

# CORPORATE LAW

## **The Nigerian Corporate Manslaughter Bill: a thousand steps to nowhere**

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### **Introduction and background**

The 2012 Dana plane crash in Nigeria was greeted with condemnation and general outcry across the length and breadth of the country, and even beyond. The crash was one too many as there had been series of plane crashes in Nigeria over time. One echoing issue from the crash was the question of whether or not the airline could be criminally liable for the deaths of the over 150 people involved in the crash. However, the existing legal framework via the Criminal and Penal Codes could not accommodate holding a corporate body liable for manslaughter and homicide as the case may be. Meanwhile, the legislative arm of government; the sixth assembly had taken steps to address this and a Corporate Manslaughter Bill was proposed by Chris Anyawu and Yakubu Dogara, of the Senate and House of Representatives respectively. Hence, the emergence of the Corporate Manslaughter Bill 2010, fashioned on the United Kingdom's Corporate Manslaughter and Corporate Homicide Act 2007.

However, almost a decade after Dana, the Bill has not been passed into law as the Nigerian President, Muhammadu Buhari declined presidential assent to the Bill on 9 July, 2018 on the ground of its inconsistency with the provisions of the 1999 Constitution on the presumption of innocence. The focus of this article is to analyse the provisions of the Bill *vis a vis* its purpose which is to provide a legal framework for holding corporate bodies criminally liable for deaths caused by corporate activities. In addition, it discusses the constitutionality of the Bill as it is, in the context of the refusal of presidential assent. The article concedes that there are loopholes in the Bill, which will cause challenges to its implementation and effectiveness if eventually passed (especially as its "principal" the UK Act has not proved to be a successful model for holding corporations criminally liable for deaths). However, it argues that the Bill is consistent with the provisions of the 1999 Constitution, contrary to that alleged by the Nigerian President. Thus, this article suggests that the Bill be re-worked with more effective parameters, in order to achieve its ultimate aim of providing a legal framework for corporate liability for homicide.

### **Corporate homicide is a global reality, but Nigeria is a peculiar case**

The issue of corporate homicide is one that is global and perhaps inevitable.<sup>1</sup> This is because the growing increase in technology, industrialisation and global population means there is a growing interaction between humans and corporations, often leading to harm to both. The harm done to the corporation can be in the form of fraud to it, while the harm to humans can be injury or death because of unsafe goods and services. Countries across the globe have recorded incidences of death caused by the activities of corporations: from the United States of America to the United Kingdom, from Malaysia to Australia, and from Bangladesh to Nigeria.<sup>2</sup>

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<sup>1</sup> Khairat Oluwakemi Akanbi, 'The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom' (2014) 22 No 1 IIUM Law Journal 117

<sup>2</sup> Ibid.

In 2019, the world was thrown into mourning by the crash of an Ethiopian airline Boeing 737 Max8, which killed one hundred and fifty seven people of more than thirty nationalities.<sup>3</sup> Earlier in the year, the same Boeing 737 Max aircraft had crashed in Singapore, which led in March 2019 to the country suspending the operation of all variants of the Boeing 737 Max aircraft.<sup>4</sup> On 21 February 2021, a Nigerian air force plane crashed in Abuja, the nation's capital, five minutes after take-off, killing all on board.<sup>5</sup>

Earlier in 2014, a South Korean ferry with more than four hundred people *en route* a tourist resort island sank on April 16 which led to the death of more than three hundred people.<sup>6</sup> The Esso gas plant explosion in 1998 killed two people in Longford, Victoria, Australia.<sup>7</sup> In the United States of America, the BP refinery exploded in 2005, causing the death of fifteen people. The sinking of the *Herald of Free Enterprise* in 1987, which killed one hundred and ninety three people, and the King's Cross Station fire in 1997, which killed thirty-one people are some of the incidences of corporate homicide in the United Kingdom. In 2013, Bangladesh experienced what has been described as the deadliest garment factory accident ever,<sup>8</sup> when an eight storey commercial building collapsed in the greater Dhaka area in Bangladesh killing more a thousand people and leaving several others injured. Some of these incidents have provoked discussion and law reform of the criminal liability of corporations for homicide. It was the collapse of *The Herald of Free Enterprise* in the United Kingdom, and the following unsuccessful prosecution for manslaughter, that led to the eventual passing of the Corporate Manslaughter and Corporate Homicide Act 2007. In the same vein, the Westray accident, which killed twenty-six people, and the unsuccessful attempt at prosecuting the corporation, that influenced the introduction of Bill C45 in Canada.<sup>9</sup> In addition, Australia has undergone law reforms in the area of corporate criminality.

Yet, in Nigeria, corporations still escape liability for deaths because the existing legal framework cannot accommodate corporate liability for homicide. In addition, the fact that Nigeria is a developing country means many of its experiences of corporate homicide are unreported because of ignorance, poverty and the influence of religion.<sup>10</sup> The influence of religion is hinged on such beliefs, as the devil is responsible or influences deviant behavior in people, illness and deaths are punishments from God, and everything happens based on the will of God. These beliefs mean victims of crime do not report or seek for justice.

Despite its abundant human and natural resources, the country is one of the poorest countries in the world. It has been reported that forty per cent of Nigerians live below the poverty line, and that more than eighty-two per cent of Nigerians live below one dollar per day.<sup>11</sup> The implication is that people are too poor to report and take steps to monitor the prosecution of corporations who are often rich and powerful entities. More so, they may be

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<sup>3</sup> <https://www.aljazeera.com/news/2019/03/ethiopian-airlines-flight-nairobi-crashes-deaths-reported-190310082515738.html> accessed 26 March 2020

<sup>4</sup> [www.bbc.com/news/world-asia-47534292](http://www.bbc.com/news/world-asia-47534292) accessed 18 February 2021

<sup>5</sup> <http://www.bbc.com/news/world-africa-56145992> accessed 20 February 2021

<sup>6</sup> [www.nbcnews.com/storyline/south-korea-ferry-disaster](http://www.nbcnews.com/storyline/south-korea-ferry-disaster) accessed 25 June 2014

<sup>7</sup> [www.theguardian.com/world/2014/may/15/south-korea-ferry-captain-charged-manslaughter](http://www.theguardian.com/world/2014/may/15/south-korea-ferry-captain-charged-manslaughter) accessed 11 August 2014

<sup>8</sup> See *DPP v. Esso Australia Pty Ltd* (2001) SC/Victoria.

<sup>9</sup> [www.bbc.uk/news/world-asia-22635409](http://www.bbc.uk/news/world-asia-22635409) accessed 3 May 2013

<sup>10</sup> Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell 2003) 226

<sup>11</sup> Although the country has no State religion, it is a multi-religious society where three major religions are recognised.

<sup>12</sup> Report released by the National Bureau of Statistics covering the period between September 2018 to October 2019 See [www.aljazeera.com](http://www.aljazeera.com) accessed 10 January 2021.

influenced when offered a token by powerful corporation in exchange for keeping quiet about the crime.

The menace of fake foods, drugs and substandard services has contributed greatly to the incidences of corporate homicide in Nigeria. According to Dora Akunyili, erstwhile Director General of the National Agency for Food, Drugs Administration and Control (NAFDAC), the menace of fake and substandard drugs had been killing Nigerians as early as the 1970s. She cited an incident when Nigeria donated meningitis vaccines to the Niger Republic and the vaccines were later detected to be counterfeits after approximately 600,000 people had been vaccinated with it.<sup>12</sup> At the time, fake drugs worth about sixteen million dollars were recovered by the NAFDAC.<sup>13</sup> The infiltration of fake drugs into the Nigerian drugs market was made easier by the endemic corruption in the country, which makes it easy for manufacturers of fake drugs to escape the law; this is an inducement to continue to perpetrate the illegality.<sup>14</sup> Similarly, more than eighty children were killed as a result of taking an adulterated teething drug. As a result of the outcry, the pharmaceutical company was prosecuted for violating a regulatory offence, as the legal framework could not sustain prosecution for manslaughter.<sup>15</sup> Generally, the Nigerian legal framework does not support corporate criminal liability beyond strict liability regulatory offences,<sup>16</sup> thus the existing homicide legislation is unsuitable for prosecuting corporations.<sup>17</sup>

Nigeria has experienced more than forty mainly avoidable plane crashes from 1960 to 2019.<sup>18</sup> Yet, the airlines escape criminal liability as none of them was prosecuted for the deaths. Thus, the crash in June 2012 of a commercial plane, operated by Dana airlines in Lagos Nigeria and killing more than one hundred and fifty people, was one crash too many.<sup>19</sup> There was a large outcry and public condemnation of the crash. In particular, there were complaints by passengers who had flew the plane shortly before the crash that the plane had had near crash experience earlier.<sup>20</sup> Thus, defining a framework for holding corporations liable for homicide became inevitable. More so, a year after, in October 2013, another plane owned by Associated Airlines crashed minutes after take-off in Lagos, killing sixteen people on board.<sup>21</sup>

## Defining corporate homicide

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<sup>12</sup> Bulletin of the World Health Organisation, (Vol 84, No 9, September 2006) 685-764  
[www.who.int/bulletin/volumes](http://www.who.int/bulletin/volumes) accessed 18 February 2021.

<sup>13</sup> Ibid.

<sup>14</sup> Nigeria's corruption rating according to Transparency International Corruption Index has been poor.

<sup>15</sup> *Adeyemo Abiodun v. F.R.N* (Unreported) Suit No CA/L/550/M/2013. Decided by the Federal High Court Lagos, on 17 May 2013.

<sup>16</sup> See Khairat Oluwakemi Akanbi, 'Corporate Criminal Liability as a Catalyst for Effective Anti-Corruption Law in Nigeria' (2018) vol. 3 No1 KIU Journal of Humanities.

<sup>17</sup> Khairat Oluwakemi Akanbi, 'The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom' (2014) 22 No1 IIUM Law Journal.

<sup>18</sup> <https://www.channelstv.com/2013/10/04/timeline-of-plane-crashes-in-nigeria/> accessed 27 April 2020

<sup>19</sup> Vanguard Newspapers 21 July 2012.

<sup>20</sup> See also, Khairat Oluwakemi Akanbi, 'Corporate Criminal Liability: Towards Regulating Corporate Behaviour Through Criminal Sanctions in Nigeria' (2015) PhD thesis Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia.

<sup>21</sup> [www.channelstv.com/home/2013/10/03/updateprivate-aircraft-crashes-near-lagos-depot/](http://www.channelstv.com/home/2013/10/03/updateprivate-aircraft-crashes-near-lagos-depot/) accessed 7 January 2014.

Homicide simply means when a person kills another person. It includes murder, manslaughter and infanticide.<sup>22</sup> It is regarded as the most grievous crime as a result of the belief that life is sacred and the belief that only the giver of life should take it.<sup>23</sup> Thus, corporate homicide will simply mean when a corporation as a “legal person” kills another person.<sup>24</sup> However, as a result of the peculiar personality of corporations, a number of questions need to be answered in determining what qualifies as corporate homicide. First, what class of homicide qualifies as corporate homicide? Will it be murder, manslaughter or infanticide? Second, how can a corporation, as an artificial person, kill another person?

First, the Latin maxim *actus non facit reum nisi mens sit rea* is the basis for criminal liability. The *actus reus* for manslaughter and murder is the same, which means that a life must have been lost as a result of the act or omission of another. With respect to infanticide, there is a little variation as the life that must have been lost must be that of an infant under the age of twelve months. The difference between murder and manslaughter is in the *mens rea*, known as malice aforethought.<sup>25</sup> Thus, a murder is said to have occurred when a person kills another with malice aforethought. In the same vein, manslaughter occurs when a person kills another without malice aforethought.<sup>26</sup>

Manslaughter has been described as the most complex form of homicide because it is quite wide-ranging, from voluntary manslaughter when a person seemed to have the mental element for murder but killed in circumstances recognised by law, to involuntary manslaughter when a person lacks the necessary intention but still committed the *actus reus* of killing. Manslaughter also includes gross negligent manslaughter, which is when a person is negligent in the discharge of a lawful activity leading to death. In *R v. Adomako*,<sup>27</sup> the House of Lords provided an exposition of what constitutes involuntary manslaughter and held that in proving involuntary manslaughter, there must be a duty of care that must have been breached as a result of negligence leading to loss of life.

With respect to corporate homicide, death occurs as a result of corporate activity and the corporation is responsible for the death and not individual members of the corporation. Thus, the death must have been because of a systemic breakdown within the corporation. A corporation by virtue of incorporation or registration is ordinarily formed for lawful purposes.<sup>28</sup> Thus, when death occurs as a result of corporate activity, it is usually as a result of negligence and not because the corporation was pre-meditated or had malice aforethought. Thus, corporate homicide occurs when in the course of doing its legitimate business; a corporation is negligent leading to loss of lives. Hence, corporate homicide qualifies as a form of gross negligence manslaughter.

### **Justification for corporate criminal liability for homicide**

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<sup>22</sup> C.M.V Clarkson, H.M. Keating and S.R. Cunningham, *Criminal Law* (7<sup>th</sup> edn, Sweet and Maxwell 2007), 660.

<sup>23</sup> *Ibid*, page 662.

<sup>24</sup> The case of *Salomon v. Salomon & Co Ltd* [1897] AC 22 has already settled the personhood of a corporation in the eyes of the law.

<sup>25</sup> *Ibid*, page 665. That the term “malice aforethought” has undergone reform under the English Law, from intention to kill to intention to cause grievous bodily harm. See *Hyam v. DPP* [1975] AC 55.

<sup>26</sup> See the Supreme Court of Nigeria’s decision in *Festus Amayo v. State* (2002) SCM 169.

<sup>27</sup> *R v. Adomako* [1995] 1 AC 171.

<sup>28</sup> C.M.V Clarkson, ‘Context and Culpability in Involuntary Manslaughter: Principle or Instinct?’ in Ashworth and Mitchell (eds), *Rethinking English Homicide Law* (2000), 152.

As stated above, corporate homicide qualifies as a form of gross negligence manslaughter. It might be asked why should there be a legal framework for corporate liability for homicide since, in actual fact, a corporation is only an abstraction who can do nothing for itself except through its natural persons; thus, why not hold the culpable officer or member of a corporation liable? The justification for corporate liability as opposed to individual liability lies in the very nature of the act or omission leading to death. In essence, the justification lies in the nature of the “killing” itself. Thus, corporate homicide occurs when the act or omission leading to death is caused by the systemic breakdown or misconduct of a corporation and the corporation is indeed the blameworthy person and not an individual member or officer of a corporation.<sup>29</sup>

Another argument could be that considering the peculiar nature of corporations as artificial persons and the “definition” of corporate homicide as a form of gross negligence manslaughter, it is not necessary to “punish” the corporation through the instrumentality of the criminal law, since the corporation is primarily formed for a lawful purpose. However, another justification for criminalising corporate homicide is the fact the societal quest for justice is better served through the criminal law than the civil law. Besides, homicide is a crime, a grievous crime because the sanctity of life should ordinarily be preserved. In addition, the fact of legal personality itself is a justification for criminalising corporate homicide. The recognition of a corporation as a person in law means it is recognized as a rights- and duty-bearing entity whose acts and omission can constitute a crime.<sup>30</sup> Finally, the increasing rate of corporate deaths makes it imperative that it should be brought into the realm of the criminal law even if only for deterrence purposes. One of the goals of sanction that is the consequence of crime and criminality is deterrence, which may be specific or general deterrence.<sup>31</sup>

### **The Corporate Manslaughter Bill 2010**

The Bill initiated simultaneously in the upper and lower legislative arm of the Nigerian government by Chris Anyawu and Yakubu Dogara respectively, is to provide for corporate manslaughter and corporate homicide and incidental matters. It is a short piece of legislation with twenty-six chapters. The Bill is fashioned after the UK’s Corporate Manslaughter and Corporate Homicide Act 2007 and thus shares many similarities with the Act. The provisions of the Bill will now be examined.

#### *The Offence*

The Bill creates an offence when death occurs because of the way the activity of an organisation is managed or organized and as a result of which there had been a breach of a duty of care by the organisation to the deceased. It further provides that an organization can only be guilty of the offence if the way in which its activities are managed by its senior management is an important factor in the breach of the duty of care.<sup>32</sup>

From the definition of the offence, the organisation must owe the deceased a duty of care, which must have been breached, thus suggesting that there must have been some form of

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<sup>29</sup> Khairat Oluwakemi Akanbi, ‘The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom’ (2014) 22 No 1 IIUM Law Journal 118, 119.

<sup>30</sup> K.O. Akanbi and D.A. Ariyoosu ‘Corporate Criminal Liability: Imperatives of Criminalizing Corporate Wrongs’ (2014) 9 UILJ 190.

<sup>31</sup> Ibid page 195.

<sup>32</sup> Section 1(3).

relationship between the organisation and the deceased. Most importantly, there must be a nexus between the senior officers or managers and the corporate activity resulting in death. It seems that creating a nexus between the senior management and the activity constituting the crime is a subtle endorsement of the identification theory or perhaps the management failure theory of determining the corporate *mens rea*.<sup>33</sup> Thus, there is bound to be challenges to applying the theories. First, in large corporations, the senior management, who are often the directors, are usually disconnected from the corporate activity constituting the crime. Thus, hinging corporate fault on the nexus may mean that the successful prosecution of large organisations will be a mirage. Besides, where will the managerial powers in large corporations with branches be located? Another limiting factor is that the senior management might, as is often the case, delegate managerial duties, making it difficult to establish the nexus. Thus, delegation of managerial duties and the extent of delegation are likely challenges.<sup>34</sup> Another limitation is the likely injustice to a corporation when corporate activity is managed negligently, but contrary to corporate policy.

The meaning of relevant duty of care is given in s.2 as duties owed under the law of negligence, which covers duties to employees, agents, occupier of premises, and duties owed in connection with the supply of goods and services. Briefly, these are duties owed by virtue of the old common law principle established in *Donoghue v. Stevenson*<sup>35</sup> on the basis of the neighborhood principle. The broad definition of relevant duty of care is commendable, as it places a responsibility on corporations with respect to all those that can be affected by corporate activities: employees, agents, consumers and members of the general public. It is also provided that, what qualifies as a relevant duty of care is a question of law that is determinable in court.

However, some categories of duty are exempted from qualification as relevant duty of care within the meaning given in the Bill. For example, s.3 exempts any duty of care owed by a public authority in respect of a decision as to matters of public policy. Similarly, a duty of care owed in respect of actions done while exercising an exclusively public function are qualified, as such will not be regarded as a relevant duty of care unless it is in respect of employees, a duty owed as occupier of premises, or owed to one for whom the organisation is responsible for its safety.<sup>36</sup> Military and policing activities are also qualified with respect to the meaning of relevant duty of care, as certain actions done in specific instances will be exempted from the relevant duty of care rule.<sup>37</sup>

### *The mens rea*

The greatest challenge to the development of corporate criminality has been the *mens rea*. This is because of the peculiar nature of a corporation as an artificial person that is not

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<sup>33</sup> The identification theory also known as the alter ego theory was originally developed as a civil law principle in the case of *Lennards Carrying Co Ltd v. Asiatic Petroleum Co Ltd* (1915) AC 705 HL and it identifies certain categories of people within the company as the alter ego of the company. The alter ego is not treated as the agent of the company but as the company itself as it is the embodiment of the company. This principle is influenced by the fiction theory of the corporation. The management failure theory is the theory developed by the UK's Corporate Manslaughter and Corporate Homicide Act 2007 and hinges the company's *mens rea* on the senior management of the company.

<sup>34</sup> C. Wells, *Corporations and Criminal Responsibility*, (2<sup>nd</sup> edn, Oxford, Clarendon Press, 2011)98 See the conflicting judgements in *Meridian Global Funds Management Asia Limited v. Securities Commission* (1995) 2 AC 500 JCPC and *Attorney General's Reference No2* (1999) (2000) 2 Cr. App. R. 207.

<sup>35</sup> [1932] AC 562 1.

<sup>36</sup> Section 3.

<sup>37</sup> Sections 4 and 5.

capable of emotion, and the fact that the criminal law is founded on the principle of *actus non facit reum nisi mens sit rea*. Therefore, any attempt at defining corporate homicide must necessarily include the yardstick for determining corporate *mens rea*. The Corporate Manslaughter Bill has adopted the management failure model developed in the UK's Corporate Homicide and Corporate Manslaughter Act 2007 as the attribution model for determining the corporate *mens rea*. It provides in s.1(3) that an organisation will only be guilty of the offence if the way its activities are managed by its senior management is an important element of the breach of the duty of care. Thus, the *mens rea* necessary for manslaughter will be found in the senior management's conduct. In simpler terms, the organization's mental element is evident in how the members of management behave, and the corporate *mens rea* lies in the actions of the senior management.

While the attempt to adopt a corporate *mens rea* is commendable, it must be stated that the management failure model adopted is not the most suitable and thus will affect the efficiency and efficacy of the Bill when and if it is eventually passed into law. First, the management failure model is derivative and at variance with the core of the criminal law, which is based on individual liability. The idea model for corporate criminality is individualistic and based on personal fault. Second, the management failure model developed in the UK to cure the challenges of the identification model is still tied to the apron strings of the identification model. It has been submitted that the management failure model is merely a qualified form of the identification model.<sup>38</sup> Thus, it is inevitable that with time it will become saddled with some if not all the challenges that the identification model has faced. Indeed, it can be argued that the difference between it and the identification model is simply a matter of semantics, as the senior management is no other than the director(s).

#### *Thematic application and jurisdiction*

With respect to geographical jurisdiction, the Bill, being an Act of the National Assembly, has a national application and applies to all parts of the country. In fact, s.18 gives further clarification to the extent or definition of the geographical application, which includes the seaward limits of territorial sea adjacent to Nigeria or on a Nigerian controlled aircraft, hovercraft or ship, even when the person is no longer on board as a result of a mishap. It also applies to any place to which the Petroleum Act applies.

Also, its thematic application is also wide as it applies to organisations who are ordinarily not incorporated companies such as the police, the army, partnerships, trade unions, employers' associations, government agencies and departments in the same way as if they are incorporated companies. Hence, the word 'organisation' is used and not corporation, since the focus is wider than incorporated corporations. Another positive highlight with respect to the application of the Bill is s.13(1), which provides that any statutory provision on a criminal proceeding against a corporation shall be applicable to the police, government departments, partnerships, trade unions and employers associations with necessary modifications. It seems to proactively extend the definition of corporation for the purpose of corporate manslaughter. This is commendable, as it will prevent likely prosecutorial confusion with respect to past or future legislation on the extent of its application.

While the wide geographical and thematic application is commendable, the fact that individual accessory liability is excluded is a deficiency of the Bill. Section 16 excludes individual liability for aiding, abetting or being a party to corporate manslaughter. This

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<sup>38</sup> J Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2001: Thirteen Years in Making but was it Worth the Wait?' (2008)71 MLR 413, 428.

deliberate exclusion can in fact be fatal to the efficiency of the Bill. This is because directors are excluded from liability as accessories. Yet, the reality of corporate practice is that directors as managers and administrators of companies are often complicit in corporate crimes and criminality.<sup>39</sup> Not surprisingly, however, this exclusion is similar to s.20 of the model Act, the UK's Corporate Manslaughter and Corporate Homicide Act, which has also been criticised as immunising corporate officials from liability that hitherto existed under the common law.<sup>40</sup> The discretion enjoyed by directors in the management of corporate affairs suggests that they are in a position to influence a culture of compliance and good behaviour in the company. Besides, the post-crime reaction to situations can also suggest culpability as accessories after the fact. Thus, individual, specifically director's, liability as accessories can further enhance the efficiency of the Bill.

Sections 14(1) and (2) is also commendable as it recognises transfer of liability. While the concept of transfer of liability might be alien to the criminal law, it is appropriate in this context based on the peculiarity of the corporation as an artificial person. It provides that where death occurs as a result of the activity of a public organisation and such organisation has its functions transferred to another organization, the new organisation shall inherit the liability of the original organization even if such change in organizational functions took place in the course of proceedings under the Bill. This provision succinctly captures the reality of the workings of government departments and agencies especially in Nigeria, which is fraught with policy change almost as frequent as change in government.

However, the requirement that the consent of the attorney general is required can be a clog in the wheel of prosecutorial success. Section 15 makes it mandatory for the consent of the Attorney General to be sought before a criminal proceeding can be instituted. This requirement can cause delay because of the inevitable administrative bottlenecks. Besides, this can add to the already bloated powers of the office of the Attorney General, already described as a law unto himself.<sup>41</sup> Thus, the provision of s.15 is unnecessary.

Also commendable is the fact that a prosecution under the Bill does not preclude a prosecution under health and safety legislation if the circumstances so determine. Section 17(1) provides:

“Where in the same proceedings there is-

- a) a charge of corporate manslaughter arising out of a particular set of circumstances,
- b) a charge against the same defendant of a health and safety offence arising out of some or all of those circumstances, the court may, if the interests of justice so require, return a verdict on each charge”

It further provides in s.17(2) that an organisation that has been convicted of corporate manslaughter may in the interest of justice be charged with a health and safety offence arising out of all or some of the circumstances.

### *Sanctions*

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<sup>39</sup> Khairat Oluwakemi Akanbi, ‘Director’s Accessorial Liability: A Tool for Effective Regulation’ (2018) 16 MLJ 99, 109.

<sup>40</sup> Neil J. Foster, ‘Individual Liability of Company Officers’ From the Selected Works of Neil J. Foster, September 2009 [http://works.bepress.com/neil\\_foster/34](http://works.bepress.com/neil_foster/34) accessed 27 July 2014

<sup>41</sup> *State v. Ilori* (1983) 1SCNLR 94.



Like most other Nigerian legislation with respect to corporate wrongs, fines are the main sanction recognised in the Bill.<sup>42</sup> This is however not peculiar to Nigeria as a fine is the most common corporate sanction in most jurisdictions globally. This is probably because of the artificial nature of a corporation with no body to imprison, thus the reasoning that corporate sanction will always be financial especially as corporations are usually formed for profit purposes. However, as common and “suitable” as fine is as a corporate sanction, it is not without its flaws. One of which is that it can be built into the normal cost of doing business and the consuming public ultimately pay the price for it.<sup>43</sup> Hence, the proposition for the introduction of equity fine - when a corporation is made to issue shares to a victim’s compensation fund, thus cash is not removed from the corporation - is justified.<sup>44</sup>

In addition, it confers power on the court to make orders as to remedying the wrong and an order of publicity. Section 8 empowers the court to make a remedial order upon application by the prosecutor stating the terms of the proposed order. Such remedial order may be to remedy a breach or a state of affairs resulting from a breach. It may also be to remedy a health and safety deficiency or a particular policy or practice of the organisation. It is also required that before making an application for a remedial order, the prosecutor must have consulted with relevant enforcement authorities under whose supervision the remedy may be effected if eventually ordered by the court.<sup>45</sup> It should be noted however that the decision whether to order a remedy or not is entirely at the discretion of the court upon consideration of the proposal by the prosecutor and considering the available evidence. The remedial order is a good innovation as it has the effect of preventing future wrongs if the prevailing circumstances are remedied. However, with respect to the instant wrong, it cannot be remedied, as death cannot be remedied.

Section 9 provides for an order of publicity, entailing the court giving an order to a convicted organisation that it should make a publication stating: the terms of the offence committed; the fact of conviction and the amount of fine; and the terms of the remedial order made if any. It also provides that the court in determining whether to order publication must seek the views of an enforcement authority. The publicity order has been described as an effective sanction that can achieve the deterrence goals of sanction.<sup>46</sup> It can affect the public perception of an organization, thereby leading to loss of reputation.

Generally, the attempt to extend corporate liability to homicide it is commendable, as it will ensure that corporations take more stringent care with respect to their safety standards and generally enhance a culture of compliance. It is also suggestive of the government’s responsiveness to social reality since the Bill was introduced as a result of public outcry. Yet, the approach adopted in the Bill may well be an exercise in futility. This is because the Bill is an adoption of the UK’s Corporate Manslaughter and Corporate Homicide Act 2007, which itself has not proved to be a successful model for corporate liability for homicide. The management failure model developed in the Act as a means of determining the corporate *mens rea* is suitable for small corporations. The pattern of conviction following the Act in the UK has shown that most of the convictions were of small corporations,<sup>47</sup> and

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<sup>42</sup> Section 1(5).

<sup>43</sup> Linus Ali, *Corporate Criminal Liability in Nigeria* (Malthouse Law Books 2008) 292.

<sup>44</sup> See generally Robert Baldwin, Martin Cave and Martin Lodge *Understanding Regulations, Theory, Strategy and Practice* (2<sup>nd</sup> edn, OUP 2011) 250.

<sup>45</sup> Section 8 (3) and (4).

<sup>46</sup> Linus Ali, 295.

<sup>47</sup> The first conviction under the Act was that of a small one-man company: *R v. Cotsworld Geotechnical Holdings Ltd* (2011) ALL ER (D) 100. See also *R v. Lion Steel Equipment* (Unreported) July’ (2012) Crown

not large multinationals and or even government agencies.<sup>48</sup> It does not reflect the essence of the reality of modern corporate operations that is hinged more on systemic structure than on acts of individual officers of the corporation. Thus, in most instances, the corporate officials are disconnected from the acts constituting the offence.

In addition, management failure is a derivative model since corporate *mens rea* is based on the fault of corporate officials. This fact suggests that even if the Act were successful in prosecuting large corporations, it will not stand the test of time. A derivative model contradicts the very foundation of corporate criminal liability, which is the concept of corporate personality. Basing the *mens rea* of a corporation, which is a legal person, on individual(s) who is another legal person, suggests that the legal personality of a corporation is a hoax. Besides, personal liability is the hallmark of the criminal law. Thus, any attempt at introducing derivative liability into the criminal law will be a contradiction.<sup>49</sup> In addition, the management failure model contained in the Bill and its principal, the UK Act, is likely to pose some of the evidential challenges of the identification model. For example, s.1(4)(c) of the Bill defines senior management in as persons who play significant roles in:

“(i) the making of decisions about how the whole or substantial part of its activities are to be managed or organized, or (ii) the actual managing or organizing of the whole or substantial part of those activities...”

Thus, evidential issues of what qualifies as a substantial part of an organisation’s activities, and what qualifies as a significant role, are some of the challenges that may arise if the Bill is passed and finally gets tested. In addition, there is the need to expand the sanctions and introduce more suitable and contemporary sanctions. Further, the financial sanction of fine as it stands needs to be modified to the nature of equity fine in order to be effective as a corporate sanction.

### *The constitutionality question*

As stated above, the reason given for the refusal of Presidential assent is that the Bill as it is, is unconstitutional and violates the constitutional provisions on the presumption of innocence. Section 36 of the 1999 Constitution<sup>50</sup> is part of the fair hearing provisions of the Constitution and provides in (5) that everyone charged with a crime shall be presumed innocent unless the contrary is proved, except in situations whereby any law imposes the burden of proving particular facts on the person.<sup>51</sup> Similarly, the presumption of innocence provisions is equally embedded in the Evidence Act,<sup>52</sup> to the extent that the burden of proving the guilt of the accused is on the prosecution and such must be proved beyond reasonable doubt. Thus, the yardstick for criminal culpability will be that the prosecution

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Court (NI); *R v Prince Sporting Club* (Unreported) (2013) Crown Court Southwark; *R v Mobile Sweepers (Reading) Ltd* (Unreported) (February) 2014 Crown Court Winchester; and *Health and Safety Executive v Huntley Mount Engineering Ltd* (Unreported) July, (2015) Crown Court Manchester.

<sup>48</sup> *R v CAV Aerospace Limited* (Unreported) July, (2015) Central Criminal Court involved a large company with more than 400 employees. A parent company was convicted when an employee of its subsidiary was crushed by stacks of aircraft grade metal billets.

<sup>49</sup> However, it must be stated that derivative liability is not novel to the criminal law as vicarious liability is recognized in strict liability offences. Yet, the application of vicarious liability in strict liability offences has been condemned and strict liability offences are often referred to as quasi crimes.

<sup>50</sup> As amended.

<sup>51</sup> The requirement of presumption of innocence is in fact a global one as there are international instruments endorsing the same. An example is Article II of the Universal Declaration of Human Rights 1948.

<sup>52</sup> Section 135 Evidence Act 2011, Cap E14 LFN 2004.

must establish that the accused actually committed the offence; otherwise, the accused will be acquitted. It has been held that the purpose of the Constitution is to safeguard the interest and ensure that accused persons are given a fair trial.<sup>53</sup> Thus, the presumption of innocence requirement is not to forestall criminal culpability, but merely to enhance justice and make sure an innocent party is not wrongly convicted.<sup>54</sup>

There is nothing in the Corporate Manslaughter Bill that forecloses the presumption of innocence or shifts the evidential burden. First, from the definition of the offence, the offence is committed when the way in which an organisation is managed amounts to a breach of a duty of care and causes a person's death. It goes further that an organisation is guilty only if the way that the activities are managed is a major element in the breach of duty of care. There is nothing in the Bill that says that the gross breach occasioned by the management of the organisation must not be proved beyond reasonable doubt, or shifting the burden of proof to the accused organisation. Furthermore, the Bill provides that the question of whether an organisation owes the deceased a duty of care is a question of law, which the court must make findings on, based on the evidence before it. Thus, this further strengthens the presumption of innocence requirements rather. Presumption of innocence merely applies to give the accused a reasonable benefit of doubt considering the context of the case.<sup>55</sup> Therefore, the refusal of presidential assent because it is a violation of the constitutional requirements of presumption of innocence cannot stand.

### **Conclusions and recommendations**

The Bill, though long overdue, may turn out to be an exercise in futility. The reality of contemporary times is that there is a need to hold corporations criminally liable for deaths that occur from corporate activities as a result of the inevitable growing interaction between corporations and humans. This attempt at creating a legal framework in Nigeria took a long time in coming, but on closer examination shows that it seems like taking steps to nowhere, because the purpose of the legal intervention cannot be fully achieved under the Bill as constituted. Thus, there is the need for a reworking of the Bill with the right parameters that will ensure its effectiveness and efficiency.

It is recommended that the management failure theory of corporate *mens rea*, which is incorporated in s.1 (3) of the Bill, be replaced with the corporate culture theory. The corporate culture theory was developed in the Australian Criminal Code Act 1995 and has been described as the best theory for determining corporate *mens rea*.<sup>56</sup> First, it is based on personal liability and not derivative like the management failure. Second, it seems to capture the essence of modern corporate activities that is systemic and not individualistic in nature. The evidential challenges of the management failure are absent. This theory propounds that a corporation is not merely a collection of its human elements but also a set of policies, attitudes and expectations that influence the human elements in the corporation. Thus, the

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<sup>53</sup> *Adeniji v State* (2001) NWLR pt.73/50, see also *Laoye v. State* (1995) LNWL (pt.10) 832.

<sup>54</sup> See generally on presumption of innocence, Jacob Abiodun Dada and Eugene A. Opara, 'Application of Presumption of Innocence in Nigeria: Bedrock of Justice or Refuge for Felons' (2014) 28 *Journal of Law, Policy and Globalization* 68, 77 ISSN 2224-3259.

<sup>55</sup> See *Okoro v. State* (1988) 5NWLR (pt 94) 255, *Onafowokan v. State* (1987) 3 NWLR (pt.61) 538 and *Garba v. State* (2011) 14 NWLR (pt 1266) 98.

<sup>56</sup> Jonathan Clough and Carmel Mulhem, 'The Prosecution of Corporations' in *Corporate Culture as a Basis for the Criminal Liability of Corporations* (An Allen Arthur Robinsons Report for the United Nations Special Representative of the Secretary General on Human Rights and Business 2008).

corporate culture locates the corporate *mens rea* in the corporate ethos, culture, standards and practices.

It is also recommended that director's accessorial liability should be introduced into the Bill. This is because of the vantage position that directors hold in corporations. Having directors as accessories to corporate liability will ensure a culture of compliance, as there is a higher motivation to do the right thing. Finally, sanctions should be expanded to include community service, corporate probation and equity fine.