

CHALLENGES OF CORPORATE CRIMINAL LIABILITY IN NIGERIA*

Abstract

Criminal law was originally designed for human beings. Its application has no restrictions or limitations in scope especially with regard to offences requiring *mens rea*. The issue of criminal responsibility was individually based. In other words, in the offences requiring the proof of mental element, the moral character of criminal law has made the individual the basic unit of responsibility. However, with the emergency of corporations and the extension of criminal law to corporations, some difficulties/challenges emerged. This article explores the challenges of corporate criminal liability in Nigeria. The paper demonstrates that the main challenge with the basis of corporate criminal liability premised on the principles of vicarious liability/ identification theory is that the legal concepts such as *actus reus mens rea* conspiracy, complicity, aiding and abetting etcetera designed with natural actors in mind, do not easily lend themselves to inanimate entities. It is recommended that the corporate culture model should be adopted by our legislators as one of the basis of corporate criminal liability in Nigeria.

Keywords: Corporation, Corporate criminal liability, Challenges, Nigeria

1. Introduction

The desire of mankind to exploit and harness their environment for survival led to the development and perfection of a strategy where companies/corporations are accorded the status of natural persons through incorporation in order to ensure business efficiency and convenience. Consequently, once incorporated, it acquires legal personality distinct from its shareholders. Corporations embark on various socioeconomic activities which impact tremendously on the people and the environment. Large scale corporations are the defining force on the globe. They are everywhere, in almost every aspect of our lives. On the other side of the coin, corporations are dangerous animals as well. In the course of prosecuting their various activities, corporations have become involved in crimes. Corporations commit various crimes which include: fraud, false statement, anti-trust, worker's deaths, obstructing of justice, financial crimes etcetera. In Nigeria, many people lost their lives in the Sosoliso air crash in December, 2005. The same happened in ADC air crash in October 2006 and DANA air crash in 2012. Federal Government of Nigeria set up committees to investigate these incidents. The reports of the various committees appear not to have seen the light of the day. Many people died in these plane crashes and the companies were not punished. The imposition of criminal liability on corporations which was originally designed for natural human beings became very problematic. This is because, the artificiality of corporations do not easily lend themselves to the extant criminal laws designed with human actors in mind. It is obvious that corporations play vital role in the socio-economic and political spheres of mankind. They also commit crimes in the process of prosecuting their various activities aimed at the realization of the objectives of the corporation. In order to save the society, many jurisdictions have developed legal regime framework to check the criminal activities of these corporations. However, the traditional criminal law imposed on corporations appears not to be producing the desired result sequel to their peculiar nature. Even though they are legal entities under the law, they lack most of the attributes of natural persons which were considered *ab initio* in the creation of the traditional criminal law. Thus, the law instead of trying to look at the problem of corporate wrong doing with fresh eyes has tried to super impose its individualistic constructs on the companies. This led to myriads of challenges with regard to corporate criminal liability in Nigeria. This paper will examine these challenges.

2. Meaning of Corporation

Corporation has been defined as an entity having authority under the law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely. A group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the group and has the legal right that its constitution gives it.¹ It can also be defined as an artificial person created by law, consisting of one or more natural persons united in one body under such grant to secure succession of members without changing the identity of the body and empowered to act in a certain capacity or to transact business of some designated form like a natural person.² Corporation can be seen as a creation of the law following the legal procedure established by the law and upon creation, acquires virtually all the attributes of a natural person distinct from its members or shareholders.

3. Meaning, Basis, and Challenges of Corporate Criminal Liability

It is pertinent to note that an established, acceptable, and unanimous definition of corporate criminal liability is elusive. In consequence, corporate criminal liability in this paper means the act of holding a corporate person

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¹ Bryan A G, (ed) *Blacks and Law Dictionary* (10th edn, USA: Thomas Reuters, 2014). 70.

² Companies and Allied Matters Act 2020 Laws of the Federation of Nigeria, Section 43(1).

accountable for a criminal act, committed by the corporation. It involves the punishment of a corporation for an established crime committed by a corporation and the process of doing so. It can also be defined as an illegal act or omission or commission punishable by criminal sanctions, committed by individual or group of individuals in the course of their operations.³ Corporate criminal liability in Nigeria is no doubt fraught with myriads of challenges/difficulties which stultify its effective application to check the criminal activities of corporations. These are many and varied but include the following: It is a legal truism that criminal law was meant for human beings *ab initio*. In other words, the current criminal law has adopted the view that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour.⁴ It is on the strength of the moral character of the criminal law that the individual has remained the basic unit of responsibility. From the starting premise that all adult human beings are responsible for the consequences of their actions, the traditional criminal law then moves to a consideration of the circumstances which may generate liability in specific case, commonly referred to as the general part of the criminal law. It divides the preconditions to individual criminal liability into three elements: act requirements, fault requirements, and defence.⁵ The justifications for individual criminal liability are premised upon the notion of a human being who possesses certain characteristics independent of the law, the most important of these being autonomy and rationality.⁶ It is obvious that criminal law in its traditional form is meant for natural humans and not for artificial persons. According to Ashworth,

One of the significant differences between individual and corporate liability is that in the former, the subject of responsibility is easily identified. Adult human beings all take one of two basic physical forms, despite infinite individual variations. It is upon this common ground of the human body that the principles of fault ascription, rationality and autonomy are premised. There is, of course, considerable debate surrounding the conditions under which human beings fulfill these requirements of moral personhood, but this does not alter the fact that the notion of human being corresponds to something quite specific.⁷

Being a prescriptive branch of law, penal law purports to direct the behaviour of individuals in accordance with society's interests and values.⁸ A prerequisite for the achievement of this goal is transmitting the criminal law dictates to an addressee capable of grasping the message via the human consciousness⁹. Indeed, the direct and sharp connection with human consciousness is apparent in major aspects of criminal law which include behaviour, defence and punishment. Offences deal with the individual's conscious deviation from permitted modes of behaviour. Defences are offered to those who act under lack of diminished or disturbed consciousness¹⁰. Similarly, the justification for punishing violators rests mainly on the assumption that it will deter future conscious violations by the transgressor and others. According to Hale:

Man is naturally endowed with these two great faculties, understanding and liberty of will, and, therefore is a subject of properly so-called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he had capacity to obey¹¹.

With the emergence of corporations and their predominance in virtually every facet of human life, challenges arose with the application of the traditional criminal law which was made for natural human beings. Corporations once incorporated as articulated before become a legal entity with the full powers of a natural person. The consequence of this status is that a company, upon incorporation, automatically acquires a legal existence that becomes vested with capacity to enjoy rights and of being subject to duties which are not the same as those enjoyed or borne by its members. Thus, except to the extent that the company's memorandum or any enactment otherwise provides, every company shall for the furtherance of its business or objects, have all the powers of a natural person of full capacity.¹²

³ Preati Shama, Corporate Criminal Liability, Available on Line at <http://Jurisonline>, visited on 5/6/2020.

⁴ Wells C, *Corporation and Criminal Responsibility* (Oxford: Clarendon Press, 1993) 63

⁵ Law Reform Commission of Canada; Criminal Law; The general part: Liability and Defences, working paper No. 29, 1982, 24

⁶ Quaid Jennifer A, The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis [1998] *Mcgill Law Journal* (43) 88.

⁷ Ashworth A, *Principles of Criminal Law* (Oxford: Clarendo press 1991) 52

⁸ Dabn Cohen M, *Persons and Organization*, (Berkely; Univeristy of California Press, 1986). 27.

⁹ Hart L A, *Punishment and Responsibility*, (London: Longman Publishers, 1968) 48.

¹⁰ Eliezer Lederman, 'Perpetrator and Corporation: Rethinking A Complex triangle' [1985]. *The Journal of Criminal Law and Criminology* (76) (2). 295

¹¹ Hale L. M. *The History of the pleas of the Crown*, (London: Professional Book Limited, 1971). 78

¹² Companies and Allied Matters Act 2020 Section 43 (1)

The reality, however, is that, though a corporation is vested with all the powers of a natural person of full capacity, it is indeed not a natural person and cannot act by itself. In other words, unaided, the corporation can neither enter into contracts nor carry out the several responsibilities and obligations imposed on it. This complexity led to the evolution of the abstraction theory which is to the effect that, although the corporation cannot act on its own, it can do so through the instrumentality of some human agents who will engage in correspondences, attend meetings and attend to other obligations on behalf of the corporation. Corporations have neither soul nor body and do not act independently. The imputation of criminal liability on Corporations therefore, poses a challenge. Liabilities for tortuous acts, contractual breaches and criminal conduct ordinarily attachable to human conduct become attributed to the corporation through human agency.

In order to impute criminal liability on corporations, the courts and parliament had to devise a strategy for doing so. The vicarious liability principle was employed in this direction. The alter ego theory of corporate criminal liability is a testament to the development of criminal law in this direction. It is used to hold corporation criminally liable by attributing the criminal acts of its leading officials to it.¹³ In this background, the doctrine of identification was first introduced in *Lennards' carrying company limited V Asiatic Petroleum Company Limited*¹⁴ In this case, the court observed that corporation did not have a mind or body of its own and could not be held accountable per se. However, liability of the company could be sought in the negligence of the person who was the directing mind and will of the company, its very ego and centre of personality.¹⁵ The court stated that if Mr. Lennard was the directing mind of the company, then his action must unless a corporation is not to be liable at all, have been an action which was the action of the company itself. However, the identification model of attribution of criminal liability to corporations is not in accordance with the traditions of criminal law characteristics which require capacities necessary for moral personhood which include rationality, autonomy, emotionality and the capacity to choose and cause the realization of ones choice and mental state such as joy, fear and anger.¹⁶ This created a challenge with regard to corporate criminal liability. The application of traditional criminal law to corporation has been attacked by scholars. According to Adam, the most fundamental objection is that corporate criminal liability is inconsistent with the basic premise of criminal law. The traditional forms and functions of criminal law are not applicable to artificial persons because they cannot in any meaningful sense have *mens rea* or be guilty of a criminal offence.¹⁷ Moral responsibility is reserved for persons who possess certain capabilities, which are prerequisite of moral desert and criminal punishment.¹⁸ Since corporations do not possess the capabilities, they are not proper subjects of criminal liability. It is improper to convict a legal entity that has no free will or character and thus, no soul to damn and nobody to kick.¹⁹ Additionally, corporations act only through their officers, employees, and holding an entity vicariously liable for the conduct of its agents and employees is inconsistent with the principles that an actor is responsible only for his own conduct and intent. Commenting on the basis for corporate criminal liability Clarkson states that;

The law instead of trying to look at the problem of corporate wrong doing with fresh eyes has tried to super impose its individualist constructs on the companies. It has reasoned that only human beings can actually commit crimes and therefore, it has tried to find a senior individual within the company who committed the *actus reus* and *mens rea* of the crime. Such a person must be regarded as part of the brains of the company.²⁰

4. Adapting to Complex Corporate Structures

The identification theory is ineffective in holding liable large corporations with complex corporate structures.²¹ The identification of the person responsible for the offence is essential to the alter ego theory and the complex corporate structures are characterized by diffusion of responsibility.²² The most significant change for the purposes of the criminal law is the fact that the structure of many corporations, especially large-scale corporations is no longer based on a pyramid headed by a single, all powerful individual. Modern organization is portrayed as a coalition of groups of divergent claims and interests, engaged in a continuous process of bargaining with one

¹³Amrit Mahal, 'Challenges to the Doctrine of Identification in Complex Structure: The way Ahead' [2006] *International Journal of Law and Legal Jurisprudence Studies* (1) (3), 98 (1915) AC 75.

¹⁴ (1915) AC 75.(CA)

¹⁵ Ibid

¹⁶Michael M, *Planning Blame: A General Theory of the Criminal Law* (New Jersey: Harvard University Press, 1997). 596.

¹⁷Adam S, 'What Development in Western Europe Tell Us About American Critiques of Corporate Criminal Liability' [2003]. *Batfula Criminal Law Review*, (89), 97.

¹⁸ Michael M. (n15) 617

¹⁹John Coffee, 'No soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment'. [1981]. *Michigan Law Review* (79), 383.

²⁰Clarkson C M V, *Understanding Criminal Law*, (3rd edn. London: Sweet and Maxwell, 2001) 145. See also, *Balton Engineering v T. J. Graham and Sons Limited* [1957] *QB*. 159

²¹Matthew Good, 'The Common Law: Vicarious Liability and the Development of Primary Liability', AT Australian Institute of Criminology [2006] 6 <http://aic.gov.au/media_library/publications/proceedings/26/goode.pdf> accessed may 17.2017

²² Wells Celia, 'Corporate Crime: Opening the Eyes of the Sentry' [2010] *Legal Studies* (30) 370

another. This vision of the corporation is not included in the current individual-based responsibility model which imposes liability only upon individual or individuals identified as the ‘directing will and mind’ of the corporation. Wells aptly captured this challenge when she observed that:

Public corporations are owned by a dispersed range of share holders who have little or no control over the day-to-day or even year-to-year management. Managers have control over resources which they do not own and on a scale which no one individual would even be likely to own. In addition, the organizational structure is such that knowledge and control is disaggregated. Corporate goals are the responsibility of a large number of individuals who may or may not know what other individuals are doing.²³

The ultimate consequence of the above changes is that many corporations, particularly large ones, have developed to the state of being ownerless. The idea of group of individual members has given way to that of a permanent, self-perpetuating bureaucratic machine in which members are only secondary and can no longer be realistically identified with the organizations²⁴. Thus, one of the biggest challenges or criticisms of the current individual liability model is that it cannot attribute blame worthiness where no one individual can be identified as responsible. On the other hand, in large corporations, the presence of many individuals contributes to the anonymity and impersonality of corporate decisions which translate into a discontinuity between individual interests and those of the organizations²⁵. The mega structures of modern organizations make it virtually impossible to identify the acts of individual(s) whose acts would be attributed to the corporation for the purposes of criminal liability under the identification model as a basis of corporate criminal liability. Furthermore, the social importance of an organization’s policies and decisions increase with the magnitude of its resources, reflecting the greater potential of large organizations to cause substantial harm. Two corollaries of size are formality and complexity. Formality reflects a bureaucracy that is constituted by formal offices and the rules of connecting them. The impersonality of such formality renders the organization impermeable, such that events can be said to affect the organization in a way which is not easily reducible to a comparable impact on individuals.²⁶ Complexity also contributes to this opaqueness of organizational decision-making. The large number of interdependent sub-units that constitute the organization and interact in various ways makes it difficult to trace organizational decisions and acts to the wills and actions of particular individuals.²⁷

5. Whose Act should be attributed to the Corporation?

This challenge has diminished the efficacy of the identification model as a basis for corporate criminal liability. The identification doctrine has made some strides in attempting to establish who may be identified as the corporation but uncertainty still governs its application. The discordant tunes of the courts in this respect gave credence to this challenge. Previous cases on this theory have not clearly addressed the issue of where the actual controlling officers within the corporation could be identified. In *Tesco Supermarket Ltd v Natrass*²⁸ Lord Reid considered that the company may be held criminally liable for the acts only of the board of directors, the managing director as well as other superior officers of the company who carry out the functions of management and speak and act as the company. Sequel to this reasoning or principle, the House of Lords held that the branch manager was not a person of sufficiently important stature within the corporate structure to be identified as the company for this purpose, and since there had been due diligence at the level of top management, the company could use the defence. Also, in the same case, Viscount Delhome was of the view that a company should only be identified with a person who is in actual control of the operations of the company or part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders. Lord Pearson also believed that the company’s constitution should be taken into account when identifying the controlling officers within the corporation. The theory of the organs of the corporation identifies the acts and thoughts of prominent figures in the corporation’s hierarchy, known as organs when acting within the scope of their authority as those of the corporate entity itself. By assigning the organ’s *mens rea* to the corporation, this technique serves as a device for the personification of the corporate entity, enabling the conviction of the corporation as directly liable for offences which require criminal intent.

It is pertinent to note that an inherent challenge in this aspect of corporate liability is that the proponents²⁹ of this theory of the organs of the corporation have had to grapple with the problem of defining the organs by formulating a criterion to distinguish them from other employees of the corporation. No clear test has evolved and many difficulties have been encountered in the attempt to apply the theory. The theoretical basis for imposing criminal liability on the corporation remains unclear with regard to this aspect of the identification theory and this is a

²³ Ibid

²⁴ French P A, *Collective and Corporate Responsibilities* (New York: Columbia University Press, 1984). 38.

²⁵ Fisse, B. ‘The Attribution of Criminal Liability to Corporations: A Statutory Model’. (n24) 289.

²⁶ Dan-Cohen M, *Rights, Penalties and Organizations* (Berkeley: University of California Press, 1986), 30.

²⁷ Ibid. 36.

²⁸ *Tesco supermarket v Natrass* [1972] AC 355 (HL)

²⁹ Leight L G, ‘The Criminal Liability of Corporation and the other Groups’ [1977] *Ottawa Law Review* (9) 247.

serious challenge. Probably, this uncertainty has encouraged the trend toward a slight restriction in the scope of corporate criminal liability. In the United States, the Model Penal Code and some other State Statutes have suggested with regard to *mens rea* offences of affirmative corporation conduct, that unless legislative purposes to impose liability on corporation plainly appears, the corporate entity is criminally liable only for offences which are authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by high managerial agent, acting on behalf of the corporation within the scope or his office or employment³⁰. A similar trend of limitation can be observed in England as well. In 1940's the group of organs was held to include all responsible agents³¹ and important officials.³² However, in the 1970's, the House of Lords narrowed the group to include only those who constitute the directing mind and will of the company.³³ The obvious implication of this decision is that the scope of those whose acts would be identified as the acts of the corporation for the purposes of imputation of corporate criminal liability is further restricted. These restrictions, however, do not offer a solution to either doctrinal or practical problems that underline corporate criminal liability. It is humbly submitted that in the area of substantive criminal law as opposed to the realm of strict liability administrative offences, neither imputation nor identification is supportable. Penal law, which emphasizes the personal aspect of liability, is hesitant to regard the illegal conduct of one person as the conduct of another.³⁴ The attribution of the conduct of an organ or agent to the corporation for the purposes of imposing liability on corporation brings into existence a doctrinal limitation and a serious challenge.

The attempt by the House of Lords in *Global Fund Management Asia Limited v Security Commission*³⁵ proved awry. In this case, the House of Lords per Lord, Hoffman stated that Lord Reid's diction in *Tesco Supermarket Limited v Natrass*³⁶ is a misleading general metaphysic of companies and opined that the true question in each case was who as a matter of construction of the statute in question or presumably other rules of law, is to be regarded as the controller of the company for the purpose of the identification rule. In appropriate cases, that might be a person who was less elevated in the corporate structure than those mentioned in *Tesco Supermarket Limited v Natrass*. In the *Meridian*³⁷ case, where the question was whether the company was in breach of the New Zealand laws requiring disclosure of substantial shareholding knowingly held by an investor, the controllers were held to be two senior investment managers who were not even members of the company's Board. It is humbly submitted that the decision of the House of Lords in this case inevitably leaves uncertainty as to who will be regarded as the relevant person within the corporate hierarchy for the purpose of the identification rule in any particular case. Since the precise answer to the question of whose acts and knowledge are to be attributed to the company depends on the analysis of the context of the particular rule with which the court is dealing with, it is doubtful whether more certainty can be provided at the general level.³⁸ While the *Tesco*³⁹ took a hierarchical approach towards the scope of the doctrine and limited it to a few select individuals, the *meridian*⁴⁰ case approach was wider. It tried to determine who for the performance of the function in the course of which the offence took place was the directing mind of the company. The former has been criticized for its narrow approach while the latter was criticized for having introduced ambiguity by its broad approach. The *Tesco* and *Meridian* tests on whose acts should be attributed to the company did not solve this challenge or problem. So, as it is today, it is very unpredictable and open to manipulation which is not in the interest of justice and certainty in law. The common law position on corporate criminal liability remains operative in Nigeria. It can be reasonably concluded that there is no clear direction in Nigeria as regards the actual legal framework on corporate criminal liability specifically, as it relates to offences with mental elements.

6. Conspiratorial Relationship Challenge

Another challenge confronting corporate criminal liability in Nigeria is the issue of conspiracy or conspiratorial relationship between the corporation and officers of the company. Conspiracy is defined as an agreement by two or more persons to do or cause to be done an illegal act by illegal means. The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed.⁴¹ The Supreme Court in *Mojola Akinlolu v State* defines conspiracy thus: generally, conspiracy is said to be an agreement between two or more persons to do or carry out an unlawful act. It is a matter of inference deduced from certain criminal acts of the

³⁰ Mode Panel Code 1962 Section 2.07 (1) (c)

³¹ *Kent v Sussex Contractors Limited* [1944] K. B., 156 (CA)

³² *Brester Limited* (1944) ALL E.R., 515.(HL)

³³ *Tesco Supermarket Limited v Natrass* [1972] 170 (HL)

³⁴ Eliezer Lederman, 'Perpetrator and Corporation: Rethinking A Complex Triangle' [1985]. *Journal of Criminal Law and Criminology* (76) (2), 297.

³⁵ *Ibid*, 500

³⁶ *Ibid*, 520

³⁷ *Ibid*, 515

³⁸ *Ibid* 130.

³⁹ *Ibid* 142.

⁴⁰ *Ibid* 509.

⁴¹ *Benson Obiakor v The State* [2002] 10 NWLR (Pt. 776) 613 at 628 (SC)

parties accused, done in pursuance of an apparent criminal purpose in common between them and which hardly are confined to one place⁴². Conspiracy is an agreement of two or more persons to do an act which is an offence. Evidence of direct plot between conspirators is hardly capable of proof. The bottom line of the offence is the meeting of the minds of the conspirators to commit an offence, and the meeting of the minds need not be inferred by what each person did or did not do in furtherance of the offence of conspiracy. In the instant case, it was established on printed record from evidence that PW1, PW2 and PW3 as well as the confessional statement of the appellant and other co-accused persons that they acted in concert and an inference of conspiracy can be safely drawn.⁴³ The facts of this case were that on 18th of November, 1994 at the mobile petrol station, challenge Area of Ibadan, one Alhaji N. O. Kolawole who was the manager of the petrol station was preparing to go to bank to deposit N150,000 only, being proceeds of sale of petroleum product at the filling station. A gang of 5 armed robbers then invaded the station in a Peugeot wagon car with the inscription 'First City Merchant Bank and disguised as if they wanted to buy petrol and milk from the station. While the driver of the car was buying petrol from the attendant at the station, two other occupants of the vehicle alighted from the vehicle and moved to the supermarket of the filling station pretending to buy milk. The appellant then shot the manger with a gun in his possession. The man fell down and died. A co-convict of the appellant, one fatai solake took away the polythene bag containing the sum of N150,000 which fell from the deceased. Thereafter, the armed robbers escaped. On the 30th of January, 1995, the gang left Ibadan to Lagos and was caught in another robbery operation. The workers at the filling station were invited and they identified the armed robbers as those who visited and robbed them few days ago. The appellants were arraigned and eventually were convicted for conspiracy and armed robbery. Also, the Supreme Court, on the meaning of conspiracy observed as follows:

I concede that the unlawful nature of an act could be found in combination and confederacy, that is better reserved to conspiracy in criminal law, as agreement between two or more invariably or automatically constitute the commission of an offence by two persons or by least one of them. The offence of conspiracy cannot be committed by one person because that person cannot be convicted as a conspirator, the meaning of which is involved in a conspiracy.⁴⁴

In *Mulcuhy v R. Willes J.* while considering a charge of conspiracy laid against an accused person stated the principle thus:

A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act itself and the act of each of the parties, promises against promise, *actus contra actum*, capable of being enforced if lawful, punished if for a criminal object or for the use of criminal means.⁴⁵

The Supreme Court also defined conspiracy as an agreement by two or more persons acting in concert or in combination to accomplish or commit an unlawful or illegal act, with intent to achieve the agreed objective.⁴⁶ The court in the same case observed that in order to establish an offence of conspiracy against an accused person to commit a criminal offence, the prosecution is required by law to prove the following:

- (a) That there was an agreement between two or more persons to do or cause to be done, some illegal act or an act which is not illegal but by illegal means.
- (b) Where the agreement is other than an agreement to commit an offence, that some acts besides the agreement was done by one or more of the parties, in furtherance of the agreement and.
- (c) Specifically, that each of the accused individual, individually participated in the conspiracy.⁴⁷

An attempt to comprehend the attribution of the perpetrator's offence to the corporation suggests comparing their relationship to that of the conspirators. The theory of conspiracy holds any conspirator liable for crimes committed by fellow conspirators even if the conspirator was not capable of committing the offence himself.⁴⁸ The analogy to the theory of corporate criminal liability suggests that in each breach of law, what the corporate body has *been accused of is in the furtherance of an offence previously plotted between the corporation and the perpetrator.*⁴⁹

⁴²*Omojola Akinlolu v State* [2017] 70 NSCQR (pt. 3) 1902 at 1934 (SC) See also *Balogun v AG Ogun State* [2002] NSCQR 196 (SC) *Folorunsho Atutohai v State* [2015] 3 NWLR (Pt. 1445) 17 (CA)

⁴³*Fatai Buhari v State* [2015] 5 NWLR (pt 1452) (SC) See also *Nwosu v State*, [2004] 15 NWLR (pt. 897), 466 (SC) *Oduneye v State* [2001] 2 NWLR (pt. 697), 31 (SC) *Adiyobi v State* (2011) 12 NWLR (pt. 126) 347 (CA)

⁴⁴ *Usmandacaza v State* [2008] 33 NSCQR (Pt. 2) 1351, (SC)

⁴⁵ [1898] 3 HL, 317.

⁴⁶ *Agugua v State* [2017] 69 NSCQR (Pt. 2), 647 (SC).

⁴⁷ *Ibid* see also *Akogwu v State* [2018] NWLR (Pt. 1605) 137 (SC) *Darlington Eze v FRN* [2017] 70 NSCQR (Pt. 1) 482 (SC) *Okafor v State* [2016] NSCQR (Pt. 1) 481 (SC)

⁴⁸ *Ibid*, 630 also *Pinkerian v United State (1946) 328 US, 640*

⁴⁹ Eliezer Lederman (n48) 300.

The underlying assumption that a corporation and a perpetrator can be partners to a criminal conspiracy is questionable and constitutes a great challenge in this area of law with regard to corporate criminal liability in Nigeria. Conspiracy requires an agreement between separate parties to perform an illegal act for which each party must have necessary criminal intent⁵⁰. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and, in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence⁵¹. The big question is, therefore, whether the perpetrator and the corporation which are actually one can be separate parties to a conspiracy. Many jurists agree that a corporation cannot be convicted for conspiracy with its organ or agent, nor can it be convicted for conspiracy with another corporation through a common agent.⁵² The rationale behind this approach is that despite the legal perception that the perpetrator and the corporation are separate legal personalities; the corporation is incapable of either thinking or acting independently. The requirement for the plurality of offenders in conspiracy is fulfilled only where at least two minds meet, each of which is capable of contributing to the furtherance of the conspiracy. This theory had been adopted in England⁵³ and Canada⁵⁴ and equally finds substantial support in the United State.⁵⁵ This is also the position of the law in Nigeria. In *Benson Obiako v the State*,⁵⁶ the Supreme Court inter alia, held that:

Conspiracy is a matter of inference from certain acts of the parties. Consequently, in a charge of conspiracy, the actual commission of the offence is not necessary to ground a conviction for conspiracy. All that is needed is a meeting of the mind to commit an offence and this meeting mind needs not to be physical. Once the court arrives at a conclusion that the prosecution has established some community effort on the part of the accused persons aimed at committing a crime, it will be safe to convict them of conspiracy.

Conspiracy is an independent offence and does not depend upon the actual execution of what was agreed upon. In the context of conspiracy, an overt act agreement to perform an illegal act has a more obligatory effect on its parties and makes retreat from the idea more difficult.⁵⁷ Viewed in this way, the suggested comparison between conspirators and perpetrators and corporations seems implausible. Even if the perpetrator represents the corporation as well as himself in his thoughts, these thoughts are anchored in a singly human consciousness. Therefore, the practical implication of treating the perpetrator – corporation relationship as a conspiracy amounts to punishing thoughts, a notion that stands in contradiction to fundamental principles of criminal law and poses impossible challenges/ problems of proof. Moreover, conceptualizing the perpetrator -corporation as a conspiratorial relationship based upon the distinct functions allegedly performed by the single human mind during the perpetrator- corporation relationship might have far reaching consequences. Such a line of argument might justify imposing criminal liability for conspiracy by developing a theory of legal ‘Schizophrenia’ whereby a human mind fulfilling diverse functions is viewed as a spilt mechanism.⁵⁸

Furthermore, it is difficult and a very big challenge to explain the relationship between the perpetrator and the corporation and the resulting expansion of criminal law on the basis of the conspiracy theory.⁵⁹ By definition, the doctrine of identification and imputation are incompatible with the conspiracy relationship. The distinctive feature of this doctrine is that they lift the legal veil which separates the corporeal and the legal entities as one. The Criminal conspiracy, on the other hand, focuses on the co-ordination between two totally separate and independent parties. The theory of conspiracy is incompatible with the perpetrator – corporation relationship. Any interference with the mental independence of the individual conspirators or any increase in their mutual dependence gives rise to doubts as to their ability to conspire among themselves. Put differently, the concept of conspiracy as constituted in our extant criminal law appears not meant for corporations and has remained a huge challenge to corporate criminal liability in Nigeria. It requires the meeting of two or more separate minds to conduce to or establish conspiracy. In this direction, the capacity of spouses to conspire with each other has been doubted⁶⁰. Harping on this principle of law as regards conspiracy and the meeting of two minds requirement, the Supreme Court in *Benson Obiako v The State* states that:

⁵⁰ *Benson Obiako v State* (2000) 10 NWLR (Pt. 776) 613 (SC)

⁵¹ Criminal Code Act Laws of the Federation Cap 38, 2004 Section 8.

⁵² Goods J, ‘Corporate Conspiracy: Problems of *Mens Rea* and the Parties to the Agreement. (1975) *Dal Housie Law Journal* (2), 121.

⁵³ *R v McDonnell* [1965] 3 W.L.R. 1138.(HL)

⁵⁴ *R.v. Maxtin* [1933] I.D.L.R., 434.(CA)

⁵⁵ *Union Pacific Company v United States* (1990) 183f, 745.

⁵⁶ (n78) 629.

⁵⁷ Calvert J, ‘The case of the Schizophrenia Management Director’ [1964] *Modern Law Review* (27) 220

⁵⁸ Eliezer Lederman, (n48) 301

⁵⁹ *United States v Dege* (1960) 364 U.S 51 (SC) See also *Mawju vR* (1957) 2 W.L.R.R. 277

⁶⁰ [2002] 10 NWLR (pt. 776) 613 at 627 (SC)

By virtue of section 34 of the Criminal Code, a husband and wife of Christian marriage are not criminally responsible for conspiracy between themselves alone. The provision of section 34 of the Criminal Code only gives a defence to a Christian couple charged and tried for conspiracy between the two of them only. This is based on the common law presumption that a husband and wife are one, each being part of the other and since conspiracy requires the agreement of at least two persons to commit an offence, such husband and wife cannot commit the offence.⁶¹

Consequently, if the uncertainty as to the independence of one party to an alleged conspiracy is called into question, his capacity to conspire with the party upon whom he is dependent, similar doubt must exist when the mind of the alleged party to the conspiracy is in effect the mind of the other party as well as in the perpetrator – corporation relationship. Under the identification theory, the mind and will of the officers of the corporation are seen as that of the corporation and imputed on the corporation for the purpose of criminal liability. There is no doubt that this is diametrically incompatible with the doctrine of conspiracy and still remains a challenge in this aspect of the law with regard to corporations. Commenting on this, the Canadian Supreme Court observed that.⁶²

Another irony could be found in the propensity of the doctrine to absolve the employer of an offence, while holding the company liable, especially in matters of conspiracy. This is so because conspiracy requires at least two persons to commit the offence. The attribution of the fault of the employee to the company has legal implication of infusing the fault of the employee in the company and so the law sees one and not two offenders. Justice Estey alluded to this legal implication in *Canadian Dredge case* where he held that ‘the management officer is not guilty additionally of the offence of conspiring with the employee to commit the wrongful act in question because in the identification theory there is only one entity... and hence the basic requirement of two persons in conspiracy is not met.

Consequently, we humbly submit that the offence of conspiracy as presently constituted is not amenable to corporations.

7. The Complicity Relationship

Another challenge to corporate criminal liability is the definition of the perpetrator – corporation relationship in terms of criminal complicity. Criminal complicity concerns the performance of a single offence by a number of participants, each of whom takes a distinct part in its performance. Only the behavior of the principal offender must include all the elements of the offence. Complicity is the involvement in a crime together with other people, associate or participates in a criminal act as an accomplice.⁶³ Accomplices fulfill diverse functions and their respective contribution to the crime is individually defined⁶⁴ According to the Black’s Law Dictionary.

Accomplice is defined as someone who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory. A person is an accomplice of another in committing a crime with the intent to promote or facilitate the commission of the crime, he solicits, requests or commands the other person to commit it or aids the other person in planning or committing it⁶⁵⁶⁶.

The counselor or procurer is absent from the scene of the crime even though he usually is the originator of the offence, an adviser prior to its commission and the motivating force behind the commission of the crime.⁶⁷ The aider-and-abettor, on the other hand, is actually or constructively present at the scene of crime and assists the principal offender in its commission. The *actus reus*, for accomplice liability consists of persuading, instigating or encouraging the principal offender in its commission including by words, gestures and even mute presence. The *mens rea*, for accomplice liability consists of two types viz, the state of mind rendering encouragement or assistance which is confined to the accomplice’s intention to persuade, instigate or assist the principal offender committing the offence. Secondly, the state of mind required for the offence committed which consists of the mere awareness of the possible occurrence of the offence.⁶⁸ Abetment is an act of encouraging, inciting or aiding another. The verb variant ‘abet’ means to encourage, incite or set another one to commit a crime. An abettor is an instigator or setter on, one who promotes or procures a crime to be committed.⁶⁹ Abetment is easier to prove

⁶¹ 662. (SC)

⁶² Bryan A G, (Ed), *Black’s Law Dictionary* (10th edn USA: West Publishing Company 2014) 345-346

⁶³ Lafave and Scott, *Hand Book of Criminal Law* (London; Butter Worths 1972) 495.

⁶⁴ *Usama Kaza v State* [2008] 33 NSCQLR (Pt.2) 412 (SC)

⁶⁵ *Brayan AG*, 347.

⁶⁶ *Ibid* 438

⁶⁷ Gilliens P, *The Law of Criminal Complicity* (New York: Long Man Publishers, 1980) 149

⁶⁸ Bryan A Garner, (Editor).4

⁶⁹ *Usman Kaza v State* [2008] 33 NSCQR (Pt. 2) 412 (SC)

than conspiracy because it entails or involves more overt actions. For an accused to be convicted of an abetment under section 7 of the Criminal Code, the prosecution must prove the following ingredients: (i) That there was an encouragement, incitement, setting or instigation, promotion or procurement of offence. (ii) Any of the above acts must be positive and unequivocal specifically addressed to the commission of the offence (iii) The act abated must be committed in consequence of the abetment (iv) an accused person could be convicted of the offence of abetment on proof by the prosecution of the any of the acts mentioned in (ii) above. In other words, the acts mentioned in (ii) above are the alternative and not cumulative.⁷⁰ An encouragement here means an act of making some one feel brave or confident enough to do something by giving active approval in support of the crime. Incitement also has the element of encouragement. By incitement the person is provoked by a strong passion or feeling to commit an offence.⁷¹

An analysis of the perpetrator – corporation relationship in terms of criminal complicity raises similar challenges/problems to those encountered when considering the comparison to conspiracy. The lack of necessary plurality of offenders, each of whom has independent physical and mental capacities, is fatal to both comparison.⁷² Conspiracy is distinguished from abetment in that conspiracy consists simply in the agreement or confederacy to do some act, no matter whether it is done or not. In abetment, the intention to do a criminal act is not a crime itself until something is done amounting to do or attempting to do some act to carry out the intention. More so, the offence of abetment deals only with offenders who may be described as accessories before the fact and after the act. Abettors must have committed acts or omissions which must take place in pursuance of the conspiracy.⁷³ Thus, all the elements or ingredients required to ground complicity as provided by the complicity doctrine and the law are diametrically lacking in the perpetrator – corporation relationship with regard to complicity. The human consciousness operative in the events involving the corporation and the perpetrator is one – dimensional in the sense that it can be only the persuasive force alternatively, the persuaded agent, and cannot be both. Any theory/analysis suggesting that the same intelligence can be construed as performing a double role at once, instigating and being instigated to commit the offence, is completely artificial. It is therefore, antithetical to the principles governing complicity for an individual offender to be both an inciter and a performer. The same challenge is seen when comparing the perpetrator – corporation relationship to that of the aider and abettor and the principal. One physical and mental organism cannot at the same time perform a forbidden act and assist in its performance. One organism cannot intend to execute the crime totally alone and simultaneously intend to support another in doing the same act. By definition, the *actus reus* of aider and abettor is not the performance of the intended offence but, rather, the act of helping another to commit the offence. In the same vein, no form of legal acrobatics can interpret the *mens rea* of a single mental state in ways that differ substantively. The single mental state of the perpetrator corporation cannot be interpreted with respect to the corporation as the intention to perform the offence single-handedly and at the same time, with respect to the perpetrator, now in the guide that the aider and abettor has the intent to aid another in committing the offence.⁷⁴ An American court jettisoned this possibility and averred unhesitatingly that if a corporation can act only through its agents, and thereby become in law completely identified with its agent, how can it be an accessory to this act? For in such a case, it must be accessory to its own act, which is a legal absurdity.⁷⁵

It is humbly submitted that the lack of the necessary characteristic plurality of offenders in the perpetrator – corporate relationship makes it difficult to consider the relationship in terms of the criminal participant theory. Each party within the criminal partnership must be capable of individually fulfilling at least one role in the partnership; otherwise he cannot be defined as a party to such an offence. In order to view the perpetrator as an aider and abettor to the corporation, it would be necessary to prove that the body corporate could independently fulfill the function of one of the parties to the crime. It is obvious that the corporate entity cannot satisfy this condition. This no doubt constitutes a serious challenge to the corporate criminal liability in Nigeria. The Criminal Code⁷⁶ is very clear on this, it provides that; when an offence is committed, each of the following person is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it:

- (a) Every person who actually does the act or makes the omission which constitute the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) Every person who aid another person committing the offence;
- (d) Any person who counsels or procures any other person to commit the offence.

⁷⁰ Ibid 412

⁷¹ Eliezer Lederman, 303

⁷² Ibid, 391 see also *Mukaila Salawu v State* [2014] 60 NSCQR (SC)

⁷³ Eliezer Lederman, 304.

⁷⁴ *State v Southern Rail Way Company* (1907) NC, 145

⁷⁵ Criminal Code Act Cap 38 Laws of the Federation of Nigeria 2004 Section 7

⁷⁶ Criminal Code Act Cap C38 Laws of the Federation of Nigeria, 2004 Section 10

In the fourth case, he may be charged with himself committing the offence or with counseling or procuring its commission. A conviction of counseling to procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence. Any person who procures another to do or omit to do any act of such a matter that, if he had himself done the act or made the omission, that act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission, and he may be charged with doing the act or making the omission. A person who receives or assists another who is, to his knowledge, guilty of an offence in order to enable him to escape punishment, is said to become accessory after that fact of the offence⁷⁷. The Penal Code provide, that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.⁷⁸ It also provides that; whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone.⁷⁹ Section 83 of the Panel Code provides that; a person abets the doing of a thing who:

- (a) Instigates any person to do that thing, or
- (b) Engages with one or more other persons in any conspiracy for doing of that thing; or
- (c) Intentionally aids or facilitates by any act or illegal omission the doing of that thing.⁸⁰

A community reading and analysis of both Codes as shown above is in accordance with the conclusion that complicity entails a multiplicity of parties or persons each of which is capable of individually and independently fulfilling a particular or specific role in committing the offence. The theory of imputing or identifying an officer of the corporation whose act would be regarded as the act of the corporation for the purposes of complicity under the Criminal Code Act and the Panel Code Act appears to be a legal incongruity and absurdity. It is therefore, a challenge to Corporate Criminal Liability in Nigeria.

8. Conclusion and Recommendations

The article examined the Challenges of Corporate Criminal Liability in Nigeria. It is obvious from the examination that corporate criminal liability in Nigeria is besieged with myriads of challenges. These challenges have impacted negatively on the application of criminal liability on corporations in Nigeria. However, other models of corporate criminal liability should be experimented in Nigeria. The legal framework on corporate criminal liability in Nigeria is very vague and can best be described as a maze within a maze. Consequently, it is highly recommended that it should be entirely overhauled. Challenges of corporate criminal liability in Nigeria could be assuaged by the introduction of other models of corporate criminal liability, especially the corporate culture model. There should be a paradigm shift from the identification model to other models. New models of corporate criminal liability that accommodate or reflect the real attributes of corporations should be fashioned to eliminate these challenges.

⁷⁷ Panel Code, Cap C38 Laws of the Federal of Nigeria, 2004 Section 71

⁷⁸ Panel Code, Cap 89 Laws of the Federation of Nigeria, 2004 Section 80

⁷⁹ Section 83, Ibid

⁸⁰ Ibid