law Review* (1995) 47: 605.

Wells C. “Corporate liability and consumer protection: *Tesco v Nattrass* revisited” *The Modern Law Review* (1994) 57: 817.

Wells C. *Corporations and criminal responsibility* 2nd edition Oxford University: Oxford 2001.

Williams G. *Criminal law: the general part* 2nd edition Stevens and Sons: London 1961.