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A NEW DAWN OF CORPORATE CRIMINAL LIABILITY LAW IN THE UNITED KINGDOM: LESSONS FOR NIGERIA

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ABSTRACT

The UK Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 received royal assent on July 26th, 2007 and came into force on 6th April, 2008. This conscious legislative action has given birth to a new statutory offence of corporate manslaughter thereby marking a radical end to the old common law offence of corporate manslaughter by negligence. This article, apart from justifying the new Act, also examines the useful lessons and limitations of the Act that may serve as barometers for the possible reforms of the principles of corporate criminal liability in Nigeria. This article contends that the UK's CMCHA 2007, despite the few areas hotly disputed, is an important innovative legal development worthy of emulation. The need for this work stems from the fact that the UK's CMCHA 2007 has the required ability to provoke the needed reforms on corporate criminal liability in Nigeria.

Keywords: Corporate Crime, Corporate Liability, Homicide, CMCHA 2007.

1. INTRODUCTION

Corporate personality and imposition of corporate criminal liability have given a great unease in the field of Criminal Law. But the awareness and support of the imposition of criminal liability on corporations is now well established. The English Law Commission in one of its reports recognised that the major aim of criminal law "is prevention of crime and it is argued that the publicity attendant upon the prosecution of a company for the commission of an offense symbolizes the failure of control of the company, and it is socially desirable to have the company's name before the public."[1] But the general belief or attitude in the early sixteenth centuries was that it was inconceivable for a corporation to be held criminally liable. In fact, in one of his commentaries, Blackstone stated that "a corporation cannot commit treason or a felony or other crime in its corporate capacity though its members may in their distinct individual capacities."[2] Chief Justice Holt also agreed that "a corporation is not indictable but its members are."[3] This general attitude appeared to have been premised on two major reasons. The first reason was specifically linked to the legal formalism attendant upon the corporation-

[1] U.K Law Commission Working Paper No 44 (172) p 34 & 38
[2] Commentaries 18, section 12
[3] Anonymous, 12 Mode. 559, 88 Eng. Rep.1518 (KB 1901)

as-person-metaphor. In other words, since corporations are seen as 'artificial persons', juridical entities or legal constructs'[4] distinct in identity of the shareholders who created them[5], an imposition of criminal fault on corporations would therefore defeat the essence of the legal anthropomorphism of the corporate form. According to Smith and Horgan:

> "Since a corporation is a creature of law, it can only do such acts as it is legally empowered to do, so that any crime is necessarily ultra vires and the corporation having neither body nor mind, cannot perform the acts or form the intent which are prerequisite of criminal liability."[6]

The second corollary reason was predicated on the jurisprudential principle that there could be no vicarious liability for the crimes committed by the agents of corporations because of the requirement of *actus reus* and *mens rea,* hence *actus non facit reum nisi mens sit rea* (i.*e.* an act does not render one guilty unless the mind is guilty). In *Peaks Gunston and Tea Ltd. V. Ward*[7] Channel J. had this to say:

> "By the general principles of criminality, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and therefore, in the ordinary cases a corporation cannot be guilty of criminal offence, nor can a master be liable criminally for an offence by his servant".

Corporations could not therefore possess the moral blameworthiness necessary to act in *propria persona*. Imputing an agent's intention to a corporation appeared radically inconsistent with the purpose of criminal law of punishing the blameworthy since the *respondeat superior* doctrine was yet undeveloped to allow for an imputation of any kind of mental state.[8] However, the principle of entity liability of corporations for the acts of its organs later evolved under the common law.[9]

2. CORPORATE CRIMINAL LIABILITY UNDER THE COMMON LAW

Under the common law a corporation is liable for criminal liability subject to certain limitations such as assault, manslaughter, murder and rape. This appears to be a departure from the past when criminal liability of corporations was for acts of nonfeasance which was later extended to misfeasance acts. Thus the common law regime began with strict liability welfare offences which do not require proof of *mens rea* so that in offences that require proof of *mens rea*, corporations are made liable by an imputation of the knowledge and intention of the alter ego and directing mind of the corporation.[10] It also came to instances where corporations were vicariously held liable for the acts of thier agents.[11] As already stated however, there are certain 'human crimes' to which a corporation could not be criminally held liable. The category of these offences are enumerated by Stable J as follows: "....perjury and offence which cannot be

[4] Salamon v. Salamon (1897). See also Weissman, A *et al*, "Rethinking Criminal Corporate Liability" in *INDIANA LAW JOURNAL*, Vol.82, 2007, p. 411 at 418
id at 412
[5] Ibid at 412
[6] *Criminal Law Cases and Materials*, Butterworth, 1996, p 149
[7] (1902) 2 K.B 1
[8] Khanna, V.S., "Corporate Criminal Liability: What Purpose Does it Serve?" in *Harvard Law Review,* Vol.109, 1996, p.1480
[9] See the English cases of *DPP v. Kent & Sussex Contractors Ltd* (1944) KB 146; *R v. I.C.R Haulage Ltd* (1944) KB 551; *Moore v. Brestlet Ltd* (1944) 2 ALL E.R 515, etc.
[10] Ibid
[11] See *Griffith v. Studebaker* (1924) 1 KB. 102

vicariously committed or bigamy.....offences of which murder is an example, where the only punishment the court can impose is corporal, the basis of which the exception rests being that the court will not stultify itself by embarking on a trial in which if a verdict of guilty is returned, no effective order by way of sentence can be made."[12] According to Stephen Griffin:

> "[A] corporate entity may not be convicted of murder as the sentence for that offence, namely, a mandatory penalty of life imprisonment, is incapable of being imposed against an artificial entity."[13]

Nevertheless, there appears to be some judicial invention for the basis for corporate criminal liability because from the decision of Birgham LJ in the *Herald of Free Enterprise (R v East Kent Coroner ex p Spooner and Others*[14] (on an application for a judicial review in the Queen's Bench Divisional Court), a tacit acceptance that a corporate body could be liable for the offence of manslaughter could be inferred. He said:

> "... [O]n appropriate facts the *mens rea* required for manslaughter can be established against the corporation. I see no reason in principle why such a charge should not be established…Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* of manslaughter against it or him by evidence properly relied on against it or him".

According to Mueller:

> "Why should not a corporation be guilty of murder where, for instance a corporation's resolution sends the corporation workmen to a dangerous work place, without protection, all the officers secreting from these workmen the fact that even a brief exposure to the particular work hazards will be fatal as was the case in the notorious Hawk's West venture in West Virginia, where wholesome death (as in Bhopal's case in India) was attributed to Solicosis?."[15]

At common law a corporation could therefore be convicted of involuntary manslaughter, but by gross negligence, even though manslaughter was not classified as a distinct offence. In convicting for manslaughter, the House of Lords[16] has held that it is sufficient that the jury adopted the gross negligence test without reference to the test of recklessness as defined in the case of *R v. Lawrence*[17]. So the ordinary principles of law of negligence must still apply in ascertaining whether or not a corporation has been in breach of duty of care to the victim who has died. Where such is established the next question would be whether that breach of duty caused the death of the victim who has died. Also, the jury must consider whether that breach amounted to a gross negligence. The jury will also have to consider whether the extent to which the corporation's conduct departed from the proper standard of care incumbent upon him and

[12] See *R. I.C.R Haulage* (supra).
[13] GRIFFIN, S., "Corporate Killing-the Corporate Manslaughter and Corporate Homicide Act 2007" in *L.M.C.L.Q.*, 2009, p.72 at 74
[14] (1989) 88 Cr App R 10
[15] Mueller, "Mens Rea and Corporation"in *U.P.L. Rev.* Vol.19, 1957, p.21at 23 in Lefave *et al Criminal Law,* St Paul MNN USA West Publishing Company, 1986, p.259
[16] See *R v. Adomako* (1994) 3 All ER 79
[17] (1981) 1 All ER 974. Although it is still open to the trial judge to use the word 'reckless' in its ordinary meaning in particular circumstances.

reasonably expected of him in the circumstances of the case which must have posed a risk of death to the victim, was such that it should be judged criminal[18]. Until recently, it has not been possible to convict the corporation itself for criminal negligence, unless it is found that the individuals, who can be identified as the 'directing mind and will' of the corporation, are themselves guilty of gross negligence. This is known under the common law as the "identification principle." And because a corporation's artificial nature makes it incapable of committing a physical act that is a prerequisite for the offence of manslaughter, corporate liability for involuntary manslaughter was ascertained in accordance with the identification principle. Under the common law identification model, offences of individual senior officers and employees are imputed to the corporation on the basis that the states of mind of these officers and employees are that of the corporation. This is otherwise known as the "*Alter Ego"* doctrine or the "Organic theory". In every corporation there are certain individuals who control and direct the activities of the company. They are considered the embodiment of the company such that their acts and states of mind are that of the company. The company could thus be held liable, not for the acts of these principal officers or servants, but for what is deemed to be the company's own acts. The judicial development of this is traceable to the popular words of Viscount Haldene L.C in a well-known case of *Lennard Carrying Company v. Asiatic Petroleum Ltd*[19] when he echoed thus:

> "My lords, a corporation are an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for the same purposes may be called an agent; but who is really the directing mind and will of the corporation, the very ego and centre of personality of the corporation".

Accordingly, a corporation could be liable for the offence of involuntary manslaughter where a person's death was caused by gross negligence of the corporation's directing mind. It must be noted however, that a case against a personal defendant cannot be fortified by evidence against another defendant. In other words, a case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such so that the evidence against the corporation can only consist of evidence related to the directing mind and will.[20] This is called the rule against 'aggregation'. As has been argued, a corporation could therefore, "escape conviction for involuntary manslaughter in circumstances where an individual representing the company's directing mind was incapable of being convicted for involuntary manslaughter."[21] But the identification principle is not without some difficulties. The main complex task has remained the formula to be employed in knowing what category of workers is to be considered as the "directing mind" or *"alter ego"* of a corporation. If it is conceded that the obvious place to look at is the company's memorandum of understanding and articles of association,[22] it may further amount to hair splitting to try to draw a line separating the *alter ego* of a corporation from its mere agents. And the nature of modern multinational corporations is that such powers and duties are spread across departments and sections. In such situations there may be obvious problems in the allocation of responsibilities and liabilities

[18] See Lord Mackay's statement in *R v. Adomako* (supra)
[19] (1915) A.C 705. See also Denning L.J in *H.L. Bolton (Engineering) Company Ltd. V. T.J. Gramham & Sons Ltd* (1956) 3 All E.R. 624 at 630
[20] Griffin *supra note* 13 at 75
[21] Ibid
[22] Where those who wield corporate powers or the senior management such as directors, managing director, general manager, and even secretary have been considered as a corporation's alter ego. For e.g. in *R v. I.C.R. Haulage Ltd*(1944) 2 All E.R. 515*,* a company was held liable for conspiring to defraud by the acts of its managing director.

within the higher echelons of a corporation. It would appear that, these lapses in the identification model prevented the prosecution from sustaining successful prosecutions against companies for the offence of involuntary manslaughter because up till date there has been a dearth of cases where a public company has been convicted for involuntary manslaughter in England.[23] Griffin has also attributed this failure to the hierarchical complex management structures of big corporations when he argued that:

> "[T]he failure to prosecute public companies may be explained in the context of complex management structures of large corporations, which frequently result in a dilution of any causal link between a culpable employee and company's directing mind. In a large corporation, corporate policy and implementation of corporate powers flowing from directing mind may become misinterpreted, confused or abused by lower tiers of management. Although the wrongful act or omission of an employee may have been linked to the instructions of a more senior employee, the act or omission would often be considered devoid of any direct and binding authority from the directing mind."[24]

Thus in *Tesco Supermarket Ltd v. Nattrass*[25], Tesco evaded liability simply because the store manager could not be regarded as part of the company's directing mind, nor had the store manager been delegated an authority by the directing mind to act in a manner contrary to the company's policy. The facts had it that Tesco Supermarket had advertised and made a very low-price offer on a specific product through a poster that was pasted on its shop. But when the said product was lacking in supplies at that relevant time, Tesco forgot to remove the said advertisement. When the unfortunate customer has seen a higher price stock already on the shelves, he mistook it for the said lower price product and was charged the full price. Thinking that he was deceived by misleading prices, the customer brought an action against Tesco for breach of Trade Descriptions Act 1968. Tesco contended that it was not to blame since it was the act/omission of the store manager. Affirming Tesco's contention, the court therefore held that the company was not liable, rather it was the individual store manager, who though worked for Tesco, could not be considered the 'directing mind and will' to impose liability on Tesco as a company. In other words, attempts at identifying and sanctioning key responsible officers in a corporation have always been a herculean task. Owing to the fact, that in recent times there has been an upsurge of series of human disaster, accidents and deaths in which corporations have been found to be at fault[26] (though no major company has been convicted), the debate and call around the world for the reform of the legal principles governing corporate criminal liability in general and corporate manslaughter in particular, has gathered momentum. The UK recently responded to this call by the birth of 'Corporate Manslaughter and Corporate Homicide Act 2007' which was brought into force on April 6, 2008.

[23] The first known recent case being *R. V. Kite & OLL Ltd.* 91994) 8 December (Unreported). Here, a company who organises canoe trips was convicted for manslaughter (through its managing director) for the death of four students who drowned as a result of the gross misconduct of the managing director.
[24] Ibid, at 76
[25] (1972) AC 153
[26] See for e.g., the UK's 1997 Southall Rail crash, in which seven persons died; the 1999 Paddington (Ladbroke Grove) crash, in which 31 people died as well as the 2000 Hatfield Rail crash, in which four persons died

3. THE UNITED KINGDOM'S CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

This new law has *inter alia* modified the common law identification principle[27] as noted above by the idea of *collective knowledge or aggregation model* so that, rather than being contingent on the guilt of one or more individuals, liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run. It must be remembered that under the common law identification principle, it was not possible to aggregate the culpable conducts of persons within a company's senior management to establish a company's liability for involuntary manslaughter. The gross negligent conduct had to be directly attributable to an individual representing the company's directing mind.[28] However, under section 1 of the new Act, identification principle is 'further extended to permit corporate liability to be established by an aggregation of the cumulative conduct of a collective of senior managers of a company'.[29]

By section 1, the crime is committed where in particular circumstances; an organisation owes a duty to take reasonable care for a person's safety and the way in which activities of the organisation have been managed or organised amounts to a gross breach of that duty and causes the victim's death. The manner in which the activities of the organization concerned were managed or organised by senior management must be a substantial element of the gross breach[30]. Section 2 defines relevant duty in relation to an organization to mean any of the following duties owed by it under the law of negligence: a duty owed to its employees or to other persons working for the organisation or performing services for it; a duty owed in connection with—the carrying on by the organisation of any other activity on a commercial basis, or the use or keeping by the organisation of any plant, vehicle or other thing. An organisation is guilty of an offence under this section 1(3) only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1). By section 1(4)(c) "senior management", in relation to an organisation, means the persons who play significant roles in: the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities. An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised: (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. Causation will be assessed in the normal way but what is meant by 'gross breach' may be daunting, but must not be far from a reprehensible conduct.[31] Arguably, the term reflects the threshold for the common law offence of involuntary manslaughter by gross negligence.[32] But how does one identify it and 'in whom'? The Act has however identified it as an act /conduct of the organization that falls far below what can reasonably be expected of the organization in the circumstances.[33] In other words, the jury must establish that the conduct of the corporation in the circumstances showed "a significant departure from the proper and normal standard of care reasonably expected of it."[34]

Section 8 provides a clearer framework for assessing an organization's capability by setting out a number of matters for the jury to consider as follows: If there was a failure, how

[27] Griffin, *supra note* 13
[28] Ibid, at 80, See also *R v. P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (Central Criminal Ct).
[29] Ibid*;* See also Lederman, E., "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and Search for Self-Identity" in *Buffalo Criminal Law Review*, Vol.4, 2001, pp. 661-666
[30] Section 1(3)
[31] *R v Misra & Srivastava* (2005) 1 Cr App R 21
[32] See *Attorney-General's Reference (No. 2 of 1999)* [2000] QB 796
[33] Section 1(4)(b)
[34] See Griffin, s*upra note 13at 78*

serious that failure was; how much of a risk of death it posed. The jury may also consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection 2, or to have produced tolerance of it. They may also have regard to any health and safety guidance that relates to the alleged breach.

Section 18 expressly excludes secondary liability for the new offence. Secondary liability is the principle under which a person may be prosecuted for an offence if they have assisted or encouraged its commission. In general, this means that a person can be convicted for an offence if they have aided, abetted, counselled or procured it. However, section 18 specifically excludes an individual being liable for the new offence on this basis by providing that "an individual cannot be guilty of aiding, abetting, counselling or procuring the commissioning of the offense of corporate manslaughter". This does not though affect an individual's direct liability for offences such as gross negligence manslaughter, culpable homicide or health and safety offences, where the relevant elements of those offences are made out. A company's punishment if convicted of corporate manslaughter takes the form of an unlimited financial fine payable to the state.[35] The court is also empowered to direct that a remedial order be made against a corporation convicted of corporate manslaughter.[36] When the remedial order is made, a company is required to take further specific measure to remedy the cause of the breach and by section 10, the court is also clothed with the discretionary power to order a convicted corporation to publicize the fact that it has been convicted of corporate manslaughter, failure of which will amount to a crime punishable by fine.

4. A CRITIQUE OF THE CMCHA 2007

Most of the reforms of the CMCHA are to be welcomed, but there are a few that might be questioned. Agreed, the Act helps to reactivate the culture of health and safety in corporations since it has added to the number of crimes to which a corporation could be held liable.[37] But the kind evidence required to convict for corporate manslaughter was not spared a thought by the Act. There has to be overwhelming evidence to show that the way and manner in which a company was run at a particular time at the senior management level was far below the normal standard of care reasonably expected of it as to amount to gross breach and which inevitably linked the cause of death to the company. Moreover, what is "substantial" or how "senior is senior" as used under section 1 of the Act appears regrettably vague.[38] This lacuna, as has been argued may invariably make a corporation escape liability or could even tempt some companies to push responsibility for health and safety down to the junior and middle management levels, although this could in turn expose them to other offences.[39] There may also be the possibility of corporations trying to conceal and hide their senior management "behind such a cloak of darkness" that it may be almost impossible for prosecutors to locate. As argued by Griffin, it may be possible for the management at the senior level of a large corporation to argue that most significant corporate failings took place at the junior and not at the senior management level.[40] The solution to this may be to insist that companies name a senior manager that would oversee health and safety issues. It is also argued that CMCHA 2007 appears not to make any difference since it does not produce a new health and safety law and does not as well

[35] Section 1(6)
[36] Section 9
[37] See Andrew, D.H *et al,* "The Impact of Corporate Manslaughter and Corporate Homicide Act 2007 on Construction Industry in the UK*",* at: http://ascpro0.ascweb.org/archives/cd/2010/paper/CPRT240002010.pdf. (Visited 10th January, 2013).
[38] Griffin, S., "Corporate Manslaughter: a radical reform?" in *Journal of Criminal Law*, Vol.72(2), 2007, p.159
[39] Ibid
[40] Ibid at 160

highlight the problem of corporate killing.[41] CMCHA 2007 is further criticised for its inability to hold individual members of a company culpable since it is only the corporation itself that can be held criminally liable under the Act. The new Act has also failed to issue a custodial sentence due to the lack of individual culpability.[42] Other contested limitations of the Act include: the exclusion of liability for public bodies and the court remedial order that is seen as largely ineffective.[43] Despite these reservations however, it is the view of the writers that the CMCHA 2007 will have a better rewarding effect on corporate accountability and liability in the UK. The hopes it brings far outweigh its demerits.

5. CORPORATE CRIMINAL LIABILITY IN NIGERIA

As a former British Colony, the Nigerian legal system is modelled after the English legal system; hence the foregoing common law position represents the law in Nigeria. Apart from the criminal code and penal code, there are other enacted statutes that have made provisions for corporate criminal liability in Nigeria.[44] Accordingly, corporations could be held criminally liable in Nigeria.[45] Thus in *R v Zik Press*[46] a corporation was found guilty of an offence of contravening Section 51(1) (c) of the Nigeria's Criminal Code. Similarly, in *Mandilas & Karaberis v. COP*[47] a corporation was convicted of the offence of stealing by conversion under sections 390 and 383 of the Nigerian Criminal Code. While in *A.G Eastern Region v Amalgamated Press of Nigeria Ltd*[48] the preliminary objection raised by the defense counsel on the ground that an offence could not be committed by a corporation in the absence of *men rea* was overruled by the court.[49] However, there are certain 'human crimes' to which a corporation has not been held criminally liable in Nigeria. For e.g. a corporation could not be charged with the offences of personal violence or with offences for which the only punishment is imprisonment.[50]. Nevertheless, the cases of *R v Corry Bros Ltd*[51]; *Granite Construction Company v Superior Court*[52] *and Northern Mining Construction Company Ltd v Glamorgan Assizes*[53] have all established the fact that corporations could be held liable of manslaughter. But in Nigeria, the notion of corporate criminal liability being a recent development, cases are rare and there are yet no known cases of corporations being charged for the offences of manslaughter or murder.

6. THE USEFUL LESSONS OF CMCHA 2007 FOR NIGERIA?

As a former British colony, the principle of corporate criminal liability in Nigeria is still governed by the old common law doctrine. The common law, it must be remembered, makes it more intractable to prosecute corporations because of the 'identification doctrine', which

[41] Ibid
[42] Krystina, P & Amy, E "CORPORATE MANSLAUGHTER-SLAUGHTERING THE LAW" in *The Student Journal of Law* at: http://www.sjol.co.uk/issue-3/corporate-manslaughter (Visited 10th January, 2013).
[43] Ibid
[44] See Food and Drug Act CAP 150 LFN 1990; Standard Organization of Nigerian Act CAP S9 LFN 2004; Federal Environmental Protection Agency Act CAP 131 LFN 1990; Oil in Navigable Waters Act CAP O6 LFN 2004, etc.
[45] See Folorunsho, D., "Corporate Crimes and Liability Under Nigerian Law" (Head of Department, Department of Property and Commercial Law, Faculty of Law, Delta State University, Nigeria).
[46] (1947) 12 WACA 202
[47] (1958) WNLR 147
[48] (1956-57) 1_E.R.N.R 18
[49] See also *FRN V. Thormson & Ors.* (Unreported, 1984)
[50] See Ainley C.J in *A.G Easter Region v. Amalgamated Press of Nigeria Ltd (supra)*
[51] (1927) 1 KB 810
[52] 149 Cal. App. 3rd 465 quoted by Lafave *et al supra note* 15
[53] Unreported Feb 1, 1965

requires that all the blame be linked at least to a director of a company usually identified as the 'directing will'. As company's responsibilities are commonly spread across the board, it is an obvious difficulty to pin all the blame of the corporation on only one person. And invariably, it is also not possible to incriminate a company by 'the aggregation of the fragmented faults of the directors'.[54] To be liable for the common law corporate manslaughter, criminal liability of a company must be attributed with the culpability of the human element known as the corporation's directing mind and will. Because the directing mind of a corporation may partly or wholly delegate its function to individual members of the senior management of the corporation, the attribution of authority becomes a very integral factor in the establishment of the criminal liability of a corporation for the common law offence of corporate (involuntary) manslaughter. Accordingly, under the Nigerian law, a corporation cannot be convicted of the common law offence of involuntary manslaughter except a 'separate conviction is also sustained against an individual who was part of the company's directing mind and will.'[55] This is the current unfortunate state of the Nigerian law on corporate criminal liability. But the UK's CMCHA has gone beyond this by criminalising corporate killing without the need to pin all the blame on at least a director of the company. This is a commendable and innovative legal development worth emulating. The senior management test adopted by the CMCHA is indeed a version of the aggregation model, since corporate fault has now 'moved away from the wholly individualistic approach of the identification doctrine to a test that better reflects corporate criminal liability'.[56] Finally, it is also a lesson that, to achieve a deterrent, paltry fines should not be imposed on corporations who profit immensely from their transactions.

7. REFORMING THE CORPORATE CRIMINAL LIABILITY LAW IN NIGERIA

The whole essence of the UK's CMCHA 2007 without doubt, is to make it easier to convict companies that cause fatal accidents and to help decrease the number of fatalities.[57] In Nigeria, every often it is either a plane crash or an oil spillage/pollution. There have been some major disasters that have focused and engaged the attention of the Nigerian public as to what really has gone wrong. Within the spate of seven years, the Nigerian aviation industry has recorded an unprecedented horrendous fatal air crash.

On October 31, 2005 Bellview Boeing 737 crashed killing all the 177 passengers and crew on board. In November 12 of the same year 2005, a plane belonging to Sosoliso Airline crashed killing all the 109 passengers and crew. December 18 of the same year 2005 recorded another air mishap involving Boeing 737 in which the passengers were stranded, but fortunately escaped unhurt. In October 31 of the following year 2006, ADC Airplane carrying 96 passengers crashed killing all the passengers on board. An Aircraft carrying ballot papers for the 2007 general election crashed in April 21, 2007 killing the 2 naval officers on board. Again, in April 10 2008, a plane carrying the under-20 female teammates athletes from Port Harcourt to Douala, Cameroun crashed, but luckily all the 111 passengers escaped death. Also in 2008, May 14 to be precise, Beechcraft 1900D crashed killing the 3 passengers and crew on board. In March 2012, a police helicopter carrying a high-ranking police official crashed killing four people in the central city of Jos. On June 3, 2012, DANA Airplane crashed killing all the 153 passengers and some residents of the crash site. In December of the same 2012 the governor of Kaduna State, Patrick Ibrahim Yakowa and former national security adviser, General Owoye Azazi were killed in a helicopter crash in Bayelsa State.

[54] Slapper, G., "Corporate Punishment" in *Journal of Criminal Law*, Vol.74(3), 2010, p.182
[55] *Supra note* 37 at 155
[56] Cavanagh, N. "Corporate criminal liability: an assessment of the models of fault" in *Journal of Criminal Law* Vol.75(5), 2011, p.422
[57] See Andrew *et al*, *supra note* 37

The same thing applies to the oil and gas sector, particularly in the Niger Delta. In the Niger Delta, oil pollution is most paramount as a report has it that an average of three (3) major spills is recorded in the Niger Delta every month.[58] Shell Development Company of Nigeria (SPDC), a major multinational oil company has acknowledged recording an average of 221 spills per year in its operational area in the Niger Delta.[59] A major oil spillage was reported sometime in 2002 in the Sapele area of the Niger Delta.[60] Similarly, in August 28, 2008 SPDC'S Trans-Niger pipeline resulted in a significant oil spill into the Bodo creek in Ogoniland of Rivers Sate. The oil spilled into the swamp and creek in the community for weeks killing the fish the people depend on for food and livelihood. (Amnesty International, 2009: 8). There was also a recent oil spill near Exxon Mobil's Ibeno oilfield in Akwa Ibom State of Niger Delta.[61] Again in September 2012 over 150 persons from the Mgbuoshimini community in Obio/Akpo Local Government Area of Rivers State were reported to have been admitted in different hospitals due to strange sicknesses they suffered when water was polluted by the operations of Agip Oil Company of Nigeria.[62] This is just to mention but a few.

These unfortunate disasters have indeed raised the public eyebrow as to the impotency and the unenforceability of corporate criminal law in Nigeria. With the frequency and worrisome occurrence of these human disasters, particularly the air crashes between 2003 and 2012, it becomes very pertinent to revisit our laws on corporate manslaughter and homicide. There are perhaps, lacunae in our laws that need to be filled or amended as the case may be. The recent events are legitimate and clear cases of high corporate failings. Most unfortunately however, in none of the above incidents was a corporation or its agents prosecuted, let alone found criminally liable. The reason is because most of the relevant laws are so obsolete and weak that they can only bark and not bite. The laws and machineries of government are so weak to catch the strong multinational corporations who are the major players in these very pivotal sectors of the Nigerian economy. That is why it is 'generally perceived that home jurisdictions in vulnerable areas in Nigeria, are powerless when it comes to the control of multinational corporations.'[63] One would have thought that the carried-over laws, which have been repealed, amended or reformed by our colonial masters, would have received the same changes here in Nigeria. But the reverse is always the case. There is what may be called self-inflicted legislative neo-colonialism such that laws rendered otiose in Britain are still ruling Nigeria without tinkering.

In the UK and other civilized jurisdictions to decide to remove or amend some of the problems militating against the successful prosecution of corporations, shows the enormity of the problems of the common law doctrine of corporate criminal liability. This perhaps, has led and will continue to lead to the dearth of prosecution of corporations for criminal recklessness in Nigeria. These ought to provide the catalysts for possible reform of corporate criminal liability law in Nigeria.

[58] C.L.O, 1999

[59] See SPDC, 'The Environment' at: <http://www.shellnigeria.com/info/info_display.asp?Id=135 (accessed 21st August, 2012)

[60] See "Oil Spillage occurs in Sapele" *Vanguard*, January 18, 2002

[61] See "Oil Spill Stretches for miles near Exxon Nigerian Field", *BUSINESSDAY*, Saturday September 01, 2012 at: http://businessdayonline.com/NG/index.php/oil/43730-oil-spill-stretches-for-miles-near-exxon-nigeria-field (visited 1st September,2012)

[62] See "Agip Water Pollution: Strange Ailment Befalls Mgbuoshimini Community", *The National Network Newspapers*, September 5-11, 2012, p.6

[63] Amao, O.O., "corporate social responsibility, multinational corporations and the law in Nigeria: controlling the multinational in host states", in *Journal of African Law* Vol.52(2), 2008, p.2

8. RECOMMENDATIONS

Obviously, the calamities are untold; the laws are not only weak, but moribund. There is therefore, no other alternative than an adequate reform, appraisal and revamp of corporate criminal liability law in Nigeria. Perhaps, a clue from the UK and other civilized jurisdictions will lead to the desired changes. In the light of this, it is suggested that a distinct statutory offence of corporate manslaughter be enacted in Nigeria. And in enacting this law, the common law model based on the identification doctrine, currently governing the Nigerian law on corporate liability should be jettisoned as fallen into desuetude. A radical and workable alternative to the dominant identification doctrine should be created. There is a general concession by scholars that under the common law identification doctrine, proof of corporate crimes can be problematic.

The reform in Nigeria should equally seek to replace this with the cumulative or aggregation model. In tackling corporate crime, it is further suggested that sentencing or punishment by way of fines-unlimited[64]or substantial/ruinous[65]; remedial orders, publication; corporate probation; criminal restitution of gains received and other monetary penalties, should be imposed. In the US, immediately after the 1991 Sentencing Guidelines, the total average of fines imposed on public companies was estimated at $19 million between 1991 and 1996.[66] And five years after the Sentencing Guidelines, an average total of fines imposed was estimated at $646 million.[67] In fact, it is on record that Daiwa Bank and Hoffman-LaRoche were fined $340 million and $500 million respectively.[68] So the traditional goals of criminal sentences or sanctions may not be adequately captured if by contrast, a Nigerian law would be imposing very paltry fines of N1000.00; N200.00 and N400.00 for a highly environmental crime as oil pollution.[69] It is not only laughable, but unimaginable. However, corporations should be able to merit mitigations for crimes committed by instituting effective compliance programmes for its employees which may include employees anonymously reporting suspected managerial crimes to outsiders.[70] As practiced in the US, a company seeking leniency must demonstrate that it has effectively cooperated with compliance mechanisms such as to have prevented and detected wrongdoings by its employees.[71]

Corporate leniency or mitigation cannot be overruled. But it should be merited. Criminal indictment on corporations should be counterbalanced and effectively managed to avoid devastating consequences or risks on the market and economy. In addition, it is conceded that CMCHA's exclusion of secondary liability is arguably a misnomer. Insulating executive members from individual culpability would be to the benefit of the corporation alone and not to the public. It is thus suggested that, by way of secondary liability, the individual senior executives of a corporation should be made to face punishment by way of stringent fine or disqualification once the corporation is convicted of corporate manslaughter. The exception would only be where the directors took every reasonable action within their disposal to abort the commission of the crime.[72] A better deterrent would be served by this since it will increase the willingness of corporations to ensure stricter adherence to health and safety rules.[73]

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[64] See s.1(6) CMCHA 2007

[65] As adopted in the US. See Cohen, M.A., "Corporate crime and Punishment: An update of sentencing practice in Federal Courts, 1988-190", in *B.U.L.R.*, 71, (1991), p 247

[66] Arlen, J., "Evolution of Corporate Criminal Liability: Implications for Managers" in Gandossy, R. & Sonnenfeld, J. (ed) *FROM LEARDERSHIP TO GOVERNANCE FROM INSIDE OUT* (2004) p.2

[67] Ibid

[68] Ibid

[69] See sections 7, 9 & 10, Oil in Navigable Waters Act CAP.O6 LFN 2004.

[70] Ibid at 9

[71] Weissmann *et al, supra note* 4 at 443

[72] Griffin, *supra note* 37 at 164

[73] Ibid

9. CONCLUSION

In this article, we have considered some of the reasons why the philosophical foundations of corporate manslaughter and homicide law ought to have a central place in the so-called reformative agenda of the current democratic regime in Nigeria. It is high time that the Nigeria government heeded to the *vox populi*, rather than being legislatively conservative with important reformative needs of the nation. The multinational corporations cannot continue to have their field'-day in the face of the ever-increasing carnage associated with them. The reform of the Nigeria's corporate criminal law is long overdue. Something urgent needs to be done and something can be done. The UK's CMCHA 2007 and other reforms elsewhere have the ability to engender a sound and workable law on corporate criminal liability in Nigeria. It is hoped that adaptations towards the exigencies of the time as witnessed in other jurisdictions will not be treated with any levity in Nigeria. If nothing, at least the ghastly accidents of the recent times should trigger the attention of the Nigerian parliament on the issue under review. The curiosity of a generous and elevated mind is ever more agreeably or usefully employed in the examination of the laws and customs of other nations.[74] So reforming the Nigerian corporate manslaughter and curbing corporate abuses could be realized by examining another nation's law-the CMCHA 2007.

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