



Corporate Governance vis-à-vis Corporate Criminal Responsibility: the Position of Shareholders*¹

ABSTRACT

The increasing economic powers of public companies and the implications of separation of ownership from control in such companies have sprung up a number of inter-related challenges. One of such challenges is the quest for accountability to shareholders in corporate governance. Thus, transparency, accountability, and security have increasingly become as important aspect of corporate governance. The question is, since the interest of shareholders is paramount in corporate governance, can the acts of a shareholder be imputed on a corporation irrespective of the nature of the shareholder. The aim of this research is to examine Corporate Governance vis-à-vis corporate criminal liability as it affects shareholders, with the objective of discussing the criminal liability of a controlling shareholder. The research adopts doctrinal designs using analytical approach with reliance made on Statutes, case law, law reviews and data in web-based sources. The research found that where a a directors of the company becomes a controlling shareholder or a member of the board of directors, he is a “directing mind” of a corporation and his acts can be imputed on the company. Consequently, while corporate governance aims at protecting the interest of shareholders, there is need to distinguish between which activity of the shareholder is intended to benefit the corporation and which is intended to benefit the shareholder but under the guise of “for the benefit of the corporation”. This is to ensure that at every point in time the corporation is bearing its own liability whether criminal or civil and not someone else’s.

Keywords: Corporate Governance, Corporate Criminal Responsibility, shareholders.

1. INTRODUCTION:

Corporate governance is a system of rules, policies, and practices that dictate how a company’s board of directors manages and oversees the operations of a company. This includes principles of transparency, accountability, and security. It is a system of direction and control that is altogether different from the daily operational management activities enacted by a company’s executives². Of course every public company has and is expected to have a board of directors to govern and oversee a company. Corporate governance involves a set of relationship between a company’s management, its board, its shareholders and other stakeholders. It provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.³ It is not to be contested that poor corporate governance is risky and dangerous for any company because it has the potential of either obstructing the company from achieving its goal or leading to its collapse and significant financial losses for shareholders. Shareholder primacy is one the most important and key principles of corporate governance. It is one aspect of company law where the place of the shareholder is importantly recognised in two ways⁴. There is the basic recognition of the importance of shareholders to any company since they buy the company’s stock and fund its operations. Then, from the basic recognition of shareholders importance follows the principle of responsibility to shareholders. It

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² James Chen, Margaret James & Amanda Bellucco Chatham; Corporate Governance, investopedia.com accessed March 29, 2022.

³ Alan Gutterman: *Corporate Governance* (Sustainable Entrepreneurship Project, 2019) 1

⁴ A shareholder can be a person, company, or organization that holds stock(s) in a given company. A shareholder must own a minimum of one share in a company’s stock or mutual fund to make them a partial owner.

is a critical policy that allows shareholders to elect a board of directors and whose “prime directive” is to be always seeking the best interests of shareholders. The board of directors hires and oversees the executives who comprise the team that manages the day-to-day operations of a company. This means that shareholders, effectively, have a direct say in how a company is run. In fact, they have a voice, a strong one at that in the running of the company. Ordinarily, shareholders are not involved in the day-to-day management of the business operations but they have the right to elect representatives (directors) and to receive information material to investment and voting decisions. However, some shareholders may seek a voice in the company’s strategic direction and decision-making. Of course this involves the assumption of a degree of responsibility. The question is to what extent does the fraudulent conduct of a shareholder affect the corporate criminal liability of any corporation. Can the acts of a shareholder be imputed on a corporation irrespective of the nature of the shareholder? This study is in five sections. Section I introduced the study. Section II examined the essence of transparency and Security in Corporate Governance. It further discussed the consequences of Poor Corporate Governance. Section III is on Criminal Responsibility of a Corporation while Section IV is on Shareholders and corporate offences and the extent to which the fraudulent act of a shareholder affect the corporation’s liability. Section V is the recommendations and conclusion.

2. The Essence of Transparency and Security in Corporate Governance

The basic principles of corporate governance are accountability, transparency, fairness, security and responsibility. Corporate governance identifies who has power and accountability and who makes decision. Amidst all policies and decisions, shareholder interest is of paramount importance to corporate governance. The shareholders may reach out to the members of the community who do not necessarily hold any interest in the company but who may nonetheless benefit from its goods or services. This means that Shareholders can be and are actually the link between the company and the community especially where the company carries out business. Shareholders outreach to the members of the community therefore strengthens and encourages the company’s lines of communication. However, shareholder cannot have effective communication with the members of the community if they are not properly informed and if they don’t have quality information about the corporation and its operations. In essence, there is need for accountability to the shareholder and the shareholders must ensure by appointing the directors and the auditors that an appropriate governance structure is in place. Effective communication⁵ with the community will go a long way to promote the company’s transparency. It means that all members of the community both those who are directly or indirectly affected by the company and members of the press get a clear sense of the company’s goals, tactics, operations, capacity and general welfare.⁶ By this transparency, it means that anyone, whether inside or outside the company, can choose to review and verify the company’s actions. This will foster trust and is likely to encourage more individuals to patronize the company and possibly become shareholders of the company as well.

The need for security in corporate governance cannot be over emphasised. Security has become an increasingly important aspect of corporate governance. Shareholders, clients and customers desire to feel confident that their personal information will not be leaked or accessed by unauthorized users especially in this era of system hackers and cyber criminals. There is also need to ensure that the company’s proprietary processes and trade secrets are secure. The board approves corporate strategies that are intended to build sustainable long-term values, selects a chief executive officer, and oversees the chief executive officer and senior management officers in operating the company’s business. This chief executive officer sets the tone at the top for ethical conduct and ensures that data breach is avoided. This is because a data breach is very expensive, and also weakens public trust in the company, which can have a drastically negative effect on the company’s stock price. Losing investors trust means losing access to capital and of course capital is very necessary for corporate growth. Everyone in a company, from entry-

⁵ It could be done vocally through verbal exchanges, through written media such as books, websites, and magazines, it can also be done visually using graphs, charts, and maps or even non-verbally

⁶ CFI; Financial Modeling & Valuation Analyst on Corporate Governance, ratefinanceinstitute.com accessed March 29, 2022.

level staffers to members of the board, need to be well-versed in corporate security procedures such as passwords and authentication methods for the company's security.

Poor Corporate Governance and its Consequences

Often highly publicized revelations of corporate malfeasance revive public interest in corporate governance. For example, corporate governance became a pressing issue in the United States at the turn of the 21st century, after fraudulent practices bankrupted high-profiled companies such as Enron⁷ and WorldCom⁸. What happened at Enron was clearly lack of corporate governance that should have prevented the creation of those entities that hid the losses. Precisely, corporate governance advocates accountability, fairness, transparency, security and responsibility. Thus, it sets up a system of rules, policies, and practices for a company that will create room for accountability. So that each major aspect of the "government" whether the shareholders, the board of directors, the executive management team, and the company's employees is responsible to the others, thereby keeping them all accountable. This practice is more effective when members are sufficiently knowledgeable to understand the information fully, and have shareholding capacity large enough to be able to influence decision, and are able and willing to resort to the court if need be⁹. Unfortunately, most of the time, though they may be able to resort to the court, but they are unwilling to litigate, at best they sell off their shares once they have lost confidence in the board of directors. Part of this accountability entails that the board regularly reports financial information to the shareholders, which reflects the corporate governance principle of transparency. Bad corporate governance can cast doubt on a company's integrity, reliability or obligation to shareholders which will certainly have implications on a company's financial stand. What happened at Enron could have been prevented in an atmosphere of good corporate governance. Enron's situation is possible where the company had a corporate atmosphere with dishonest people at the top as well as traders who made illegal moves in the market. With the Enron scandal¹⁰ which is likely the largest, most complicated, and notorious accounting scandal of all time, it is obvious that poor corporate governance endangers the life, growth and existence of a company. Many of the executives used shady tactics and covert accounting methods to cover up the fact that they were essentially stealing from the company and which act is criminal. Erroneous figures were passed along to the board of directors, who failed to report the information to shareholders. With the fraudulent schemed accounting methods, shareholders were unaware that the company's debts and liabilities totaled much more than the company could ever repay. The executives were eventually charged with a number of felonies, and the company went bankrupt. It killed employee pensions and hurt shareholders immeasurably¹¹. There is no gain saying that when good corporate governance is abandoned, a company runs the risk of collapse, and shareholders stand to suffer substantially. Both the Enron and WorldCom scandals resulted in the 2002 passage of the Sarbanes-Oxley Act which imposed more stringent recordkeeping requirements on companies, along with stiff criminal penalties for violating them and other securities laws.¹² The main aim was to restore public confidence in public companies and how they operate. The need for a watchdog empowered to take action on behalf of shareholders by investigations, inspections and institution of civil and criminal proceedings may be the concern of corporate governance. Strong transparent corporate governance leads a country to make ethical decisions that benefit all of its stakeholders. It allows a company to place itself as an attractive option to investors. Bad corporate governance on the other hand leads to a breakdown of a company and often results in scandals and bankruptcy which is unhealthy for any company.

⁷ The problem with Enron was that its board of directors waived many rules relating to conflict of interest by allowing the chief financial officer Andrew Fastow, to create independent private partnerships to do business with Enron. what actually happened was that these private partnerships were used to hide Enron's debt and liabilities which would have reduced the company's profit significantly.

⁸ James Chan & 2 ors. supra 1

⁹ Paul .L. Davies, *Gower's Principle of Modern Company Law*, 6th edn.(Sweet & Maxwell, 1997) 66.

¹⁰ Through deceiving accounting tricks.

¹¹ James Chan & 2 ors. supra 8.

¹² Alan Gutterman supra 5.

3. Criminal Responsibility of a Corporation

A corporation or body corporate is a legal person having a legal identity separate and distinct from its members. It is an artificial person whose existence is maintained by a constant succession of new individuals who replace those that have gone into legal extinction. A corporation is a large company or group of companies authorised to act as a single entity and recognized as such in law.¹³ It could also be a group of people elected to govern a city or town.¹⁴ The Blacks' Law dictionary would say that a corporation is an entity having authority under the law to act as a single person distinct from the shareholders who own it and having right to issue stock and exit indefinitely; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exist indefinitely apart from them and has the legal powers that its constitution gives it.¹⁵ A corporation could be sole¹⁶ or aggregate¹⁷. A corporation is an artificial being invincible, intangible and existing only in contemplation of law. It possesses only those properties which the character of its creation confers upon it.¹⁸

The concept of criminal responsibility concerns the different mental states related to crimes, the ways in which those mental states are evaluated, and the variety of associated defenses. Thus for an act to constitute a crime, it requires the combination of the physical and mental element and lack of a valid defence. The term criminal responsibility refers to a person's ability to understand his or her conduct at the time a crime is committed by the person. In other words, it involves what a person is thinking when he commits a crime, or what result is anticipated or expected when a crime is committed. In Laws, crimes are defined in terms of an act or omission (*actus reas*) and a mental state (*mens reas*). Though most crimes raise some general questions but the challenge is as Clarkson¹⁹ rightly argued should it be criminal to cause harm if one genuinely thinks one is not causing any harm? Should it be criminal to try to commit a crime or to plan a crime when no harm occurs? Should it be criminal to cause harm deliberately if one thinks it is necessary to do so to save one's own life? In what circumstance can someone be said to have caused harm? The responses to these questions are therefore the general principles of criminal liability. The basic rule is that an act does not make a man guilty of a crime unless his mind is also guilty.²⁰ Therefore, strictly speaking, criminal liability is not imposed on persons who cannot act and who lack mental reasoning unless it can be said that that person has a guilty mind in respect of that offence and participated in the crime to an extent. The question then is how can criminal liability be attributed to a corporation that is without a human mind, soul, will or physical body? In answer to this, there is need to talk about the rationale for criminal law and criminal sanction.

The fundamental reason for having a system of criminal law is to provide a framework that will enable States to punish wrongdoers and thereby preserve an acceptable degree of social order. Without criminal law and its enforcement, each individual person, property and family would be substantially less safe from deliberate violations by others.²¹ Criminal law is the law on which men place their ultimate reliance for protection against all the grievous injuries that human and corporate conducts can inflict on individuals and institutions. Penal laws therefore govern the strongest forces that permit official agencies

¹³ C Soanes & A Stevenson; Concise Oxford English Dictionary, 11th ed. (Oxford University Press) 320

¹⁴ Ibid.

¹⁵ B. A Garner, Black's Law Dictionary, 9th Ed (West Group St. Paul Minn, 1999) 341.

¹⁶ A corporation sole consists of a single person who is the holder for the time being of a perpetual office, for example the office of a government minister or clerical bishop.

¹⁷ A corporation aggregate consists of a group of persons contemporaneously associated that they form a single person in the eyes of the law, e. g a limited liability company or public corporation.

¹⁸ Per Marshall J in *Trustees of Dartmouth College v Woodward* 17 US (4 Wheat) 518, 636 (1819) see also

¹⁹ CMV. Clarkson, *Understanding Criminal Law* 3rd edn.(London: Sweet & Maxwell, 2001)13.

²⁰ Per Lord Hailsham in *Haughton v Smith* (1975)A.C 476.

²¹Iryna Marchuk, 'The Concept of Crime in International Criminal Law', <https://link.springer.com>, accessed 5 April 2019. See also M J Allen & S Cooper, *Elliot and Wood's Cases and Materials on Criminal Law*, Tenth Edition (Sweet & Maxwell 2010) 4.

to bring individuals to order.²² Its promise as an instrument of safety is matched only by its power to punish those who violate the laws of the state.

Corporate misconduct has been addressed by civil, administrative and criminal laws. Presently, most countries²³ agree that corporations can be sanctioned under civil, administrative and criminal laws. However, the criminal liability of a corporation has remained more controversial. In progressive business practice, corporate criminal responsibility has become a sizeable branch of criminal law, a development consistent with the status of corporate crime as a major field of sociological inquiry and with increasing social concern about the serious forms of harms occasioned by corporate activities²⁴. Based on particular historical, social, economic and political developments, countries adopt various models of responding to the criminal liability of companies in different ways²⁵. Well, the interest of the law in imputing criminal liability on corporations is more on maintaining effective and deterrent checks against the acts of individual officers and members of the corporation who act fraudulently under corporate guise. A corporation even without soul and body can be criminally responsible for an act. It is worthy of note that a company registered under the relevant law for registration of companies²⁶ is a corporation i.e a notional entity, a legal person. It has a personality distinct and separate from those of human beings who are the shareholders or managers of the company.²⁷

According to the interpretation Act²⁸ a “person” includes anybody of persons corporate and unincorporated. Under the personal income tax²⁹ “person” includes an executor, trustee, company, partnership, community, family and individual. Again section 2 of Companies Income Tax Act³⁰ states that a person includes a person or body of persons. Section 2 of the Criminal Code³¹ states that “ person” and “owner” and other like terms, when used with reference to property ,includes corporations of all kinds, and any other associations of persons capable of owning property and also when so used include the state. By virtue of the provisions of Section 2 of the Criminal Code herein stated, corporations are already subject to the Criminal Code. The Company and Allied Matters Act, 2020 defines a “person” as including a firm, individual and corporation³². But the question is while a corporation is capable of owning a property, has a corporation the requisite mental state for criminal liability? Corporations can only act through their employees and agents and that makes it more difficult and complicated to determine the extent of criminal liability of a corporation than that of an individual and whether a corporation has the requisite mental state.

Under the Company and Allied Matters Act, 2020 which is the statute regulating the registration and activities of Companies in Nigeria, as from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may, from time to time, become members of the company , shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company....³³ Every company so incorporated shall for the furtherance of its authorised business or objects have all the powers of a natural person of full capacity.³⁴ In other words like a natural person a

²² Herbert Wechsler, *The Challenges of a Model Penal Code*, cited in G. Williams, *Textbook of Criminal Law*, 2nd ed., (London: Stevens & Sons, 1983) 3.

²³ Austria (the law of responsibility of association which came into effect in 2006), Norway etc.

²⁴ Brent Fisse, *Howard’s Criminal Law*, 5th edn.589, see also Frank I. Asogwah on “corporate criminal responsibility” 158.

²⁵ Belgium(corporate criminal liability 1999).

²⁶ In Nigeria it is the Company and Allied Matters Act 2020

²⁷ G Williams, *Textbook of Criminal Law*, 2nd ed., (London: Stevens & Sons, 1983) 969. See also. Frank I. Asogwah on “corporate criminal responsibility” 159.

²⁸ Cap 192 Laws of The Federation of Nigeria(LFN) 1990 Act, Cap 123 LFN 2004.

²⁹ Decree 1993 No. 104 Act Cap.P.8 Laws of The Federation of Nigeria(LFN) 2004.

³⁰ Cap 60 LFN Act 1990, Cap C 21 Laws of The Federation of Nigeria(LFN) 2004.

³¹ The Criminal Code Schedule to the Criminal Code Act. Cap. C38 *Laws of the Federation of Nigeria (LFN) 2004*, applicable to Southern Nigeria, (to be herein referred to as “ the C C”).

³² Section 588(1).

³³ Section 37.

³⁴ Section 38.

corporation has the ability to incur and can actually incur criminal liability. The Company and Allied Matters Act, 2020 categorically stated subject to the proviso under the relevant section therein that:

any acts of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company, shall be treated as the act of the company itself and the company shall be **criminally** and civilly liable therefore to the same extent as if it were a natural person.³⁵

With the above provision, certainly, there are occasions when the acts of a corporations including those of foreign companies in Nigeria attracts criminal sanction especially failure to obey the relevant statutes that regulate and control the registration and running of companies in Nigeria. For example non compliance with section 54 of the Company and Allied Matters Act, 2020 attracts a sanction with penalty. To that extent, The Company and Allied Matters Act, 2020 provides thus:

If any foreign Company fails to comply with the requirements of section 54 of this Act in so far as they may apply to the Company, the Company shall be guilty of an offence and liable on conviction to a fine of not less than N2,500; and any officer or agent of the Company who knowingly and willfully authorizes or permits the default or failure to comply shall, whether or not the company is also convicted of any offence, be liable on conviction to fine of N250 and where the offence is a continuing one, to a further fine of N25 for every day during which the default continues.³⁶

Just a necessary digress but very apt. When it comes to contract, a contract declared void by statute may not be an illegal contract unless in relation thereto, there is also a penalty imposed by law. It is the penalty that makes it illegal.³⁷ The imposition of fine on defaulters buttresses the criminal nature of the act and why the sanction. So that any contract entered into by the company while such illegality exists is null and void. In the case of *Pan Bisbilder (Nig.) Ltd. v. FBN*³⁸ the Supreme Court observed:

Without getting unduly enmeshed in the controversy regarding the definition or classification of that term, it will be enough to say that contracts which are prohibited by Statute or at common law, coupled with provisions for sanction (such as fine or imprisonment) in the event of its contravention are said to be illegal. There is however the need to make a distinction between contracts that are merely declared void and those declared illegal. For instance, if the provisions of the law require certain formalities to be performed as conditions precedent for the validity of the transaction, without however imposing any penalty for non-compliance, the result of failure to comply with the formalities merely renders the transaction void, but if a penalty is imposed, the transaction is not only void but illegal unless the circumstances are such that the provisions of the Statute stipulate otherwise." ...The consequence of illegality - - is that the Court will not come to the assistance of any party to an illegal contract, who wishes to enforce it³⁹.

That notwithstanding, when it comes to vicarious liability, a corporation is vicariously liable to exactly the same extent as a natural person. Of course since there is no vicarious liability in criminal law, this will certainly be referring to tortious liabilities. Our concern in this discourse is without doubt about criminal liability of a corporation and its members. That haven been said, without going into the doctrine of identification, a corporation is also directly liable for acts performed by some natural persons who are identified with it. In such a case the acts and intentions of those who control the corporation are deemed to be those of the corporation itself. There are, however, two limitations to corporate liability identified in

³⁵ Section 65.

³⁶ Section 55.

³⁷ *Simon Bodi Vs. Ishaya D. Agyo* (2003) FWLR (Pt.156) 815, *Thirwell Vs. Oyewumi & 2 Ors.* (1990) 4 NWLR (Pt.143) 384;

³⁸ (2000) 1 NWLR (PT.642) 684,

³⁹ Per Achike, JSC, at page 695.

*R v ICR Haulage Ltd*⁴⁰. Firstly, there are certain offences which from their very nature, cannot be committed by corporations.⁴¹ Secondly, a corporation will not be convicted of an offence where the only punishment which may be imposed is physical. Where a corporation is convicted of an offence it will be punished by the imposition of a fine or compensation order or both⁴². Over the years, courts have dealt with criminal charges against corporations and other group of persons, such as trade unions, they have elaborated rules for determining when a corporation should be convicted of a crime. A corporation is guilty of a crime if its “directing mind” committed the prohibited act and had the necessary state of mind. To be a “directing mind” of a corporation, a person must have so much authority in the corporation that the person can be considered the “alter ego” or “soul” of the corporation. To determine who is a directing mind of a corporation depends on the facts of each case, but that notwithstanding the person must have authority to set policy rather than simply having authority to manage. This directing mind has to be intending, at least in part, to benefit the corporation by the crime. Lord Denning L.J in *HL Bolton (Engineering) Co. Ltd. v T.J.Granham & Sons Ltd.*⁴³ had this to say that:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

It is not always easy to make the distinction but there are cases in which there is need to draw a line as in Lennard’s case. This case is of course the origin of the identification theory. In *Lennard’s Carrying Co. Ltd v Asiatic Petroleum Co Ltd.*⁴⁴ the question was whether damage had occurred without the ‘actual fault or privity’ of the owner of the ship. The owners were a company. But the fault was that of the registered managing owner who managed the ship on behalf of the owners and the court held that the company could not dissociate itself from him so as to say that there was no actual fault or privity on the part of the company. Viscount Haldane LC said among other things:

... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation...For if Mr. Lennard was the directing mind of the company, then his actions must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself...⁴⁵

The difficulty in considering corporations as legal persons subject to criminal sanction is somehow based on the criminal law’s focus on a guilty mind. Ordinarily, corporations are deemed incapable of forming the requisite mental element or guilty mind to commit a crime⁴⁶. But from the above decision the guilty minds of the directing minds and will of the company (the alter ergos) can be imputed on the corporation to issue a criminal sanction irrespective of the length of time. It may interest you to know that in *HL Bolton (Engineering) Co. Ltd. v T.J.Granham & Sons Ltd*⁴⁷, the directors of the company only met once in a year.

⁴⁰ (1944) KB 551.

⁴¹ Such offences as bigamy, rape, incest, and perjury.

⁴² M J Allen & S Cooper, *Elliot and Wood’s Cases and Materials on Criminal Law*, Tenth Edition (Sweet & Maxwell:2010) 356.

⁴³ (1957) 1 QB 159 @ 172.

⁴⁴ (1915) AC 705.

⁴⁵ At 713-714.

⁴⁶ Friedman Lawrence, ‘In Defence of Corporate Criminal Liability, Harvard Journal of Law and Public Policy’ 23 (2000) 833-844. cited in Elidiana Shkira, ‘Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries’. 5

⁴⁷ supra. 27.

They left the management of the business to others and yet it was the intention of those managers which was imputed to the company to impose the sanction.

The importance of imputing criminal responsibility on corporations cannot be overemphasized. In the first place, it helps to sanction the wrongdoers who have engaged in wrongful corporate activities, it recognizes the legal personality of corporate entities and enhances effective means of punishment. The corporate sanctioning of corporate actors is a veritable means of checking the activities of the directing minds of corporations. This is because it will deter them from engaging in fraudulent acts or make them weary or reluctant to indulge in criminality especially since criminal sanctions bring more shame and stigmatization on perpetrators. Most of the time, criminal sanctions may be more effective than imposing tortuous liability, also imprisonment for the individual member of the corporation too. This will effectively allow the corporation to continue its business activities relatively uninterrupted by fraudulent activities.

4. Shareholders and Corporate Offences and the Extent of Corporation's Liability.

A shareholder is one who owns or holds a share or shares in a company, especially a corporation. He is also called a shareowner⁴⁸. A shareholder can be a person, company, or organization that holds stock(s) in a given company. But a shareholder must own a minimum of one share in a company's stock or mutual fund to make him a partial owner. A shareholder in a corporation can be a controlling shareholder, a dummy shareholder, a majority shareholder or even a minority shareholder. Each type has its implications and responsibilities. To be a controlling shareholder, it means that such a shareholder is in position to influence the corporations activities because the shareholder either owns a majority of outstanding shares or owns a smaller percentage but a significant number of the remaining shares are widely distributed among many others. A controlling shareholder, no doubt has more influence than a dummy shareholder who owns stock in name only for the benefit of the true owner, whose identity is usually concealed. Also while a majority shareholder owns or controls more than half the corporation's stock, a minority shareholder owns less than half the total shares outstanding and thus cannot control the corporations management or singlehandedly elect directors⁴⁹. Shareholders can make proposal to change the company's policy or procedure. Shareholders invest in a company by buying its stock and receiving economic benefits in return. They are not involved in the day-to-day management of the business operations but they have the right to elect representatives (directors) and to receive information material to investment and voting decisions. Some shareholders may seek a voice in the company's strategic direction and decision-making. These areas are traditionally within the realm of the board and management. However, shareholders who seek this influence are advised to recognise that this type of empowerment necessarily involves the assumption of a degree of responsibility for the goal of long-term value creation for the company and all of its shareholders.⁵⁰ Without going into details, it is good to note and distinguish between crimes committed against the company⁵¹ and crimes committed by the company itself as a legal entity.⁵²

The shareholders are members of a company. Members consist of: the subscribers of the memorandum who are deemed to have agreed to become members and on the registration of the company they must be entered as members in its register of members; Directors who have signed and delivered to the Registrar an undertaking to take and pay for their qualification shares; All other persons who have agreed to become members of the company and whose names are entered in the registrar of members. In the case of a company limited by shares, the shareholders are members.⁵³ The Company and Allied Matters Act, 2020 has said subject to the proviso under the relevant section that:

⁴⁸ B. A Garner, *Black's Law Dictionary*, 9th Ed (West Group St. Paul Minn, 1999) 1380.

⁴⁹ *ibid.* 1381.

⁵⁰ William Ackman & others; Harvard Law School Forum on Corporate Governance, corpgov.law.harvard.edu. (2022)

⁵¹ This may be in the nature of insider dealing, fraudulent trading, expropriation of corporate opportunity, breach of fiduciary duty.

⁵² see. Frank I. Asogwah on "corporate criminal responsibility" 171:

⁵³ CS. Ola, *Company Law in Nigeria* (Nigeria: Heinemann Educational Books, 2002)159

any acts of **the members** in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company, shall be treated as the act of the company itself and the company shall be **criminally** and civilly liable therefore to the same extent as if it were a natural person.⁵⁴

Notwithstanding that Shareholders are members of the company, a controlling shareholder, also is in position to influence the corporation's activities. Some shareholders also seek a voice in the company's strategic direction and decision-making, though traditionally this is within the realm of the board and management. The question is can a controlling shareholder be regarded as a "directing mind" of a corporation so that his act would be imputed on the company? Furthermore, since a shareholder can be a person, company, or organization that holds stock(s) in a given company, where a shareholder is one of the directors of the company or a member of the board of directors, will the guilt of his criminal act committed in the course of carrying out the company's business be imputed on the corporation as the "directing mind" of a corporation. In attempting to provide answer to the question, ordinarily, a shareholder who does not involve himself in the management and day-to day running of the company is not regarded as the directing mind of the company, the alter ego so that the guilt of his acts cannot be imputed on the corporation. He bears his liability as a person. But where a shareholder descends into the arena of taking major part in the control and management of the corporation including decision-making, policy making and in fact participates in the day-to day running of the company and these acts are condoned by the company, there is already an atmosphere of bad corporate governance, it will be difficult not to impute the guilty of such a controlling shareholders criminal act on the company especially when the act is carried out in the course of running the affairs of the company. That is an assumed responsibility inherent in supporting bad corporate governance. Already, he has much authority in the corporation that he can be considered the "alter ego" or "soul" of the corporation. He already has authority to set policy rather than simply having authority to manage. It is further submitted that where a shareholder who is one of the directing minds of a corporation engages in an act which attracts criminal sanction in the course of running the corporate activities, it is the act of the company and the criminal sanction will be on the company. It is basic that, a corporation is guilty of a crime if its "directing mind" committed the prohibited act and had the necessary state of mind. However, care must be taken to distinguish between which activity of the shareholder is really intended to benefit the corporation and which is intended to benefit the shareholder himself but under the fraudulent guise of "for the benefit of the corporation". This is to ensure that at every point in time the corporation is bearing its own liability whether criminal or civil rather than some fraudsters who happened to be its members.

5. RECOMMENDATIONS AND CONCLUSION

Every corporation worth its name and desirous of healthy growth must do all it takes to create and maintain an atmosphere of good governance and shown every act that may incur liabilities especially criminal liabilities. This is because notwithstanding that criminal sanctions are stigmatizing, they reduce public trust on the company, scares investors away from the company, may likely be the beginning of the collapse of the company and leaves shareholder in financial difficulty and disadvantage. A German conglomerate Siemens A.G admitted as part of its guilty plea to paying approximately \$1.4 billion in bribes, over a six year period through subsidiaries in France, Turkey and the Middle –East to obtain contracts.⁵⁵ To maintain good corporate governance that can effectively check fraud and fraudulent activities, every aspect of governance of the company especially the board of directors and managers must be up and doing and maintain the principle of accountability at all levels. There should be no corporate tolerance or support of illegal activities as such can create a scandal as in the case of Volkswagen AG⁵⁶ in September 2015.

⁵⁴ Section 65.

⁵⁵ Siemens A.G and Three Subsidiaries plead guilty to Foreign Corrupt Practices Act Violations and agree to pay \$450 Million in combined Criminal Fines, United States Department of Justice, December 15, 2008 in Elidiana Shkira, 'Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries 7.

⁵⁶ Corporate Support of Illegal Activities creates a scandal as in Volkswagen AG, United States Department of Justice, September 2015.