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Re - Examining the Remedy for Oppressive or Unfairly Prejudicial Conduct under the Companies and Allied Matters Act 2020 (CAMA)

Iguh Nwamaka Adaora, PhD, Aduma Onyeka Christiana LLM, Obi Helen Obiageli, PhD

Abstract

By the provisions of the Companies and Allied Matters Act, 2020, it has always been the law that if the majority acts oppressively towards the minority, the minority may petition the court to wind up the company on the ground that it is just and equitable to do so. The argument was that winding up was much too drastic a remedy to utilize in many cases, and that it would be desirable to give courts wider powers to intervene to set matters right, whether by ordering one party to buy the other out or otherwise regulating the affairs of a company. However, in an attempt to meet such cases, the Statute has given to the minority shareholders a remedy which allows minority shareholders to institute proceedings seeking a remedy where the company's affairs are being or have been conducted in an oppressive or unfairly prejudicial manner. This paper therefore re-examines the remedy of oppressive or unfairly prejudicial conduct under the Companies and Allied Matters Act 2020. The paper found out that the Companies and Allied Matters Act 2020, like the previous Act, has not provided an explanation of the concepts of oppressive or unfairly prejudicial conduct and the writers therefore recommend the provision of clear guidance and criteria as regards the concepts of oppressive or unfairly prejudicial conduct which would remove the uncertainties pertaining to the remedy.

Keywords: *Prejudicial Conduct,Companies,Companies and Allied Matters Act 2020,Remedy,shareholders*

1. Introduction

An unfairly prejudicial remedy is a statutory remedy currently provided by sections 353 - 356 of Companies and Allied Matters Act, 2020. It is one of the primary remedies available to minority shareholders who are the victims of oppressive or unfairly prejudicial conduct. By virtue of section 354 (2) of CAMA, the oppressive or unfairly prejudicial remedy gives the court wide discretion to grant relief against any course of conduct in the running of the affairs of a company that is unfairly prejudicial to the interests of some part of the membership including at least the petitioning member. The provision was enacted in response to the inadequacy of the oppression remedy provisions available under the repealed Companies Act of 1968 as an alternative to winding up. Section 201 of the repealed Companies Act, 1968 empowered any member who complained that the affairs of the company were being conducted in a manner oppressive to some part of the members (including himself) to make an application to the court by petition for such order as the court thinks fit. This provision did not specifically state the orders the court may give in such circumstances. Again, an order under section 201 was only permitted if the facts constituted a ground for winding up remedy on the just and equitable ground. However, this provision proved to be inadequate and was later repealed and replaced with Sections 310 – 313 of CAMA 1990, to provide a more comprehensive provision that would state the exact powers of the court and accommodate both oppression and unfairly prejudicial conduct. Subsequently, the 1990 CAMA was repealed and replaced with CAMA, 2020 wherein the oppressive or unfairly prejudicial remedy was laid out in sections 353 -356 of CAMA 2020.

2. Meaning of Oppressive or Unfairly Prejudicial Conduct

CAMA does not define what amounts to an oppressive or unfairly

prejudicial conduct, therefore, attention must be turned to the jurisprudence emanating from the courts. And in this regard, Nigerian courts rely heavily on the judicial interpretation of the terms, "oppression" and "unfair prejudice" by English courts in the corresponding provisions of section 210 of the English Companies Act of 1948. For instance, in the English case of *Re Jermyn Street Turkish Baths Ltd (1971)* the Court of Appeal considered the meaning of oppression in that context and observed:

> Oppression occurs when shareholders, having a dominant position in a company, either exercise that power to procure that something is done or not done in the conduct of the company's affairs or procure by an express or implicit threat of an exercise of that power that something is done or not done in the conduct of the company's affair and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Co-Operative wholesale Society Ltd v Meyer (1959)* burdensome, harsh and wrongful to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs…oppression must…import that the oppressed are being constrained to submit to something which is unfair to

> them as the result of some overriding act
> or attitude on the part of the oppressor.

Similarly, in *Ogunade v Mobile Films West Africa Ltd (1976)* Karibi Whyte J. (as he then was), while attempting to define the term "oppression" under the repealed 1968 Companies Act, stated that the oppression or fraudulent conduct of the majority must be harsh, burdensome and wrongful and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time. It does appear that negligence in conducting the affairs of the company, or lack of business ability or inefficiency will not be sufficient. Indeed, the writer is of the view that this definition was an affirmation of the earlier definition provided in *Scottish Co-Operative Wholesale Society (1959)* in which the House of Lords equated the word "oppression" with burdensome, harsh and wrongful. Also, in *Re Lundie Brothers Ltd (1965)* it was held that a minority shareholder complaining of oppressive conduct must also establish lack of probity or fair dealing to him in that capacity.

However, the mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted, does not lead to the conclusion that he is oppressed. Similarly, neither resentment at being outvoted nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded would lead to the conclusion that he is being oppressed. And as such, those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed. (Re Five Minutes Car Wash Services Ltd: 1966) Moreover, in *Ijale Properties Ltd v Omololu – Mulele (2000)* the minority shareholders alleged that years after the company was

incorporated, they had not held any company meeting; not filed any annual returns with the Corporate Affairs Commission, and no auditors or company secretary was appointed; rather, that the company was being run by the majority shareholders leaving the minority shareholders in the dark as regards the affairs and financial success of the company. The court held that this was a clear case where section 311 of CAMA (Now section 354 CAMA, 2020) be invoked as a basis of action. Again, South African Court of Appeal in *Grancy Properties Limited v Manala (2013)* held that for a conduct to be deemed to be oppressive, it must be ranging from something 'tyrannical' to conduct contrary to fair play conditions.

As regards unfairly prejudicial conduct, the court in *Re R A Noble & Sons (Clothing) Ltd (1983)* held that the test for unfairness is objective and that there is no need to show any conscious knowledge on the part of the controller that it was unfair, or any other evidence of bad faith. The question would be whether a reasonable bystander would regard the act or omission as unfairly prejudicial. Harman J also observed in *Re A Company* (No. 001761 of 1986) that the words 'in a manner which is unfairly prejudicial' connote that there must be harm or prejudice and that such harm must be unfair'. In essence, it implies that there may be harm which is not unfair, and harm, to be within the section, must be alleged to be unfair to the interest of some part of the members.

The obvious shortcoming in the foregoing judicial and academic analysis was observed by Hoffman J. in *Re A Company* (No. 008695 0f 1985) when he cautioned that the meaning of 'unfairly prejudicial' should not be ascribed a narrow meaning but be widened depending on the circumstances of each case. According to his Lordship:

> Unfairness is a familiar concept employed in ordinary speech, often by way of contrast to

> infringement of legal right. It was intended to confer a very wide jurisdiction upon the court and I think it would be wrong to restrict that jurisdiction by adding any gloss to the ordinary meaning of the words.

His Lordship also opined that the concept of fairness was intended to confer a very wide jurisdiction upon the courtand that the parliament deliberately chose that concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. (O'Neill v Phillips: 1999) He also drew a parallel between the notion of fairness and the explanation of just and equitable provided by the decision in *Ebrahimi v Westbourne Galleries Ltd (1973)* where Lord Wilberforce also noted:

> The just and equitable provision enabled the court to subject the exercise of legal rights to equitable considerations, ...considerations, that are, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It has also been held, based on the dictionary definitions of 'prejudice', 'prejudicial' and 'unfair,' that 'unfairly prejudicial' in section 311 refers to that which is 'unjust and inequitable'. (Dilgenti v RWMD Operation Kelowna Ltd: 1976) For instance, in *Re A Company No.001761 of 1986* case, it was held that the fact that a director had purchased a debt owed by the company without informing the company and the fact that she had asked other members of the company to transfer their shares to her and to resign as directors could not support a petition on the grounds of unfairly prejudicial conduct. Again, in *Re London School of Electronics Ltd*

(1986) a petition was made by the holder of 25 per cent of the shares in the company, whose business was providing education courses. The other 75 per cent of the shares were held by another company also involved in education courses. Two directors of the subsidiary, who were also directors and principal shareholders of the holding company, caused the subsidiary to transfer many of its students to the holding company, depriving the petitioner of his 25 per cent share in the profits to be made from the students. This was held to be prejudicial conduct and the court ordered the holding company to buy the petitioner's shares, which were valued as if the students had not been transferred. Moreover, in *Re Saul D Harrison & Sons Plc (1995)* the court stated that the words "unfairly prejudicial" are general words and should be applied flexibly to meet the circumstances of the particular case. Slade also gave an explanation of the term "unfairly prejudicial" as follows:

> Without prejudice to the generality of the wording of the section…a member of a company will be able to bring himself within the section if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardized by reason of a course of conduct on the part of those persons who have had *de facto* control of the company, which is unfair to the members concerned. The test of fairness must, I think, be an objective, not a subjective one. (Re RA Noble Clothing Ltd: 1983)

In the same vein, Hoffmann, in *O'Neill v Phillips (1999)* opined that in section 459 of the 1985 Companies Act of England, Parliament has chosen fairness to free the court from technical considerations of legal

right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. It necessary follows that unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith. It may also consist of acts or omissions committed in the past, being currently committed or which are anticipated and must comprise conduct of the company's affairs and be an act or omission of the company or an act or omission on its behalf.

Asada also noted that the introduction of the additional term "unfairly prejudicial" to oppression is to whittle down or eliminate the limitation inherent in the term "oppression", and that it would appear then that negligent mismanagement causing economic loss to a member or an investor in a company may be sufficient to ground a cause of action under section 311(2) (a) of CAMA.

3. Persons Who May Apply for the Oppressive or Unfairly prejudicial Remedy

By section 353 (1) CAMA, an application for remedy on the ground of unfairly prejudicial conduct may be made by the following persons:

(i) member of the company;

(ii) a director or an officer, former director or an officer of the company;

(iii) creditor;

(iv) Corporate Affairs Commission;

(v) Any other person who, in the discretion of the court, is the proper person to make the application. (Wilson v Okeke : 2011)

Significantly, section 353 (1) (a) stipulates that a member may petition for an order against oppressive or unfairly prejudicial

conduct. And, according to section 353(2) CAMA 'member' includes the personal representative of a deceased member and any person to whom shares have been transferred or transmitted by operation of law. Thus, the writer is of the view that the question is whether a member stipulated by the section includes a majority shareholder. It is, therefore, to be appreciated that the language of the section is clear in the sense that the reference to a member implies that any member of the company whether a minority shareholder or not has a right to petition under section 354 (1) of CAMA. Also, in *Aero Bell Nig Ltd v Fidelity Union Merchant Bank Ltd (2005)* one of the issues before the court was whether plaintiffs had the *locus standi* to bring an action praying the court to order payment of accrued but unpaid dividends after they had made an outright sale of their shares to a subsidiary company of the defendant bank. The company's profits and dividends which were merely speculative had been declared internally by the board. At a later date, the management of the company and some majority directors issued a financial statement declaring a lower profit. The court held that the plaintiffs had *locus standi* and were entitled to bring an action for relief from oppression and unfairly prejudicial conduct of the majority shareholders and directors of the company, as former officers, creditors of the company regardless of the fact that they had sold their shares to the 1st defendant bank. This was because the unpaid dividend had accrued before the sale of their shares was consummated.

As regards the circumstances under which an applicant can apply for the remedy, section 354 (2) CAMA stipulates that a member can bring a petition alleging that the affairs of the company are being or have been conducted in a manner oppressive or unfairly prejudicial

to the interest of the member or members, while a director, creditor and any other person can bring a petition alleging that the affairs of the company are being or have been conducted in a manner oppressive or unfairly prejudicial to the interest of that person. It follows that the section affords a specific protection for the interests of that person. In continuation, a petition seeking to protect the interest of members or the company can only be made by a member, and the Corporate Affairs Commission. (CAMA: Section 354 (2) (a) & (c)) The Commission, under section 354(2) (c) may make an application for a petition where the affairs of the company were or are being conducted in a manner that was unfairly prejudicial to member or members or in disregard of public interest.

In essence, it is only the Corporate Affairs Commission that can petition on the ground that the affairs of the company were or are being conducted in a manner which is in disregard of public interests in addition to other grounds. However, under section 201 of the repealed 1968 Companies Act, an officer of the company could not bring a petition. (Re Five Minute Car Wash Service Ltd: 1966) A creditor cannot petition since the repealed section 201of the Companies Act of 1968 postulated oppression qua member only.

4. The Boundaries to Oppressive or Unfairly Prejudicial Conduct

Section 354(1) CAMA provides to the effect that an application may be made to the court for an order that the affairs of the company are being or have been conducted in an unfairly prejudicial manner. The section requires prejudice to the minority shareholders which must be unfair. This means that it is not sufficient if the actionable conduct satisfies only one of these requirements since the conduct may be prejudicial without being unfair. Similarly, the action may be unfair without being

prejudicial. (Oak Investment Parties XII v Boughtwood: 2010) And as such, in order to satisfy the statutory test of unfair prejudice, it must be shown that the interests of the members generally or some part of the members, including the petitioner have been prejudiced unfairly. Thus, the element of unfairness is at the heart of unfair prejudice remedy. (Anderson v Hogg: 2002) As Peter Gibson J stated in *Re Ringtower Holdings Plc (1988)* that the relevant conduct must be prejudicial to the relevant interests and also unfairly so; conduct may be unfair without being prejudicial or prejudicial without being unfair, and in neither case could the section be satisfied, the test is of unfair prejudice, and not of unlawfulness, and conduct may be lawful but unfairly prejudicial. Furthermore, in *Re R A Noble & Sons (Clothing) Ltd (1983)* Nourse J narrowed the ambit of a similar provision under the English Act, when he pointed out that all cases successful under section 210 of the 1948 Act of England would fall within section 459 of the 1985 Companies Act of England and section 459 could include cases which would have not succeeded under section 210. It would be sufficient for a member to show that the value of his shareholding had been seriously diminished or at least seriously jeopardized by a course of conduct by those who had *de facto* control of the company; and that the test of unfairness is objective, there is no need to show any conscious bad knowledge on the part of the controller that it was unfair, or any other evidence of faith. It would be a question of whether a reasonable bystander would regard it as unfairly prejudicial. It is, hence, essential that the relevant prejudice has been caused unfairly. The test of fairness is therefore an extremely wide one and allows the court to have regard to any circumstances that it considers to be relevant. Examples of unfair prejudice include failure to give accurate accounting information, serious mismanagement, diverting business to another company in which the minority shareholders have

no shareholding. There must be an unfair adverse effect on the minority. (Wagas et al: 2015) As such, the restrictive term of "oppression" referred in section 201 of the repealed Companies Act 1968 has been widened by the interpreted terminology of "unfair prejudice". However, it is not yet clear what the term "oppressive" or "unfairly prejudicial conduct" means since CAMA, like its predecessor, did not provide a definition for those terms. The writer therefore recommends that CAMA should be amended to provide a definition or clear guidance as to what constitutes oppressive or unfairly prejudicial conduct which will bring certainty to the operation of the remedy.

Again, the alleged conduct should be relevant to the conduct of the company's affairs and it should concern a series of events or a single act. (CAMA: Section 354) As such, the conduct must be the consequence of the acts or omissions by the company or by those who have the authority to act on behalf of that company and not merely the actions or inactions of an individual acting in personal capacity. The writers are also of the view that there is no clear definition provided in CAMA as regards the concept of company's affairs; however, the case law has identified the term as the acts done by the company or those authorized to act as its organs in the course of the company's business. (Re Legal Costs Negotiators Ltd: 1999) Consequently, the company's affairs include not the board's decision and resolutions of members but also any conduct by the directors where they are acting on behalf of the company. As such, actions committed by wrongdoers in their personal capacity beyond the boundaries of the company's business would not be considered as within a company's affairs. Furthermore, problems with the section 201 of the repealed Companies Act oppression remedy was the inclusion of the need to establish that the oppressive conduct must be a continuous nature right up to the time of the petition and that the conduct affected

the petitioning member, *qua* member and not in some other capacities. Therefore, the writer is of the opinion that the addition of the term "unfairly prejudicial conduct", made by section 311 of the repealed Companies Act of 1990 and CAMA 2020, was a successful movement from a restrictive approach to a broader one, which provides flexibility to the courts to interpret the term in such a way as to provide protection to minority shareholders.

5. Court Power to Grant Reliefs

The court has a wide discretion as to the remedy to be granted to the petitioner if the petition is successful. In essence, the court is granted a wide breadth of discretion on the appropriate order to make in each particular situation. Thus, the court may, if it is of the opinion that the complaint is well founded and that it is just and equitable to do so, make orders:

(i) that the company be wound up;

(ii) for regulating the conduct of the affairs of the company in future;

(iii) for the purchase of the shares of any member by other members of the company,

(iv) for the purchase of the shares of any member by the company and reduction accordingly of the company's capital;

(v) directing the company to institute, prosecute, defend or discontinue specific proceedings or authorizing a member or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company;

(vi) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;

(vii) directing an investigation to be made by the Corporate Affairs Commission;

(viii) appointing a receiver or a receiver and manager of property of the company;

(ix) restraining a person from engaging in specific conduct or from doing a specific act or thing;

(x) requiring a person to do a specific act or thing.(CAMA: Section 355)

Indeed, the writer is of the opinion that from the wordings of section 355 CAMA, the minority shareholder does not have a 'right' to specific remedy. The power of discretion to order, for instance, either winding up or purchase of shares belongs solely to the court. Accordingly, this may either create hold upproblems on the minority side or, conversely, decrease the majority's incentives to respect the minority shareholder's interests. Again, the minority shareholder may abstain from using this legal tool, since she cannot request a specific remedy and the court's order may deviate from his will. For instance, the court may give a buyout order, even if the minority shareholder only expected a dividend distribution. A similar case would be the order of corporate winding up where the minority shareholder may be sought for a buyout. This uncertainty may operate as a disincentive for the minority shareholder to use his right, which eventually decreases the incentives on the majority to respect minority rights. Be that as it may, the writer is of the view that buyout remedy appears to be the commonest remedy for oppressive or unfairly prejudicial conduct. However, the problem with this remedy is that CAMA merely provided for the remedy without stipulating the manner and time of the share valuation. Nevertheless, the English Law experience regarding the buyout remedy is helpful where the court will generally apply the pro-rata formula of share valuation if the company was a quasi –partnership. (Equity Partners Ltd v DemarcoAlmeida: 2002) The writer therefore recommends the adoption of this English

experience in Nigeria but that the valuation of the shares should be on pro-rata basis whether or not the company is a quasi-partnership on the ground that it would be prejudicial to treat a wronged petitioner as a willing seller and discount the price of his shares accordingly. The writer is also of the opinion that such would substantially defeat the purpose of the remedy if the wrongdoer majority shareholders were routinely rewarded by a discount for a minority shareholding. Also, in determining the appropriate time of share valuation, the English Law position is recommended where the court in *Profinance Trust SA* v *Gladstone (2002)* provided comprehensive view on the appropriate time of shares valuation, and made it clear that the proper time of valuation is the date of sale, however, if it appears to the court that there is more appropriate date to value the shares, the court has the power to do so. However, it is important to note that these remedies provided under section 355 CAMA are not exhaustive as the court is given the discretionary power to grant the petitioner the appropriate remedy it thinks fit.

6. Relationship with other Shareholder Remedy– Winding Up on the Just and Equitable Ground

The winding up of a company on the just and equitable grounds is another optional redress available to a minority shareholder of a company. Section 571(1) CAMA allows a contributory to petition the court to wind up a company on the ground that it is just and equitable that the company should be wound up. By virtue of section 574(2) CAMA, the court, on hearing a petition by contributory members of a company for relief by winding up on the ground that it would be just and equitable so to do, shall make the order as prayed if it is of the opinion that the petitioners are entitled to the relief sought unless it appears to the court that some other remedies are available and that the petitioners are

acting unreasonably in seeking a winding up order instead of pursuing those remedies. As such, the petitioner has to prove that there is no other remedy available and it is just and equitable to wind up the company. The aim of section 547(1) CAMA is to ensure that such an extreme remedy would not be ordered unless there are sufficient reasons. The issue as to whether the petitioners are acting unreasonably under section 574(1) CAMA in not pursuing some other remedies depends on the circumstances of the case.

Moreover, under section 201 of the repealed Companies Act of 1968, in order to establish relief against oppression, the petitioner had to prove that it would be just and equitable to wind up the company. However, this condition is no longer required as section 311 of the repealed Companies and Allied Matters Act 1990, removed that requirement. As such winding up the company under section 571(1) CAMA is permissible even if the shareholder failed to satisfy the unfair prejudice test. Thus, winding up of a company under the just and equitable ground is also not an insolvency procedure; the petition must be able to show that there would be a substantial surplus on a winding up. The courts have also, in the exercise of their powers under the 'just and equitable' doctrine, made it abundantly clear that each case must be determined on its own facts. Thus, in *Re Bleriot Manufacturing Co Ltd (1916)* Neville J stated that the words "just" and "equitable" are words of the widest significance and do not limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstances. Furthermore, in *Ebrahimi v Westbourne Galleries Ltd (1973)* Lord Wilberforce was of the view that the circumstances under which it would be just and equitable to wind up a company can be extremely wide indeed. This is because its occurrence is not only limited to where there is a breach of rights or obligations as defined in the Companies Act

and the articles of association, but also where there is breach of equitable rights, obligations and legitimate expectations. (Re London & County Coal Company: 1967)

7. Conclusion and Recommendations

The remedy for oppressive or unfairly prejudicial conduct is a strong tool of protection by which minority shareholders are allowed to petition to the court to obtain a remedy when it seems to that minority shareholder that the company's affairs are being or have been conducted in an oppressive or unfairly prejudicial manner. Under this remedy, the court is given wide discretionary powers to provide the aggrieved minority shareholder with a sufficient remedy which includes his exit from the company by asking his shares to be bought at fair value. The remedy for oppressive or unfairly prejudicial conduct was developed out of the need for a much stronger, more flexible and effective exit right for the minority shareholder that does not require winding up of the company and *lacuna* in the winding up remedy is considered too drastic, for it involves the dissolution of the company.

Although it was initially a requirement that only a member or members could bring an action on a claim of oppressive conduct, though not in his capacity as a director, this requirement has been relaxed. (CAMA: Section 355) This is because the court recognized that members have different interests based on their common understanding or agreement which is not stated in the articles. Therefore, the wide categories of persons who can apply for the remedy has proved to be a powerful weapon for minority shareholders, including those who suffer the injury of being excluded from their positions of management in the company.(CAMA:Section 353) Notwithstanding being a powerful tool for minority shareholders protection, there are some areas that need to be reformed to improve CAMA's protection of minority shareholders,

and the writers are therefore of the view that there is need to bring certainty to the operation of oppressive or unfairly prejudicial remedy in Nigeria; and, as such there should be a clear guidance as to what constitutes oppressive or unfairly prejudicial conduct in CAMA. The most common remedy for oppressive or unfairly prejudicial remedy is order of purchase of the petitioners' shares by the company or other shareholders; however, there is no statutory scheme for valuation of the shares. Again, CAMA 2020, like the previous Act, has not provided a clear explanation of the concepts of unfairness and the writer therefore recommends that a clear guidance and criteria should be provided in CAMA to remove the uncertainties regarding the remedy. The writers also recommend the adoption of pro-rata formula for share valuation in Nigeria, and the English law position with regard to the time of valuation is also recommended where the time of valuation is the date of sale. However, if it appears to the court that there is a more appropriate date of share valuation, the court should also have the power to do so.

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Fast Tracking Justice in Criminal Trials in Nigeria: Analysis of some Select Provisions of the Administration of Criminal Justice Act (ACJA) 2015

Ewulum, B. E., PhD

Abstract

The Administration of Criminal Justice Act of 2015 is a beautiful and legendary enactment. In the Act are many provisions regulating the modality for criminal prosecutions. Nigeria, for some time now, has been bedeviled by the evil of prison congestion and unnecessary delay in the criminal justice system. These delays sometimes appear to make a mockery of the saying that justice delayed is justice denied. In this work, the author looks at some salient provisions of the Administration of Criminal Justice Act which when fully invoked and applied will speed up the process of criminal trials. The work introduced the topic and sought to find out the reason(s) for the delays. It went further to look at these provisions and came to a conclusion that an effective application of these sections will increase the efficiency and speed up criminal trials. It is to be noted that this work did not set out to look at all the beautiful provisions of the Act but solely at the few sections considered of paramount importance to the speed of criminal justice.

Keywords: *Administration, Criminal Justice, Justice System, Provisions, Prosecutions*

Ewulum, B. E., PhD
Lecturer, Dept of Public and Private Law,
Faculty of Law,
Nnamdi Azikiwe University, Awka.
E MAIL: be.ewulum@unizik.edu.ng.
07038137153

Introduction

The Nigerian Criminal Justice system has been bedeviled with a lot of problems. Chief among them is the issue of inordinate delay. A satire popular among social media has it that an elephant was running when it saw an antelope who inquired as to the reason for such race for survival. The elephant answered that the police are approaching looking for culprits of a particular offence, the antelope was puzzled and further inquired as to why the elephant should run since it committed no offence, that it can only stay and explain to the police who actually is the culprit. The elephant retorted that it will take a minimum of twenty years to explain to the police that it was not the actual culprit. That is the situation in Nigeria. A suspect can languish in jail awaiting trial for more than ten years for an offence not within his knowledge. The case of *Idoko v State(2018)* is an apt illustration of this fable. The appellant at the Supreme Court was arraigned for the offence of conspiracy to commit robbery in Benue State in 2001, for the first time. He, among other suspects, was convicted in 2003. The appellant appealed and the appeal was decided in 2013 by the Court of Appeal against him. He further appealed to the Supreme Court. The Nigerian Supreme Court allowed the appellant's appeal in 2017. It followed by simple calculation that Idoko spent close to 17 years in prison while battling to prove his innocence. There was yet the case of one Olaide Olatunji who was released from death row after 24 years for a crime he did not commit(Owolawi:2019).

1.2: What are the Causes of Delay?

In an interview granted to *Premium Times(Ezeamalu:2018)* by Justice Owoade of the Court of Appeal, the jurist submitted that the delays were not solely due to any particular organ in the country's Criminal Justice system but as a result of numerous defects in the society. He further explained, “Delay could be caused by indiscriminate transfer of police prosecutors. Usually, it is caused by the inability of the prosecutor to produce witnesses, which in turn could be caused by the public perception of police and/or the problem of frequent adjournments.” He also stated that “sometimes, delay in the Criminal Justice System is caused by uncompleted investigation and also more generally by the inadequacy of courts and judicial personnel.” According to him, “it is needless to add that unnecessary adjournments usually caused by the attitude to work of legal practitioners and some judicial officers is also a

major factor of delay in the Criminal Justice System." Justice Owoade concluded by stating that the problem of delay could be largely overcome if "compensatory and reconciliatory procedures in the criminal process are further encouraged." The Justice of the Court of Appeal is not far from the truth, yet this is just but one of the causes of these delays.

Justice David G Mann of the High Court of Plateau state had this to say about the causes of delay in our judicial system:

> Many factors are responsible for the delay experienced in the smooth, efficient and quick disposal of cases. Some of these factors are case-specific while other factors are systemic. They include the absence of basic infrastructure, convenient and comfortable courtrooms, lack of adequate funding and poor working conditions, lack of training and retraining of personnel and corruption. These are by no means exhaustive.(Mann:2017)

This work specifically seeks to review the impact of certain sections of the ACJA in fast tracking justice in Nigeria. One thing is clear so far, and that is that there is delay in our justice system and opinion had come together to seek for a remedy against these delays. It is the need to obviate these delays that led into the enactment of the Administration of Criminal Justice Act of 2015.

2.1: What is the ACJA, 2015?

The Administration of the Criminal Justice Act of 2015, abbreviated to ACJA, 2015 is one of the signature legislations of the Goodluck Jonathan Administration. The said ACJA was a parting gift from a government that was worried about the congestion in our prisons and the delays inherent in our criminal justice system. The coming of the Act was long overdue. It is to be noted that the Act merged the existing two principal legislations on Crime in Nigeria, the Criminal Procedure Act applicable in the South and the Criminal Procedure Code applicable in the North. The Act also sought to make criminal trials fast and efficient. Nevertheless, more than three years down the line, we are still worried about the problems of delay in criminal trials. The question then is why?

Is it because the ACJA did not make adequate provisions or because those who ought to utilize its provisions are yet to be aware of the beautiful provisions of the ACJA? It is in respect of these questions that this topic was chosen. The aim is to highlight those salient provisions that are specifically geared towards fast tracking the wheel of justice in view of the truism that justice delayed is justice denied, even as we assert that justice rushed is justice crushed.

2.2: The Salient Provisions of the ACJA for Fast Tracking Criminal Trials

It is to be noted that in totality the function of the ACJA is to fast track our criminal justice system and ensure that the innocent does not suffer. However, there are certain provisions that are germane for consideration with particular emphasis on the fast tracking of Criminal trials in Nigeria. The writer will focus on some of these sections that are critical to the overall intendment of the ACJA.

3.1: Section 110 Modes of Instituting Criminal Proceedings in a Magistrate Court

Section 110 of the ACJA revisited the issue of instituting Criminal proceedings. Subsection 1 of the said section is interested in who brings and how the person can bring a charge before a Magistrate Court. That is not the issue here as Subsection 2 of the same section placed emphasis on time protocol. Indeed Section 110(2) made it emphatic that service of the charge sheet on the defendant must be done within seven days or within any other time as allowed by the court. This provision therefore shortens the time for the service of the process in a criminal charge. Section 110(3) seeks to curb unnecessary delay in criminal trials when it provided that the trial of a charge preferred under subsection 1 a and b of this section shall commence not later than 30 days from the time of filing the charge and the trial of the person shall be completed within reasonable time. This section is important because it considers the trial of persons arrested without warrant. Ordinarily, these classes of persons are usually arraigned and dumped in prison and that ends the matter. With this provision, there is now a time protocol for their trial. By Section 110(4), the court is enjoined to make a report to the Chief Judge giving reasons for failure to commence and complete the trial of such a person arrested without warrant within 180 days. This is commendable as it will make all sides to the trial to sit up. The Section 110 is not yet

done. In subsections 5, 6 and 7, it encourages quarterly returns to the Chief Judge on criminal matters and these returns shall be used to monitor the fast dispensation of criminal matters, reduction of court congestions and prison congestions. This report shall also be made available to the Administration of Criminal Justice Monitoring Committee and as well the National Human Rights Commission. It is therefore correct to say that there are oversight functions over the trial courts by these authorities and in fulfilling these functions, these authorities encourage fast tracking of criminal matters.

3.2: Analysis of the Imperatives of Section 379

It is imperative here to state that Section 379 of the ACJA had provided that in filing information, the prosecutor shall file the following documents:

a. The proof of evidence consisting of
    i. The list of witnesses
    ii. The list of exhibits
    iii. The summary of statements of the witnesses
    iv. Copies of statement of the defendant
    v. Any other document, report, or material that the prosecution intends to use in support of its case at the trial
    vi. Particulars of bail or any recognizance, bond or cash deposit, if the defendant is on bail
    vii. Particulars of place of custody, where the defendant is in custody
    viii. Particulars of any plea bargain arranged with the defendant
    ix. Particulars of any previous interlocutory proceedings including remand proceedings, in respect of the charge and
    x. Any other document as may be directed by the Court.

These documents are to be served within the stipulated time to encourage the fast pacing of the trial as both sides of the divide would have been ready for the trial before it commences.

3.3: Section 306 of the Administration of Criminal Justice Act 2015

Section 306 of the Administration of Criminal Justice Act, 2015 provides as follows: "An application for stay of proceedings in respect of a criminal matter before the Court shall not be entertained." This is one of the controversial aspects of the ACJA because the said section appears to have ousted the jurisdiction of the court. The said section appears to have deprived the individual of his right to appeal a ruling which obviously goes against his interest. Usually, when such rulings are given, this interlocutory appeal preserves the *res* pending the delivery of the Appellate Court judgment. In essence the section appears to be an ouster clause in view of the Constitutional provisions for the right of appeal.(Constitution:1999) It should be noted at this outset that stay of proceedings clearly delays the trial of a criminal matter pending the outcome of the appeal lodged. With this provision, such delays are obviated and issue of fast track is achieved. Indeed, this provision emphasizes that the Court shall not entertain any stay of proceedings in a criminal matter.

It should be borne in mind that this provision had earlier been encapsulated in Section 40 of the EFCC Act as follows: 'Subject to the provisions of the constitution of the Federal Republic of Nigeria1999, an application for stay of proceedings in respect of any criminal matter brought by the Commission before the High Court shall not be entertained until judgment is delivered by the High Court'. The provision in Section 40 of the EFCC Act was not pronounced upon by the Supreme Court until the coming of the ACJA. Perhaps the reason may have to do with the proviso in the provision 'subject to' as this proviso seems to be absent in Section 306 of the ACJA.

In *Metuh v FRN*,(2017) the Supreme Court gave verve to this provision of the ACJA. In that case, the appellant came before the Supreme Court praying that the Court order a stay of the criminal proceedings against him at the Federal High Court. It is to be noted that he had earlier appealed to the Court of Appeal which ignored his application hence the appeal to the Supreme Court. At the Supreme Court, Ogunbiyi JSC posited that, 'The Supreme Court, like the two lower courts, also lacks the power to stay proceedings under Section 22 of the Supreme Court Act or under its inherent powers'. My Lord continued by saying that 'the

conclusion as stated earlier, is predicated squarely on the contention of Section 306 of the Administration of the Criminal Justice Act, 2015 and Section 40 of the Economic and Financial Crimes Commission (Establishment)Act, 2004 whereby the trial court lacks the powers to order for stay of proceedings; also the Court below under Section 15 of the Court of Appeal Act as well as under Section 22 of the Supreme Court Act also lacks the power to order for stay of further proceedings pending before the trial Court." The Court in its *obiter* emphasized that the Constitution of the Federal Republic of Nigeria 1999 as amended being the *grundnorm* also provides for dealing with criminal trials within a reasonable time. Section 36(4) specifically provides thus, 'Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or a tribunal. It is only logical to interpret the spirit of the foregoing constitutional provision to translate that where the grant of an application for stay will unnecessarily delay and prolong the proceedings, it will not be granted.

The researcher wishes to emphasize that this is a criminal proceeding. It is pertinent to state that in criminal proceedings the liberty of an individual is at stake and where unnecessary delay is employed, the rights and liberties of such individual are affected. There are also clear constitutional and statutory provisions that enjoin and mandate the trial court not to delay criminal cases. There is no doubt that the grant of an order for stay of proceedings in the case would result in undue delay in the determination of the pending charge before the trial court. In the same case, KekereEkun JSC observed the new trend in criminal trials and submitted that "it is pertinent to observe that the new dispensation throughout the hierarchy of our courts, as evidenced by the recent practice directions issued by respective heads of court in relation to matters pertaining inter alia to corruption, economic and financial crimes, human trafficking, money laundering, rape, kidnapping and terrorism is to fast track the hearing and determination of such matters. Eko JSC nailed the mischief that Section 306 sought to cure. He stated that, 'contemporary Nigerian history shows the widespread abuse of injunctive remedies to stall trials of high-profile offenders in the country being crippled by corruption. That is the mischief that section 306 Administration of Criminal Justice Act (ACJA), 2015 is addressing'

An instance of what my Lord Eko JSC was lamenting about could be found in the case involving the former Governor of Abia State who had faced a corruption related trial since 2007 (Sahara Reporters: 2018) to about 2019. The provisions of Section 40 of the EFCC Act can be said to be a particular provision in the sense that it applies only to matters instituted by the EFCC. Section 306 of the ACJA on the other side is a general provision as the ACJA is applicable to all criminal matters in Nigeria. This provision of the ACJA is laudable as it ensures the speedy dispensation of criminal trials by not giving room for any delay tactics on the part of the defendant especially the high-profile ones facing criminal trials.

At this juncture, the author posits that outside the issue of deliberate delays by high profile defendants in criminal matters for their selfish interests, there exists a deliberate delay which affects the defendants in criminal matters and which in most cases puts off individuals from accessing our criminal justice system. It therefore becomes absurd that the prolongation of a criminal matter will ultimately reopen the wounds of the complainant or in some circumstances punish an innocent defendant for a period longer that his sentence were he to be sentenced for the said crime.

3.4: Trial Procedures under Section 396

Section 396 of the ACJA made diligent efforts to fast track the pace of justice. Section 396(1) provides that the arraignment shall be done in the normal method of taking pleas. By Section 396(2), "after the plea has been taken, the defendant may raise any objection to the validity of the charge or the information at any time before judgment provided that such objection shall only be considered along with the substantive issues and a ruling thereon made at the time of delivery of judgment". The effort here is geared towards delay. Thus, any form of objection raised can only be decided during the delivery of judgment and appeal thereon carried out as an appeal over a final decision and not interlocutory. Section 396(3) emphasizes on day to day trial. Indeed, the courts have been enjoined to conduct the trial day to day till conclusion. As a follow up to Section 393(3), the Act in Section 396(4) considered the impossibility of day to day trial and provided that in the event of such, no party shall be entitled to more than five adjournments and the interval between one adjournment and the other shall not exceed 14

working days. Still on this adjournment, the ACJA provided in its Section 396(5) that where both parties have exhausted their five adjournments and the matter is yet to be concluded, the court may grant adjournment to a party that needs same but it shall not exceed seven days interval from the last adjournment and the seven days shall include weekends. To discourage the incessant application for adjournment in a criminal matter, Section 396(6) made provisions for courts to award reasonable costs. By Section 396(7), the ACJA empowered a Judge that has been elevated to a higher court to finish a matter pending before him before the elevation to avoid trial *de novo*. It is essential to submit at this stage that justice is a three-way traffic. In *Okomu Oil Palm Ltd v Okpame(2007)*, the Court of Appeal per Aderemi JCA, stated,

> After all, it must be remembered that justice is not a one-way traffic. It is not justice for the plaintiff alone. It is not even only a two-way traffic in the sense that it is justice for the plaintiff and the defendant alone. I think really justice is a three-way traffic in justice for the plaintiff who is crying for a redress of the wrong done to him; justice for the defendant who is crying that he should be heard and his defence considered before being ordered to pay any sum claimed against him and also before being mulcted in cost; and finally but very important, justice for the society at large whose social norms and psyche are certainly going to be adversely affected if it cannot be seen by the common but reasonable man that upon the facts as laid down, justice, in the real and true sense of that word, has been seen to have been done by the arbiter.

It is further to be noted that it is an essential attribute of the administration of justice that justice must not only be done, it must be manifestly seen to be done. In *LPDC vs Fawehinmi(1985),* it was quoted by the Supreme Court that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

3.5: **Trial *De Novo***

What is trial *de novo*? Trial or hearing *de novo* means trying a matter anew, same as if it had not been previously rendered. It is a new hearing or a hearing for the second time, contemplating an entire trial in same

manner in which the matter was originally heard and a review of previous hearing. On hearing *de novo*, the court hears the matter as a court hears of original and not appellate jurisdiction. A trial de novo means nothing more than a new thing trial. This further means that the plaintiff is given another chance to re-litigate the same matter or, rather, in a more general sense, the parties are at liberty once more to reframe their case and restructure it as each may deem it appropriate.(Babatunde v PAS &TA Ltd:2007) Oseji JCA, in *Nwaosu v ors v HFP Engineering Nigeria Limited (2014)*stated that:

> I am therefore comfortable with the stance that a trial de novo does not include refilling a suit afresh. It thus presupposes the existence and therefore the continuation of the hearing or trial of a suit already filed. In other words, for there to be a trial de novo there must be a subsisting action filed by the claimant. It is therefore my humble view that an order of trial de novo precludes or does not extend to any action taken or any order made towards the initiation of an originating process such as the filing of a writ of summons and statement of claim.

In *Fadiora v Gbadebo*,(1978) it was held by the Supreme Court that in trials de novo the case must be proved anew or rather reproved de novo, and therefore, the judge's findings at the first trial are completely inadmissible on the basis that prima facie they have been discarded or got rid of. The court of second trial, therefore, is entitled to and, indeed, must look at the pleadings before it in order to ascertain and decide the issues joined by the parties before it on their pleadings'.

This provision abrogating *de novo* in the ACJA obviously sets a new trend. It is painful to watch several years of sweat go down the drain simply because the *judex* handling the matter has been elevated to a higher court or in some circumstances has been transferred. The time spent in starting the trial de novo may cost the lives of some of the *participes* in the trial.

When can a matter be said to resume de novo? In the Nigerian Jurisprudence, a matter may start *de novo* in any of the following circumstances:

a. Where the Trial Judge dies during the pendency of the matter
b. Where the trial Judge is transferred
c. Where the trial judge is elevated or given another appointment.

It is imperative to state that where a judge dies during the pendency of a matter, the only way for the matter to continue is by the matter starting afresh or de novo. In the case where a judge was transferred the matter may be taken to the judge in his new division especially where the matter has gone into hearing. For such matters, applications for assignment orders are made to enable the judge to move to his new division with the case file. The current trend these days in ACJA is for the assignment order to operate automatically, that is to say, the Judge moves with all files that are part-heard to his new division. Where, however a Judge is elevated to a higher bench or given another appointment outside the Bench, it is usually problematic and most times operates as if the Judge had died. The ACJA, having noted the difficulty usually occasioned by these elevations, has decided that where the Judge has been elevated to a higher bench, such a judge shall have the leave to continue with the hearing of this matter till conclusion. This is a very laudable method geared towards fast tracking the pace of justice by the ACJA having taken cognisance of the delay usually occasioned by trial *de novo* and its attendant cost and case implications.

Unfortunately this laudable provision of the ACJA has been struck down by the Supreme Court in the case of *Ude Jones Udeogu, Orji Uzor Kalu & Another* (2019).The rationale adopted by the Supreme Court in the above decision was that the section offends the provision of the Constitution and accordingly is null and void to the extent of its inconsistency as provided in 1(3) of the 1999 Constitution (as amended), and further expatiated in *Oloyede Ishola v Ajiboye.(1994)* To many, this is a return to archival technicality that defeats the aim of the law. It has indeed moved the pace of the administration of criminal justice backwards. To others, the Constitution is supreme and no legislation should ride roughshod over it. This is the current situation as we await a resolution of this legal dilemma.

3.6: Electronic Recording of Evidence under Section 364

Part of the delays occasioned in trials generally in Nigeria is caused by the long hand direct recording of court proceedings including testimonies of witnesses. The time it costs the court to do this recording is sufficient for the court to have finished a trial. In trying to fast track the pace of justice, Section 364 of the ACJA recommended that proceedings shall be recorded electronically. It is however unfortunate that in making this recommendation the Act made it optional when it used the word

'may'. It is correct to say that electronic recording of Court proceedings will make the Courts more productive and efficient. However, it is understandable why the provision has to be optional. In Nigeria where most courts lack infrastructure including buildings, recommending the provision of electronic recording equipment is certainly living in a dream world. It is submitted that implementation of this Section will certainly assist in fast tracking the pace of justice in Nigeria.

3.7: Time Protocol for Issuance of Legal Advice Section 376

A person alleged to have committed a crime is usually arraigned before a Court that has no jurisdiction and remanded in prison custody. Such a person may remain there for more than six months as he awaits the DPP advice. It has in some cases become a perfect excuse for non-arraignment of an awaiting trial inmate. In fast tracking the pace of justice, the ACJA has made beautiful provisions relating to time for the DPP advice. Section 376(1) insists that upon investigation of an offence and before a charge, the Police shall remit the file to the Attorney General of the Federation especially relating to an offence of which the Magistrate Court lacks jurisdiction to try. Subsection 2 of the section gives the AGF 14 days upon receipt of the file to make his advice. It is the provision of the law that if he offers advice that there is no prima facie case, then he shall cause same to get to the Police and as well the Court where the defendant was remanded assuming he has been remanded. It is to be noted that upon receipt of this advice, the Police is expected to release the suspect immediately and where such person has been charged, to make the advice also available to the Court. It is imperative to state that it is not enough for the AGF to write, the Act mandates him to send a law officer to the Court where the charge is pending to inform the court of the advice accordingly. In making these provisions, the Act considers the need to fast track the system hence the inclusion of time protocol for each action.

4.0: Conclusion

This work did not set out to review the ACJA. Indeed, the contribution merely scratched the surface of the Act by taking a look and making enabling practical suggestions at those sections that encourage fast tracking of criminal justice system in Nigeria. The provisions of the ACJA are beautiful but then as usual in Nigeria the question borders on application. However, where there is a will there is a way. This paper

seeks to encourage the will for ending delays in Criminal trials in Nigeria. The authorities in charge are expected to give adequate funding to the Judiciary, Ministry of Justice, and the Police to enable them to carry out the work as expected. It is obvious that the police, courts and lawyers who are in the forefront of the administration of criminal justice must sit up to put into practice the ACJA, 2015. In the end a proper application of these sections shall assist the courts to fast track the pace of justice delivery in criminal matters in Nigeria.

5.0: **Recommendations**

The author recommends

- A public awareness of the provisions of the ACJA, 2015,
- A sensitization of all the relevant key players in the ACJA.
- A synergy among the criminal justice institutions in Nigeria and a departure from unnecessary technicality.
- A change of attitude by all the relevant stakeholders
- The political will by the policy makers to implement the provisions of the ACJA

It is believed that if these recommendations are followed, the objectives of the ACJA, 2015 will certainly be achieved.

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Evaluation of the Imperatives of Corporate Criminal Liability Law in Nigeria

Dr. N. C. Uzoka

Abstract

Criminal culpability is often associated with respect to human beings. The main object of criminal liability is to forestall the reoccurrence of criminal actions by individuals. Recently Corporate Criminal Liability has become a problem which the courts have to address. The purpose of this paper is to manifest the problem of adaptation of the criminal law which was framed having human beings in mind, to suit corporations which are juristic persons in law. Much will be made to emphasise that corporation also commit crimes and should be criminally liable. The concept of corporate criminal liability will consider the underlying principles of such liability so as to justify the imposition of criminal liability on corporations. The methodology adopted is the doctrinal methods of legal research approach in literature review, analysis of cases and access to internet sources. Doctrinal in the sense that the paper made use of primary sources such as enabling laws, statutes and acts and secondary sources such as relevant textbooks, conventions, journal articles, and newspaper publications. The paper finds that there is no legal framework for corporate criminal liability in Nigeria. In particular, there is no liability theory for determining the corporate mens rea of corporations. Most relevant Nigerian legislation and case laws do not recognise that a corporation can have mens rea. The paper discovers that the extant laws on corporate criminal liability in Nigeria are deficient. Thus, there is an urgent need to review our laws and more particularly calls for the expedited passage of Corporate Manslaughter

Ngozi Chisom Uzoka
Department of International Law and Jurisprudence,
Nnamdi Azikiwe University,
Awka, Anambra State, Nigeria.

Bill/Act in Nigeria.

Keywords: *Corporate, Criminal Liability, Law, Companies, Corporate Culpability*.

The general belief in the early 16th and 17th centuries was that a corporation could not be held criminally liable. Thus, Lord Holt was quoted to have said in 1710 that "a corporation is not indictable, but members of such corporations can be indicted". However during the 19th century this principle was steadily whittled down, starting with the conviction of corporations for the nonfeasance of statutory duties and later extended to cases of misfeasance.

However, it proved difficult to punish the corporation for lack of adequate sanctions. The sanction available to courts to impose on corporations was fines only. Over time, the English Courts followed the doctrine of respondeat superior or vicarious liability in which the acts of a subordinate are attributed to the corporation. However, vicarious liability was only used for a small number of offences.

2.1 What are the Problems with Entrenching Corporate Criminal Liability

The key problem of corporate criminal liability is forging a coherent link between the corpus of criminal law, which has been developed in the context of natural persons, and to reflect the psychology of human beings in the realities to those of corporations. Corporations are complex fabrics of human actors, on one hand and corporate hierarchies, structures, policies and attributes on the other hand. In most legal systems, criminal offences have a physical element and a mental or fault element. Otherwise known as, *mens rea* and *actus reus*. Generally, the physical element of offences can be imputed fairly easily to a corporation. The real difficulty arises in relation to the mental/fault mindset element which is the guilty mind (*mens rea*).It is not known whether the corporation can have a fault mind element on its own right in Nigeria.

2.2 Contents of the Acts Referencing Corporations

While there is a substantive law on Criminal Act and Companies Act, there is no law on Corporate Manslaughter, Corporate Homicide and/ or holding Corporations directly liable or accountable for their criminal activities in Nigeria as is obtainable in other climes.

3.1 Currently the Concept of Corporate Crime

Corporate crime was defined by an Australian criminologist John Braithwaite as "the conduct of a corporation or employees acting on behalf of a corporation, which is proscribed and punishable by law". Corporate crimes are defined as illegal acts, omissions or commissions by corporate organisations themselves as, social or legal entities or by official or employees of the corporations acting in accordance with the operative goals or standard, operating procedures and cultural norms of the organization. Such principles are intended to benefit the corporations themselves. Economic crimes are those offences that are sometimes committed in the course of legitimate duties or transactions but which invariably have negative impact on the economy. Although such crimes do not have the tag of social reprehensibility attached to them, they usually have far-reaching adverse effects on the economy, health and persons including the nation.

Corporate conduct has been regulated principally by the corporate laws. It's time that the liabilities of companies for criminal wrongs are addressed. The corporate environment of any company today, effects and includes many aspects. Every aspect is indeed affected when the environment is criminally affected. There are so many people who are affected by the acts of the companies both directly and indirectly. The first group of people affected is the consumers, others are the Stakeholders like the workers, those within the environment who may account as beneficiaries and are at maximum risk. Note that employees of the Corporation; may suffer in more than one way, such as perpetrators of the crime and may be sacrificed for punishment. Then the state; that receives the economic benefits from it may also face a dual loss when a corporation is guilty of a crime in the process of its productions.

3.2 Attitude of the Corporations to Crime and Reactions

The perpetrators perceive themselves as sharp, fast, intelligent and crafty citizens who have been able to maximally benefit from such. Corporations lend their support to such crimes for any available economic opportunities. Over the years, some sociologist and criminologist have sought to broaden the concept of corporate crime to include any misconduct involving a corporation, whether it is a breach of a criminal or civil law or regulatory rule. Some have even seen the concept of corporate crime as convening any announced legal actions

against a corporation. Thinkers like Kip Schlegel have clearly pointed out that danger of creating a very wide parameter of the concept of corporate criminal liability will nullify the impact of it and believes in the confinement of its definition to the bare minimum. He lays down in his book the simple and short boundaries of the concept of corporate crime as; "any act that violates the criminal law".

Thinkers like Bauchus and Dworkin took similar views in the twenty-first century and argue in the same line of thought that the ambiguity relating to the concept of corporate criminal liability is because of the confusion that is underling the handling of definitions of corporate misconduct and illegal behavior of companies. It is justifiable because, all illegal corporate acts or misconducts are criminal in nature. It is high time the principles of the criminal law distinguished between all types of crimes including corporate crime (clearly defined as street crimes and the white collar crimes) prevalent in the society. It becomes pertinent to note that much research has shown the need for a separate definition of crimes and differentiated from a sub-set of white collar crime, occupational crime or any other form of crime associated with corporations. Kramer concluded that the corporate crime involves:

> Criminal acts (of omission or commissions), which are the result of deliberate decision making (or culpable negligence) by persons who occupy structural positions within the organisation as corporate executives or managers. These decisions are organisational in that they are organisationally based-made in accordance with the operative goals (primarily corporate profit), standard operating procedures, and cultural norms of the organisation and are intended to benefit the corporation itself.

The writer is of the opinion that Kramer's definition of what constitutes a criminal act is all encompassing. Corporations are to be held accountable on grounds of their activities or inactivity; as well as their internal decisions. The definition further buttresses the need to

hold corporations criminally liable, as their actions and inactions are as a result of the corporation's goals and objective in achieving their target.

4.1 Problems of Isolating Crimes

The problem arises when at times the dividing line between criminal and civil provisions phases out of clarity and its gets difficult to differentiate between the two. For example, under the regulatory sanctions for commercial statutes, such as the company laws there are provisions drafted for both civil and criminal actions which can be taken in relation to the same acts of misconduct by the company. For instance, where a director of a company has evidently misrepresented their power and position as director or acted in contravention to the rule. Then a civil action can be brought against him or she by the company to recover the punitive dangers suffered or a criminal case of fraud or misrepresentation may be sought against the director. Such incidences of overlapping of law may at times blur the distinction by seeking to have matters dealt with by civil law jurisdictions instead of the criminal law. This blurriness may a times take away the strictness of applicability of the principles of corporate criminal liability.

Hence, it is suggested that to hold corporations criminally liable, the existence of statutory provisions is expedient. Statutory offences being offences created by statutes automatically give rise to liability upon its breach. It is noteworthy to state that, bringing a civil action against a director or an officer of the company should not and will not absolve the corporation of liability. Dealing with the officers of a corporation under the civil law does not preclude a corporation from being liable under the criminal law as both have different punitive effects. However, the fact that the officers of the corporation have been dealt with under the civil law may be taken into consideration while determining the punishment of the corporation.

5.1 Requisites of Crime and Criminality

A crime is said to be committed when a person has committed a voluntary act prohibited by law, together with a particular state of guilty mind. A voluntary act means an act performed consciously as a result of effort or determination of an individual with an active intent. The state of mind referred to here can be an act committed after due deliberation alone or deliberation and with intent together or recklessly with criminal negligence. The main concern here is that the proof of the act

alone is not sufficient to prove that the wrongful act committed by a person had the required guilty state of mind. Under the criminal law, the state of mind is very much an element of the crime, as the act itself and must be proven beyond reasonable doubt in the court of law, either through direct or incidental evidence.

It cannot be denied that the criminal liability is what unlocks the logical structure of criminal law. Each element of a crime that the prosecutors need to prove beyond a reasonable doubt requires a principle of criminal liability to be fixed for that criminal act. There are some crimes that only involve a subcategory of the principles of liability, but such incidences are rare and are called crimes of criminal conduct. Theft or kidnapping, for example, are such crimes because all you need to prove beyond a reasonable doubt is the presence of *actus reus* along with *mens rea.* It is this concept of intent or guilty mind called the *mens rea*, which along with other principles, is taken into account that is the principle of strict liability. Here the liability without fault may arise in cases of corporate crimes or environmental crimes. In such evident acts of strict liability, the *mens rea* needs not be specifically proved. Many legal systems follow the general rule that the corporations may be held liable for a specific intent offence based on the knowledge and intent of their employees. Thus, the *mens rea* of the employee is imputed to the corporation.

5.2 Legal Entities and Corporate Crime

It is debated most of the times, whether or not it is feasible to hold responsible for crime a non-natural entity such as a corporate body? For, it is not capable of thinking for itself, or of creating any intention of its own. It is also contemplated that the very idea of fault and blameworthiness inherent in the concept of criminal capability embedded in this latin maxim "*actus non facitreum, nisi mens sit rea*" pressures personal responsibility. This is an element which an abstract entity such as a corporate body lacks. The corporate body has no physical except the mortar buildings and its does not think for itself. The actions that its takes or the acts that it undertakes, and the thinking that goes behind these acts is done for it by its directors or employees. There is a view that guilty servants of the corporation ought to be punished. However, it is the writer's view that this has not deterred corporations from engaging in criminal activities as it does not affect its reputation.

When the corporation is punished as a whole rather than the individual members, this affects their image as well as casts doubt as to their internal control system. The situation is otherwise complex when the guilt has to be fixed on someone. Within complex organisation it becomes very difficult to track down the individual offender. An official can very easily shift the whole blame or responsibility on another worker of lower rank. In case of any such event there are other branches of the law like the law of contract, which recognize that a corporate body is very much capable of thinking and of exercising a will. This form of acceptance of liability is especially necessary where failure to perform specific duty imposed by the statute on a corporate body for example the duty to draw up and submit the tax returns or annual report submissions etc constitutes a crime.

The juxtaposition that corporate liability creates between the civil and criminal law in many cases have led to the action of the company and its misconduct being judged by the Courts by applying criminal law principals even though the punishment of the misconduct lie under the civil regulations. This brave initiation was only possible because of the intervention of the Courts, which were brave enough to read between the legislations to stay clear from any confusion and punished the acts of corporations with severe punishments. The Courts could have been saved from this confusion, had the legislation been drafted so as to pronounce in clarity on the principles of corporate liability and the criminal implications of the misconduct of the employees or the owners of the company who deliberately commit wrongs. The legislations have not yet clearly laid down the punishments where the companies are doing criminal wrongs with intent to gain profits and increase the margins of corporate gains.

6.1 Rationale and Policy of Corporate Criminal Liability

Criminal law is known especially as a mechanism for responding to individual wrongdoing. It seems obvious that natural persons can think, make decisions, commit crimes and be held criminally liable. By this individualistic notion of responsibility cannot automatically be assigned to legal entities such as corporations, some argued that corporations cannot be held liable.

6.2 How to Determine Corporate Criminal Liability

There are three systems for determining crimes corporations can be held liable. Under the first system, general liability or plenary liability, the juristic person's liability is similar to that of individuals, with corporations being virtually capable of committing any crime.

The second system requires that the legislator mention for each crime whether corporate criminal liability is possible.

The third system consists of listing all the crimes for which collective entities can be held liable. The first system has been adopted by England. It should be highlighted that company liability does not extend to human actions such as sexual offences and bigamy. Under the same principal, corporations are not liable for crimes expressly excluded by the legislator, or crimes that, due to their nature cannot be committed by corporations. Hence, corporation cannot commit bigamy, incest, perjury, or rape. However, critical point must be stressed. The above argument is that companies should be capable of being held criminally liable. This does not mean that individuals within the company should be exempted from liability. In appropriate case, where the individuals have committed the *actus reus* with the *mens rea* of the offence, they should be liable. Imposing criminal liability on corporations through these various means has been justified through several theories. Firstly, it is contended that a corporation has duties, rights and obligations just like citizens, especially in the modern technological world. However, the only way for it to act is through human beings that control its operations i.e., their organs. Thus, it is only fair to hold companies liable for acts done on these humans that act on its behalf and exercise the rights and obligations imposed on it.

Secondly, a policy-based argument states that liability for corporate offences is either on the company or none at all. In the latter circumstance, if no company is held liable for *mens rea* offenses etc; then a large number of individuals who may have been victims of those crimes will not be allowed to avail of any financial compensation and will not get any retribution for their loss. Thus, it is only fair to impose liability on them (companies) for acts done to benefit their goals versus no liability at all.

Thirdly, corporate liability enables a collective accountability for an accumulation of the corporation's criminal activity conducted by different individuals. This accountability is of essential consideration in

today's time and age where corporations are capable of being party to crimes against humanity such as genocide or war crimes that requires a large number of people to be involved in the commission of such crimes. Thus, holding a corporation accountable, as a collective will ensure a certain level of deterrence against involvement in such crimes.

Fourthly, a marginal benefit of this move aims to ensure that shareholders and employees take a major interest in the governing of the corporation. If liability is imposed on the corporation for crimes committed by the board of directors or senior officers, there will be an automatic backlash on the shareholders in the form of monetary losses and the employee in the form of lost jobs. Thus, there is some incentive to elect management wisely and engage with the overall functioning of the corporation.

6. 3 Corporations as Part and Parcel of Any Society

Corporations are a part of the community which enjoys a range of similar rights, although certainly not identical, as those accorded to individuals. As a result, corporations can be considered to be bound by the same laws and social norms like any other individual. When corporation's engage in criminal conduct, the consequences that follow are usually of considerable costs. Therefore, the types of harm inflicted by a corporation are far beyond what any individual could produce, both in terms of the amount of money involved and the impact of the misconduct on broad portions of society. For example, as part of its guilty plea to violating the FCPA, German conglomerate Siemens A. G. admitted 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. Similarly, pharmaceutical giant Pfizer paid $ 2.3 billion, including a criminal fine of $ 1.195, billion to settle civil and criminal investigations for promoting “off-ideal” uses of its drugs. It is obvious that the fines put on the companies, in the above mentioned cases, are of an enormous amount. Corporate unlawful activity is punished considerably and the company has to pay a lot. The heavy fines make the companies more aware of what they have to pay if they risk acting unlawfully during their activities.

7.1 Purposes of Identifying Crimes and Punishment

One of the main purposes of punishment is deterrence which is the prevention of future crime by the wrongdoer (specific deterrence), and

others (general deterrence). Corporate criminal liability would not be needed if administrative fines and penalties were sufficient to keep corporations in line. However, thus Corporations tend to treat fines as a cost of doing business. If the benefits of socially irresponsible behavior outweigh the potential cost; they will undertake to commit the crime. The prospect of a criminal conviction deters corporations from criminal acts. For any corporation's reputation is one of its biggest values as the slightest criminal conviction tarnishes that reputation and the cost is high. The corporation has an immense incentive to avoid this outcome. Therefore, corporations ensure or make serious efforts to avoid any criminal liability and convictions as its effects remain devastating and incurable.

Corporate criminal liability convictions also serve the purpose of being responsible. For that reason; corporations endeavour to act responsibly. Punishing a few wrongdoers is not likely to change the atmosphere of a big corporation, but collective entity liability will. By holding the corporation liable, prosecutors (and judges) can ensure that corporation puts in place compliance programs with real teeth in them. In recent times, corporations have even agreed to place outside "watchdog" directors on their boards to help with the oversight process. Overtime, compliance programs and careful over sight can reform the organisation. One part of rehabilitations is the paying of restitution to the victims of one's crime often, white collar prosecutions involves millions, even hundreds of millions or billions of dollars of fraud. Convicted individuals do not have at their disposal anything near the amount of money necessary to pay restitution to the victims. The corporate entity however does.

Corporate criminal liability has some very significant benefits in deterring corporate crime and forcing corporations that commit crime to clean up their act. These benefits should not be underestimated, given the extent to which our economy is dominated by corporations, without such liability, white collar crime could very well run rampant throughout our business sector. On the other hand, in holding corporations criminally liable, some innocent people are harmed. Where the corporation suffers monetarily because of the punishment and reduces in size or in rare situation, goes bankrupt as a result, innocent employees will be hurt financially. Also where the corporation raises its prices to offset the cost of a criminal conviction, innocent

consumers will literally pay the price, although market forces should act to keep this harm to a minimum.

7.2 The Distinction between Criminal Offences and Regulatory (Statutory) Offences

There is a distinction between criminal offences and regulatory offences. The first, also referred to as *mens rea* offences, are usually contained in penal codes and require proof of both an *actus*reus and *mens rea* in the sense of some culpable state of mind. On the other hand, regulatory offences encompass those offences that consist of an omission to discharge a specific duty of affirmative performance imposed on corporations by law. The differences between these types of offences are that sanctions for criminal offences may only be imposed by court whereas sanctions for regulatory offences may also be imposed by administrative authorities (at least at the first instance imposed by administrative authorities unless an appeal was made to a court). There are also differences between criminal and regulatory offences as regards the stigma effect of sanction: while such effect is clearly present in sanctions for criminal offences, it is not present (or only present to a smaller extent) in sanctions for statutory offences.

The most significant point about this distinction between the two is that in respect of regulatory offences it is unnecessary for the prosecution to specify any individual whose conduct will be attributed to the corporation for criminal purposes, and therefore a sort of strict liability is thus imposed. Thus, it may be argued that the dialectics about the appropriateness of attribution of mental element to an artificial entity do not apply to statutory/regulatory offences.

8.1 The Corporate Manslaughter and Corporate Homicide Bill 2015

Nigeria criminal jurisprudence recognized the offence of involuntary manslaughter which may result from an unlawful act (constructive) manslaughter, or manslaughter as a result of gross negligence which results from a breach of a duty of care. Criminal liability for the former involves an unlawful act in itself which results in death, while liability for the latter arises where the defendant's conduct though lawful, is carried out in such a way that it is regarded as gross negligence and therefore a crime. It is the second aspect of involuntary manslaughter that companies are often liable for, that raises concerns. In circumstances where a company's conduct could be regarded as grossly

negligent and therefore a crime, the present law in Nigeria requires the invocation of the provisions of the general criminal law so as to prove either the offence of manslaughter (under the Criminal Procedure Act, or homicide (under the Criminal Procedure Code). However, corporate criminal liability intersects both company law and criminal law, and problems have traditionally arisen in imposing liability on an artificial legal construct such as a company. At the expenses of prolixity, it has already been stated that the main challenge is that legal concepts such as *actus reus, mens rea* and causation designed with natural actors in mind, do not easily lend themselves to inanimate entities such as companies. Under the current Nigerian laws therefore, the task for the prosecution pursuing a possible charge of corporate manslaughter or homicide is twofold: they must prove the *actus reus* of gross negligence on the part of the business, second and more challenging, they must prove *mens rea*, and in this regard, they must show that the act of an individual or group of individuals is attributable to the business, for the latter to be criminally responsible. These burdens are different to discharge.

8.2 Laws as Methods of Shifting the Paradigms in Corporations Liabilities

The law in some jurisdictions has since moved towards finding a solution to these challenges. The U.K parliament has enacted a stand-alone offence under the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA), which is aimed at holding companies and businesses liable for gross negligence manslaughter. Nigeria is yet to enact a law with respect to corporate manslaughter and corporate homicide Act, so as to check the excesses of corporate organizations in Nigeria. In 2013, Senator Pius Ewherido, initiated a bill tilted 'A Bill for an Act to Create the Offence of Corporate Manslaughter and Matters incidental therein which sought to create offences of corporate manslaughter to make corporate bodies, entities and agencies culpable for willful acts of negligence, dereliction of duty and or gross incompetence that result in death of a person or persons. In his presentation, Senator Ewherido had told the Senate that he carried out an indebt research and came out with the bill following the Dana Air crash of June 3rd 2012, at Iju, Ishaga, Lagos State where he noted that in spite of reported advice from the technical crew that the ill stated MdD-

83 aircraft in its fleet was not safe for the flight, the management of Dana Air insisted on its flight. He regretted that after the crash that claimed over 160 lives, the airline was not punished for what he alleged to be its criminal negligence apart from the compensation to relatives of individual victims.

The Bill proposed a fine of not less than N500, 000 and not more than 500 million for any organization found guilty of corporate manslaughter just as it provides that a person convicted under it would be liable to a minimum of three years and maximum of seven years prison terms with an option of fine from N100, 000 to N1 million respectively. However, the Nigerian Bar Association which was represented by Paul Enakoro at a public hearing organized by the Senate Committee on Judiciary, Human right and Legal Matter called for a review of the punishment recommended in the Bill for persons and organizations found guilty of corporate manslaughter, saying severe punishment was necessary so as to hold companies accountable for deaths caused by negligence, dereliction of duty and incompetence.

It is regrettable, that the Bill did not metamorphose into an act before the tenure of the National Assembly members expressed and the Bill was dumped. In a bid to close the gap, the current National Assembly in December 2015 proposed a law again, the Corporate Manslaughter Bill 2015, which was presented and read for the second time on the floor of the lower chamber of the National Assembly, the House of Representative, on 15th December, 2015 and thereafter referred to its Committee on Labour, Employment and Productivity for further consideration. No mention of the bill has been made since the National Assembly re-convened in year 2018. The implications for the proposed bill are both positive and negative. An organization can only be prosecuted and convicted of corporate manslaughter if its acts or omissions result in death. An organization would thus not be convicted of an attempt to commit corporate manslaughter no matter how dangerous its activities are managed or organized. Therefore, the Bill appears to insulate corporate entities from unwarranted prosecution by government officials who driven by avarice could tag any activity of a corporate body as capable of causing death. The negative aspect will be the liability of a corporate body irrespective of the unlawfulness of the act, the person affected may sue corporate entities

for death of criminals and persons who die due to contributory negligence. Also, the trial of an organization already convicted of corporate manslaughter for other offences defined under any other health and safety legislation on the same set of facts or related facts may amount to double jeopardy and its contrary to the twin principles of '*autrefoisacquit*' and '*autrefois convic*t' provided for in Section 36 (9) and (10) of the Constitution of the Federal Republic of Nigeria. These subjections of the constitution prohibit the second trial of any person (corporate or individual) who has been convicted or acquitted of an offence, for the same offence or another offence having the same ingredients. The Bill is silent on the criminal liability and trial of an organization that has adequately compensated the family members of the victim for its breach of relevant duty of care.

Conclusively, the Corporate Manslaughter Bill, 2015 is a step in the right direction, as death of employees and persons; resulting from corporate negligence is a recurrent concern in Nigeria. However, the Bill would die a natural death as it was not passed during the lifetime of the8th National Assembly.

9.1 Conclusion

It is often said that a problem identified is half solved. We found in this paper that failure to hold corporations criminally responsible for their actions has resulted in reoccurring criminal activities by corporations. Contemporary western law, especially criminal law, has its roots in individualistic principles, in both civil law and common law jurisdictions. The criminal law as an institution in most legal systems has excluded full consideration of collectives. The question thus arises: How should we put a stop to corporate criminality, and more particularly, how could we use such individualistic legal system to put a stop to them?

The endorsement of criminal liability of corporations has largely been a twentieth century judicial development, influenced by the "sweeping expansion", of common law principles. It has therefore become imperative that Nigeria enact a statute comparable to the Corporate Manslaughter and Corporate Homicide Act 2007 of the United Kingdom to properly spell out potential liability of corporate bodies whose operations may result in the deaths of either their workers or third parties. This law when enacted obviates the need for *mens rea* which has been a clog in the wheel in holding corporations criminally liable. The penalties prescribed by various legislations on violation of the

provisions of the laws with respect to corporations are a slap on the wrist when compared to the harm caused. Some fines are so ridiculous that some corporations see it as a cost of doing business. Thus, prevailing penalties in the Penal Code, Criminal Code, and CAMA are inadequate. Finally, it is without doubt that corporate criminal liability has come to stay; this will to a large extent impede the commission of criminal activities by corporations.

9.2 Recommendations

The writer proffers the following recommendations:

a. Nigeria should enact the Corporate Manslaughter and Corporate Homicide Act as is obtainable in other climes. This will create a statutory offence under which they can easily be prosecuted.

b. Sentencing Act and a Sentencing Commission should be established so as to issue guidelines on appropriate sanctions for corporations.

c. Corporations are to establish and monitor their internal control system assiduously so as to escape from criminal liability.

d. Criminal liability should be imposed on the corporations directly as a whole and not vicariously through its directors and officers.

e. The general public should be sensitized about their rights and should be ready and willing to report / sue corporations based on any criminal activities by them.

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