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THE PROSECUTION OF CORPORATIONS: AN ANALYSIS OF THE PROCEDURAL ISSUES IN NIGERIA.

By

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ABSTRACT.

Globally, there has been an increasing attempt to criminalising corporate activities resulting in violations of the existing law. In fact, a number of international instruments exist to support holding corporations liable under the criminal law. For example, The United Nations Economic and Social Council included corporate criminal liability at its commission on crime prevention and criminal justice¹. Also, the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances also identified the need for criminal liability of corporations. Countries like Australia, United Kingdom, United States and closer home in Africa, South Africa have all evolved mechanisms for holding corporations liable under the criminal law.

In Nigeria, corporations increased significantly with the promulgation of the Privatisation and Commercialisation Decree No 25 of 1988 and with it, the attendant increase in corporate activities constituting crimes.² Therefore, corporate crimes are a growing reality in Nigeria especially in the area of unsafe goods and services. Nevertheless, there is a dearth of prosecuted cases involving corporations beyond strict liability regulatory offences. Yet crimes are committed beyond strict liability regulatory crimes.³

The aim of this paper is to analyse the procedural issues involved in prosecuting corporations by examining the relevant Nigerian legislation. This is with a view to determine whether there are procedural challenges to prosecuting corporate crimes and whether this factor is a reason why there is a dearth of criminal prosecution of corporation. The paper ends by making appropriate recommendations.

INTRODUCTION

There has been global increase in incidences of corporate activities constituting crimes over the past decades. From Europe to America, Asia to Africa, the world has continued to experience various forms of corporate crimes ranging from homicide to fraud and corruption.

On April 16th, 2014, a South Korean ferry with more than four hundred people collapsed en route a tourist resort island and more than three hundred people died.⁴ Earlier, on April 24th, 2013, there was what has been

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¹ 15th February, 2002. See <http://www.unodc.org/pdf/crime/commissions/llcomm/6e.pdf> accessed on 20/02/12

² Corporations have increased significantly since the promulgation of the Privatisation and Commercialisation Decree No 25 of 1988 later redesigned as "Act" through which the federal Government divested itself of its interests in some state owned enterprises.

³ Nigerian courts do not hesitate to ascribe criminal liability to corporations in respect of strict liability offences. This is evident in a long line of cases like *I.G.P v. Mandillas & Karaberis & Anor* (1958) WRNLR 147, *R v. Zik Press* (1947)12 WACA 202, *R v. Amalgamated Press* (1961) 2 ALL VLR 199.

⁴ www.nbcnews.com/storyline/south-korea-ferry-disaster accessed on 25th June, 2014, www.theguardian.com/world/2014/may/15/south-korea-ferry-captain-charged-manslaughter accessed on 11th August, 2014.

described as the deadliest garment factory accident ever⁵ when an eight storey commercial building collapsed in the greater Dhaka area in Bangladesh killing more a thousand people and leaving several others injured.

Also, the Australian Wheat Board violated United Nations sanctions and contravened the O.E.C.D Convention when it paid kickbacks to the regime of Saddam Hussein in order to retain its business in Iraq. This also violated Division 70 of the Australian Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999.⁶ In the same vein, Securrency International and Note Printing Australia both subsidiaries of the Reserve Bank of Australia were prosecuted for giving bribe to advance their business in countries across Asia.⁷

In the United States of America, the BP refinery exploded in 2005 which caused the death of fifteen people. Also, multinational corporation, *Halliburton* was convicted in the United States after it admitted to have bribed some top government officials in Nigeria through *KBR*, its subsidiary, in order to secure contract for the construction of the liquefied natural gas plant in Bonny Island, South of Nigeria.⁸

As stated, corporate crimes are a reality in Nigeria. For example, an American company *Parker Drilling Services* admitted to have bribed Nigerian government officials through an unnamed third party between January and May 2004 and was subsequently fined about 11.76 million dollars by the United States Government.⁹ Similarly, *Julius Berger Nigeria PLC* was indicted in the Halliburton scandal as serving as a link through which the bribe was distributed to the Nigerian government officials.¹⁰ Also, sixteen people were killed when a plane owned by Associated Airline crashed minutes after take-off in October, 2013 in Lagos.¹¹

The 2012 report of fuel subsidy¹² fund indicted some corporations for collecting funds from the Federal Government to import fuel which was never imported cheating the country of funds of trillions of naira.¹³ More than seventy five companies were indicted and asked to refund money collected from the coffers of the Federal Government including international oil firm *Mobil Producing*.¹⁴

However, these crimes are hardly prosecuted in Nigeria or at most prosecuted for violations of strict liability regulatory offences. For example, in June 2012, a commercial plane crashed in Lagos killing more than one hundred and fifty people.¹⁵ Four years after, the airline has not been prosecuted for the deaths. Earlier in 1996, international pharmaceutical company Pfizer Incorporated Limited did a clinical drug trial in Kano Nigeria, which

⁵ www.bbc.uk/news/world-asia-22635409 accessed on 3rd May, 2013.

⁶ However, civil charges were brought against officials of the Australian Wheat Board Limited. www.clmr.unsw.edu.au/article/ethics/white-collar-crime-aml-bribery-%26-corruption/recent-cases accessed on 2nd August, 2014, www.abc.net.au/worldtoday/content/2012/s3564108.htm accessed on 2nd August, 2014

⁷ www.clmr.unsw.edu.au/article/ethics/white-collar-crime-aml-bribery-%26-corruption/foreign-bribe accessed on 2nd August, 2014

⁸ The Company paid about 1.7billion dollars in fine and settlement while Albert Stanley, its erstwhile executive was sentenced to two and half year's imprisonment. See www.huffingtonpost.com/.../albert-stanley-halliburton-kbr-bribery-sent accessed on 27th March, 2014.

⁹ The Punch Newspapers 16th April, 2013.

¹⁰ Sunday Trust Newspapers, 26th December, 2010.

¹¹ www.channelstv.com/home/2013/10/03/updateprivate-aircraft-crashes-near-lagos-depot/ accessed on 7th January, 2014

¹² House Report Resolution No (HR.1/2012). Laid on Wednesday, 18th April, 2012.

¹³ It must be stated however that the Report itself has lost credibility because of the allegation of bribe received from the chairman of the committee Hon. Farouk Lawan and the secretary Hon. Boniface Emenalo from an oil marketer. In fact, the two have just been recently been on trial for violating the provisions of the Anti- Corruption Act.

¹⁴ See generally, Vanguard Newspapers April 24, 2012.

¹⁵ Vanguard Newspapers 21st July, 2012

caused the death of eleven children.¹⁶ Although, the Kano State government filed criminal charges against the company but the charges were withdrawn and both parties reached an out of court settlement in 2009.¹⁷

Another case in reference is the indictment of Julius Berger in the Halliburton bribe saga which was also not prosecuted as it entered into a plea bargaining with the Federal Government and gave up about twenty six million dollars to the coffers of the Federal Government of Nigeria.¹⁸

However, in *Adeyemo Abiodun v. F.R.N*¹⁹ where more than eighty children died as a result of taking an adulterated teething drug, the pharmaceutical company was only prosecuted for violating a regulatory offence under the Miscellaneous Offences Act. Clearly, while the death of the children constitutes a violation of the Miscellaneous Offences Act, nevertheless, the death still constitutes a more gruesome offence of homicide, yet the company was never prosecuted for this.

The question might be asked whether there is a problem with prosecuting corporations for violations of strict liability offences. The answer is no. However, as seen from the above, corporate crimes are sometimes committed beyond strict liability regulatory offences.

STRICT LIABILITY REGULATORY OFFENCES AS QUASI CRIMES

Generally, strict liability simply means liability without *mens rea* or mental fault. The liability is based solely on the act or omission constituting the *actus reus*. The concept of strict liability can be traced to the industrial revolution and the attendant technological development and urbanisation. It therefore became necessary to protect the lives and health of workers and the consuming public as a whole. Offences were then created to protect the society against risk of harm.²⁰ Thus, the introduction of strict liability offences in the criminal law started with public welfare offences and it is still its primary focus.²¹ In fact, the earliest cases on strict liability were cases involving the sale of adulterated products.²²

Generally, on the face of it, the idea of strict liability seems to contradict the basic tenets of the criminal law which is premised on the twin ingredients of *actus reus* and *mens rea*. Also, it seems unjust to hold a morally blameless person criminally liable. However, the reason for the introduction of strict liability is to protect the overall public against the risk of harm. It seems then that the likely harm to the public is viewed as a graver evil than any injustice that may be meted to an innocent person who is morally blameless.²³ It must be stated that most modern

¹⁶ www.bbc.co.uk/news/world-africa14493277 posted on 11th August, 2011, accessed on 7th January, 2013.

¹⁷ *A.G Kano State v. Pfizer International Incorporated* (Unreported) Suit No K/233/2007.

¹⁸ According to the then Chairman of the Economic and Financial Crimes Commission, Farida Waziri, It also paid an additional 3.5 million dollars to the Federal Government to cover the cost of investigation. Sunday Trust Newspapers, 26th December, 2010

¹⁹ (Unreported) Suit No CA/L/550/M/2013. Decided by the Federal High Court Lagos, on 17th May, 2013

²⁰ It must be stated however that the concept of strict liability had been established earlier in the civil law through the case of *Rylands v. Fletcher* where the House of Lords held that when a person keeps something on his land which escapes and is likely to cause mischief to another, the owner of the land is liable for any damage which is a natural consequence of that escape whether he was negligent or not.

²¹ Strict liability offences have been described as public welfare offences. See Frank A Schubert, *Criminal Law The Basics* (Los Angeles, Roxbury Publishing Coy 2004), 119

²² It has been said that the earliest case on strict liability was the case of *Woodrow* (1846) 15 M & W 404, which was on the sale of adulterated milk. The fact that the defendant believed that the milk was pure was held irrelevant. See J. C Smith, *Smith & Hogan Criminal Law* (10th Edition UK, Butterworths 2002) 119.

²³ The dictum of Kennedy LJ in *Hobbs v. Winchester Corporation* (1910) 2 KB 471 CA at 483.

statutes usually contain statutory defence of due diligence which will reduce the likely injustice. Therefore, a person who has done all that is reasonable to prevent the crime from occurring is protected against injustice.²⁴

In addition, most of the offences of strict liability do not occur in form of positive aggressive acts, rather it occurs more in the form of failure to act where a duty has been imposed. Also, its violations do not necessarily result in immediate harm to a particular person or property but merely creates a risk of harm and it is this risk that the law seek to prevent.²⁵ It will seem therefore a justification for liability without fault because whether there is intention or not, the consequences of risk of harm are the same. It has been suggested that without strict liability, many work place accidents will not be taken seriously.²⁶

Also, strict liability regulatory offences have been described as quasi-crimes and not truly criminal. In *Alphacell Ltd v. Woodward*,²⁷ the House of Lords held that the imposition of strict liability is justified if the offence is regulatory and not really criminal.²⁸ In *Wings Ltd v. Ellis*,²⁹ the defendant company put untrue information on its brochure contrary to the provisions of the Trade Descriptions Act 1968. The House of Lords said the offence was not truly criminal in nature since it was for maintenance of standards in trade.³⁰ Also, in *Pearks, Guston & Tee Ltd v. Ward*,³¹ the quasi-crime principle was used when the court held that quasi crimes constitute an exception to the criminal law principle of *mens rea*.³² It must however be stated that it is the courts that have decided the classification of offences as truly criminal or quasi criminal. Thus, it is not entirely true because the Statutes do not make such distinction: it merely forbids the commission of a crime and declares it as criminal.

As stated, strict liability developed as a result of the industrial revolution, therefore, it is submitted that corporations were the natural targets of strict liability offences. Therefore, it has remained a major way of determining the criminal liability of corporations. In addition, corporations are creations of statutes through incorporation; therefore, one of the ways of regulating its activities was through making statutes that creates duties for the corporations³³ with attendant liability for breach of such duties. In order to be able to attach liability to those corporations, liability was therefore made strict in apparent disregard of the requirement of *mens rea*.³⁴

Also, the fact of incorporation which limited the liability of shareholders and owners of companies meant they could afford to be careless making the public more susceptible to risk of harm.³⁵ Therefore imposing strict

²⁴ Statutory defence imposes a burden on the defendant to prove that he exercised due diligence to prevent the commission of the crime.

²⁵ Schubert, at 120. It must be noted also that strict liability do not punish conduct per se but the consequences of conduct and that is why it is usually sanctioned by fine which is lesser than that of mainstream criminal law.

²⁶ Pinto and Evans, at 313, See also Celia Wells, *Corporations and Criminal Responsibility* (2nd Edition OUP Oxford, 2001), 313.

²⁷ (1972) AC 824 HL.

²⁸ See also, *Gammon (Hong Kong) Ltd v. AG of Hong Kong* (1985) 1 AC 1 (PC), See also Mike Molan, *Cases & Materials on Criminal Law* 3rd Edition Cavendish Publishing Limited

²⁹ (1985) A.C. 272 (H.L.).

³⁰ See also the case of *Alphacell Ltd v Woodward* (supra).

³¹ (1902) 2 K.B. at 11.

³² Per Channel J at 11.

³³ Pinto and Evans, at 20.

³⁴ This is more so because of the belief then that a corporation was incapable of *mens rea*. See V.S Khanna *Corporate Criminal Liability: What Purpose Does it Serve?* *Harvard Law Review* (1996) 1479.

³⁵ Pinto and Evans at 310.

liability should reduce the likelihood of being careless and the risk to the public. Thus, strict liability offences are regulatory because the common law cannot accommodate the idea of liability without a mental element.³⁶

Nevertheless, as seen from the examples given earlier in this paper, corporations commit crimes beyond strict liability crimes and it is for this category of crimes that there is the need for a robust legal framework.

THE NIGERIAN LEGAL FRAMEWORK FOR CRIMINAL PROSECUTION: 1999 CONSTITUTION, CRIMINAL CODE, PENAL CODE, CPA, CPC, EVIDENCE ACT:

The main legislations on criminal procedure in Nigeria are the Criminal Procedure Act (CPA) and Criminal Procedure Code (CPC) applicable in the Southern and Northern parts of the country respectively.³⁷ In addition, the 1999 Constitution and the Evidence Act³⁸ also regulate criminal proceeding in Nigeria.

Also, the prosecution of some regulatory offences lies in the hands of the regulators. Therefore, there are specific legislations that provide the procedure for prosecuting specific offences. An example is section 6 of the Economic and Financial Crimes Commission (Establishment) Act (EFCC Act)³⁹ which vests in the Commission the powers to take charge of activities relating to investigation and prosecution of economic and financial crimes.⁴⁰ Similarly, section 61 of the Corrupt Practices and Other Related Offences Act (ICPC Act)⁴¹ provides that criminal prosecution under the Act shall be deemed to have been done with the consent of the Attorney General.⁴²

INSTITUTING CRIMINAL PROCEEDINGS:

The Constitution vests the power to institute criminal proceedings in the Attorney General of the Federation or of a State.⁴³ Section 150(1) provides:

“There shall be an Attorney General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation.”

Section 213 of the CPA supports this view when it states that the Attorney General (AG) shall have general control of prosecution. It further provides that the AG may delegate the powers conferred on him with respect of any class of offence to the Attorney General of a State.⁴⁴ The CPC similarly provides in section 253 that the AG have powers to institute criminal proceedings and that such powers can be exercised by him in person or by any other person under his written authority.

³⁶ The *mens rea* or mental element is an ingredient of criminal liability under the common law.

³⁷ The Criminal Procedure Ordinance was enacted in 1945 to govern the whole country. However as a result of the heterogeneous nature of Nigeria, a Criminal Procedure Code was enacted in 1960 to cater for the predominantly Muslim northern part of the country. The Criminal Procedure Ordinance became known as the Criminal Procedure Act and remains applicable in the southern part of the country. However, both the Criminal Procedure Act and Criminal Procedure Code are domesticated as the laws of the States in southern and northern part of the country. For example the Criminal Procedure Act, Laws of Lagos State and Criminal Procedure Code, Laws of Kwara State.

³⁸ 2011 Cap E14 L.F.N. 2004.

³⁹ 2004.

⁴⁰ In the same vein, section 13(2)a-d of the Act establishes a legal unit within the commission which shall be responsible for prosecuting offence under the Act.

⁴¹ 2000. It is also known as the Anti-Corruption Act.

⁴² The provisions of the two legislations are subject to the general powers of the Attorney General as the chief law officer as provided in the Constitution.

⁴³ Section 195 also provides for an Attorney General of a state who shall be the Chief Law officer of a state.

⁴⁴ Section 213 (4).

Statutorily, the Nigerian Police is also vested with the general powers to maintain law and order and institute criminal proceedings in respect of all classes of offence subject to the constitutional powers of the AG. Section 23 of the Police Act⁴⁵ provides that a police officer can conduct all prosecutions before any court but subject to the constitutional powers of the AG.⁴⁶

As stated, regulators also have powers under their enabling legislations to institute criminal proceedings in respect of offences within their jurisdiction. However, such powers are subject to the powers of the AG laid down in the constitution. For example, section 5 of the ICPC Act gives powers to officers of the Commission⁴⁷ in the course of investigation, the powers and immunity of a police officer.⁴⁸ There are however no conflict between the powers of the police to maintain law and order and that of the regulators. This is because both the CPC⁴⁹ and CPA⁵⁰ provide that where the particular provision defining an offence provides that only a particular person(s) can prosecute the offence, then the Police is excluded from prosecuting the offence and only such person(s) named in the provision can prosecute the offence.

Private individuals can also institute criminal proceedings. The Supreme Court held in the case of *Gani Fawehinmi v. Akilu*⁵¹ that private individuals can institute criminal proceedings but with the consent of the AG. Similarly, section 342 of CPA provides certain conditions that must be fulfilled before a private person can institute criminal proceedings. These conditions are that such individual should provide an information endorsed by a law officer that he refused to initiate prosecution of the said offence because of public instance; secondly, such individual shall pay or enter into recognizance to pay the sum of one hundred naira with one surety in like sum to the effect that he will prosecute the case to conclusion and will pay any cost that the court may award.

In summary, apart from the Attorney General; Police, the regulators and private individuals can also institute criminal proceedings in Nigeria but they are subject to the constitutional powers of the AG of the Federation being the chief law officer of the country. Section 174 (1) of the Constitution give the AG wide discretionary power. It provides that the AG shall have the powers to institute, take over, continue and discontinue at any the stage any criminal prosecution before any court of law in Nigeria.⁵² This provision can pose a challenge to the enforcement of corporate crime laws because the AG may decide to prevent or stop the criminal prosecution of any corporation notwithstanding any evidence showing the commission of a crime by such corporation. Nevertheless, section 174 (3) limits the powers of the AG which is that he should consider the interest of justice, public interest and the need to prevent abuse of legal process. It is submitted that the limitation provided in section 174 (3) is vague. The questions of public interest and interest of justice are vague and discretionary. The Supreme Court has emphasised the near absoluteness of the power of the AG in *State v. Ilori*⁵³ when it held that the AG is a law unto himself.

Per *Kayode Eso* (JSC) as he then was held:

⁴⁵ Cap P19, L.F.N 2004.

⁴⁶ Section 4 Police Act provides the general duties of the police. See also the case of *Olusemo v The C.O.P* (1998) 11 NWLR, Pt 575 at 547. Also, where a statute creating an offence says it is a particular person that can prosecute the offence, then the police cannot prosecute such offence.

⁴⁷ Section 3(1) establishes the Independent Corrupt Practices and Other Related Offences Commission.

⁴⁸ See also section 6 and 27 of the Act.

⁴⁹ Section 142.

⁵⁰ Section 59.

⁵¹ (1986) 11-12 SCNJ 151.

⁵² Section 211 vests similar powers on the Attorney General of a State in respect of matters on which the State has jurisdiction but still subject to the powers of the Attorney General of the Federation.

⁵³ (1983) 2 SC 155

"The Attorney General has at common law, been a master unto himself, law unto himself and under no control whatsoever, judicial or otherwise, vis a vis his powers of instituting or discontinuing criminal proceedings. These powers of the Attorney General are not confined to cases where the state is a party. In the exercise of his powers to discontinue a criminal case or to enter a *nolle prosequi*, he can extend this to cases instituted by any other person or authority..."

Therefore, it is submitted that the wide discretionary power can constitute a challenge to the enforcement of corporate crime laws. This is because, as stated earlier, the limitation provided in section 174 (3) is vague and discretionary. Thus, the powers of the AG should be subject to some form of more definite checks for effective crime control.

WAYS OF INSTITUTING CRIMINAL PROCEEDINGS:

The Criminal Procedure Act (CPA) provides various ways of instituting criminal proceedings. It provides in section 77 that criminal proceedings may be instituted both in the High Court and the Magistrate Court. It states that a criminal proceeding can be initiated in a Magistrate Court on a complaint whether on oath or not on oath.⁵⁴

It provides further four ways by which criminal proceedings can be initiated in the High Court. It is instituted either by information filed by the AG, or by information filed after the accused had been summarily committed for perjury under Part 31 of the Act, or by information filed after the accused had been committed for trial under Part 36 of the Act or on a complaint whether on oath or not.⁵⁵

The Criminal Procedure Code (CPC) provides that a criminal proceeding can be instituted at both the Magistrate Court and the High Court. It provides in Section 143 (D) that criminal proceedings can be instituted at the Magistrate Court upon complaints of facts which constitute the offence. Section 143(A, B, C and E) further provides for ways by which criminal proceedings can be instituted in the High Court which are upon filing a first information report, upon a complaint in writing from the AG or from information received from any person other than a police officer, it has reason to believe or suspect that an offence has been committed.

Generally, the provisions of both the CPA and CPC do not contain special provisions on instituting criminal proceedings against a corporation as an artificial entity. However, the manner of commencing a criminal proceeding has no effect on the type of personality of the accused whether as natural person or an artificial person. For example, it is immaterial whether proceeding is initiated upon a complaint on oath, or by filing of information. Both information and complaint can be laid against a corporation as well as against a natural person.

However, it should be noted that section 252 of the Constitution confers exclusive jurisdiction on the Federal High Court in respect of certain matters. These include the regulation and taxation of companies, banking, customs, copyright and admiralty matters. Thus, it seems criminal proceedings can be instituted against a corporation in other courts apart from the Federal High Court in respect of matters not covered in section 252 of the Constitution.

However, criminal prosecution of corporation are hardly done at the Magistrate Court in Nigeria. This is probably because criminal cases involving corporations are usually reported to the regulatory agencies. Generally, the regulatory legislations usually exclude Magistrate Courts from prosecuting the regulatory offences.⁵⁶

⁵⁴ Section 77 (a).

⁵⁵ Section 77 (b) i-iv.

⁵⁶ An example is section 19 of the Economic and Financial Crimes Establishment Act which provides that only the Federal High Courts, the High Court of the Federal Capital Territory and the various State High Courts shall have jurisdiction to try offences under the Act.

Also, it seems that corporate crimes are hardly reported to the police or as stated are limited to regulatory offences which are investigated and prosecuted by the regulators. In addition, the Magistrate Court may not be able to adequately sanction a convicted corporation because of the limited sanctions conferred on it.

Thus, both the CPA and CPC provides for general ways of instituting criminal proceedings whether against natural persons or corporations which can be in a High Court or Magistrate Court. However, corporate crimes are hardly instituted in Magistrate Courts because of the reasons highlighted above.

PRESENCE OF AN ACCUSED PERSON DURING CRIMINAL TRIAL:

Generally, a basic rule of the criminal law is that an accused must be present physically throughout his trial.⁵⁷ However, section 100 of the CPA provides for instances when the presence of an accused person may be dispensed with. This must be in relation to an offence with a penalty less than the sum of one hundred naira or six months imprisonment. Also, in this instance, the accused must have applied that his appearance be dispensed with and he enters a guilty plea in writing or through a legal practitioner. It also provides further that the personal appearance of an accused person can be dispensed with where on an allegation of previous conviction, the accused person did not admit in writing or through a legal practitioner. In every other instance, the CPA requires that an accused be present in court.⁵⁸

However, it must be stated that Part 51 of the CPA provides for special provisions for the conduct of a criminal trial involving a corporate body. Section 467 provides that a corporation⁵⁹ shall be represented by a representative. Section 471 specifically provides for powers of such representative to act on behalf of a corporation which includes making a statement on behalf of the corporation, giving assent to the trial and consenting or objecting to a summary trial. It may also enter a plea in writing by its representative.⁶⁰ In fact, section 472 provides that any requirement of the CPA which states that anything is to be read or done to an accused shall be read or done to the representative. The representative of a corporation for this purpose does not stand as a representative but as the corporation itself. Therefore, the requirement of section 210 that an accused must be present at all trials can be satisfied by the corporate body.

The CPC provides for wider discretion in dispensing with the appearance of an accused person during trial. Section 154(2) provides that the court can dispense with the personal appearance of the accused if it sees reason to do so, provided that the accused person is represented by a legal practitioner and pleads guilty in writing.⁶¹

The CPC also provides for special provisions for the trial of a corporate accused.⁶² Section 333 provides that a corporation can enter its plea in writing by its representative but if it fails to enter a plea, a guilty plea shall be entered for it and trial shall proceed. It provides further in Section 336 that any requirement of the code in respect of an accused on matters to be said or read to an accused shall be done to the representative.

Similarly, Part 47 of the Administration of Criminal Justice Act⁶³ provides for trial of a corporation. Specifically, section 477 provides that a company can be represented at the trial and such representative is qualified to do any act which the company is required by law to do at the trial.⁶⁴

⁵⁷ *Adeoye v. State* (1999) 4 SC (11) 67.

⁵⁸ Section 210 which also excuse the personal appearance of an accused person who is of unsound mind under section 223.

⁵⁹ Corporation is defined as a body corporate incorporated in Nigeria or elsewhere. See section 467 CPA.

⁶⁰ Section 468.

⁶¹ However, section 154(3) provides that such an accused must however be present during sentencing.

⁶² Cap XXVII, Sections 332-338.

⁶³ 2015. This Act provides for the administration of criminal justice in the courts of the Federal Capital Territory and other Federal courts in Nigeria.

By the above provisions of these legislations on the presence of an accused person during trial, there is no challenge to having a corporate accused stand for its trial as these legislations provide for who may represent the corporation during trial. The CPC, CPA and ACJA contain specific provisions on the presence of a corporate body during a criminal trial.

However, based on the provisions of section 154(2) of the CPC, courts in the northern part of the country enjoy a wider discretion because the CPC provides a wider discretion for the courts to dispense with the trial of an accused person.

WAYS OF COMPELLING THE APPEARANCE OF AN ACCUSED PERSON:

The criminal procedure legislations also provide for two methods of compelling the appearance of an accused person in court. This can be either by a summons⁶⁵ or through a warrant of arrest.⁶⁶ For example, the CPA provides that the accused may be compelled to appear for trial either by a summons or through a warrant of arrest.⁶⁷ Similarly, sections 47(1) and 56 of the CPC also provide that the appearance of an accused person can be compelled through a summons and warrant of arrest respectively.

From the above provisions of the two legislations, an accused person can be compelled to appear for a criminal proceeding through summons and warrant of arrest. It is submitted that there is no problem with compelling the appearance of a corporate body through a summons. The Act provides in section 83 the ways of summoning the accused and this does not pose a problem to a corporate body. It provides that a magistrate may, upon a complaint before it, issue a summons to an accused person stating the substance of the complaint against him and asking him to appear at a time not less than forty eight hours.⁶⁸ Section 89 further provides for means of effecting service of summons on a corporate body which shall be by giving same to a director, secretary or chief agent within the jurisdiction or by leaving same at the principal place of business in Nigeria.⁶⁹

The CPC also provides in section 50 for ways of serving a summons on a corporation which shall be by serving the secretary, the local manager or any other principal officer of the corporation at any office of the corporation in northern Nigeria. However, a corporate body cannot be compelled to appear for a criminal proceeding through a warrant of arrest. Normally, section 23 of the CPA provides that a warrant of arrest will be issued where a complaint is made on oath by the complainant or a material witness. It may also be issued where the accused person refuses to respond to a summons. Therefore, where a complainant makes a complaint on oath before a court, a warrant of arrest may be issued in respect of such accused person. Nevertheless, a corporate body accused in this instance cannot be arrested since it has no physical being. Arresting a member or official of a corporate body in this instance will be unfair and the Act is silent on this point.

Similarly, the CPA is also silent on what happens when a corporate body that has been properly served a summons refuses to respond to the summons. Section 96 merely states that a warrant may be issued where the CPA that should be addressed. Similarly, the CPC provides in section 54(1) that the presence of an accused can be compelled ordinarily by a summons or by a warrant of arrest. A warrant of arrest will be issued in this instance when the statute creating the offence states that the accused can be arrested with a warrant or where the accused

⁶⁵ See also section 481-483.

⁶⁶ A summons is a written request that an accused person appear in court. It contains the name of the accused and the substance of the offence.

⁶⁷ A warrant of arrest is an authority in writing by the court to a police officer or any other authorised person to arrest an accused person.

⁶⁸ Section 78, 79 and 80 of the CPA.

⁶⁹ Section 85 however provides that the accused may be asked to appear at a time less than forty eight hours if there is a sworn affidavit to the effect that the accused will leave town before forty eight hours.

⁶⁹ Section 89 (b)-iv.

person refuses to respond to a summons or evades the service of a summons. Like the CPA, the CPC is also silent on what to do to a corporate body that refuses to respond to a summons.

Besides, there may also be a need by regulators to summon an accused person for investigative purposes. The wordings of the Economic and Financial Crimes Commission (Establishment) Act (EFCC Act)⁷⁰ presuppose that an accused person contemplated under the Act is a natural person and not a corporate body. Section 13(b) merely provides that the general and assets investigation unit is responsible for the arrest and apprehension of economic and financial crimes offenders. A corporate body cannot be arrested or apprehended. This means that the Act is silent on how to apprehend a corporate body accused of violating a financial or economic crime.

The Corrupt Practices and other Related Offences Act (ICPC Act)⁷¹ provides in section 29 that the Commission can summon any person in order to be examined in relation to the commission of an offence under the Act and failure to respond can lead to an arrest and detention of the person.⁷² Again, the ICPC Act is also silent on what happens to a corporate body that refuses or fails to respond to a summons. Secondly, section 29 of the ICPC Act is silent on how to summon a corporate body and who shall attend the inquiry as the corporate body. However, the CPA provides that a representative may act on behalf of a corporation including making statements on behalf of such corporation.⁷³ Nevertheless, section 29 should have been couched in a more definitive way to prevent ambiguities.

It is submitted that from the above there are gaps in both the CPC and CPA; also in the EFCC and ICPC Acts on compelling the appearance of a corporate accused by warrant. This can affect the enforcement of corporate crime because there is no way to compel the appearance of a corporation that has refused to respond to a summons. This can frustrate the prosecution of a corporation since there is no way to compel its appearance when it refuses to respond to a summons. Thus, both the CPC and CPA should be definite on what happens to a corporation that refuses to respond to a summons. Also, the appropriate provisions in the ICPC Act and the EFCC Act should be amended in a more definitive way to deal with a corporate accused.

MATTERS OF EVIDENCE AT TRIAL:

The Evidence Act 2011 is the legislation regulating matters of evidence at trial in Nigeria. Although the Act does not have specific provisions directed at a corporation, however, its provisions are applicable to a corporation.

WHO CAN GIVE EVIDENCE?

Section 175 of the Evidence Act provides that all persons can give evidence in any proceeding whether civil or criminal unless the court states otherwise that a person is not a competent witness by reason of age, health or any other cause.

Section 18 Interpretation Act⁷⁴ defines the word person to include a corporate body. By these provisions, a corporation is competent to give evidence in a criminal proceeding in Nigeria unless the court states otherwise.

It seems by the provision of section 175, that any person can be called as a witness to any proceeding in Nigeria. However, in cases involving a corporate body, at times witnesses to crime can be another corporate body or employees of the corporate body who may be reluctant to give evidence against a corporation for fear of losing his job.

NATURE OF EVIDENCE:

⁷⁰ EFCC Act Cap E1, L.F.N 2004.

⁷¹ ICPC Act 2000.

⁷² Section 35 ICPC Act.

⁷³ Section 467.

⁷⁴ Cap 123, L.F.N 2004.

Evidence can be in form of oral, documentary and real evidence. It is submitted that a corporation can give evidence in any of the three forms. As stated earlier, both the CPC and CPA provide for who may represent a corporation in a criminal trial; the person can therefore validly give oral evidence on behalf of a corporation. Also, documentary evidence is provided for in Sections 83-87. Section 83 of the CPA provides that documentary evidence is admissible if the maker of the document had personal knowledge of the matter contained therein or if the document forms part of a continuous record. Documentary evidence is apposite in proceedings against a corporation. This is because a corporation is normally managed through the use of official memos, notes and meetings. Therefore, minutes of proceedings at meetings can be used as documentary evidence at trial if need be. In fact, section 168(4) places presumption in favour of a minute of a meeting of a company incorporated under the Companies and Allied Matters Act if the minute is signed by the chairman of the company.⁷⁵ Also, section 84 provides that statements in documents produced by computers are admissible. This also aids the admissibility of official documents used in the ordinary course of business. However, this is without prejudice to the giving of oral evidence by the appropriate witness as the case may be.⁷⁶

Real evidence entails the inspection of physical objects, place or person as opposed to documents. It is provided in section 127 and it empowers the courts to inspect real evidence which may be by a visit to the *locus in quo* if circumstances demand.⁷⁷ This provision does not pose any problem to a corporate body. In prosecution of cases involving a corporation, there may be the need to visit the scene of an accident for example, or to inspect immovable equipment in a factory.

TYPES OF EVIDENCE:

There are five types of evidence recognised under the Evidence Act. It includes admissions, confessions, opinion, hearsay and character evidence.

An admission is defined in section 20 as any statement oral or documentary which suggests an inference to a relevant fact or a fact in issue. Section 21 provides further that an admission can be made *by an agent*⁷⁸ acting with the express or implied authority of a party to a proceeding. A corporation can therefore make an admission under the Act since such admission can be made by an agent (in this case can be a director, secretary or officer of a corporation) since a corporation will normally use a proxy in the course of trial.⁷⁹

Section 28 defines a confession as a form of admission made by a person charged with a crime stating that he committed the crime. The effect of the combined provisions of sections 20, 21 and 28 is that a corporation charged with a criminal offence can confess to the commission of the offence.

Hearsay evidence is ordinarily not admissible except in the circumstances provided in the Act.⁸⁰ An exception is the provisions of section 41 which makes admissible the hearsay evidence of a person made in the ordinary course of business especially entries made in electronic device or books as long as the maker made it contemporaneously with the transaction or so soon after it. Similarly, section 51 provides that entries in books of accounts and electronic records kept in the course of business are admissible. These provisions are relevant to a corporation which may present entries in books made by its employees and agents as proof of transactions in the course of trial.

It is submitted that documentary and hearsay evidence is more applicable to a corporation than a natural person. This is because most of the activities of a corporation are documented and not oral because of its peculiar nature of as an artificial being. Opinion evidence is ordinarily not made admissible except opinion of experts on issues of foreign law, customary law, science or art and handwriting.⁸¹

⁷⁵ In fact, section 84 makes admissible documents produced in a computer.

⁷⁶ Sections 125 and 126 of the Evidence Act.

⁷⁷ See also the case of *Othniel Shekse v. Victor Plankshak* (2008) 15 NWLR (Pt 1109) 105 SC. In this case, the Supreme Court stated the general principles of visit to the *locus in quo*.

⁷⁸ Emphasis mine.

⁷⁹ See also sections 467 and 472 of the Criminal Procedure Act and sections 333 and 336 of the Criminal Procedure Code.

⁸⁰ Section 38.

⁸¹ Sections 67 and 68.

Section 81 makes evidence of good character admissible in a proceeding. Section 81 makes admissible the evidence that the accused has been of good character. This means that a corporation standing trial can tender evidence that it has a corporate culture of compliance and good behaviour. Therefore, section 81 makes the evidence of a good corporate culture admissible.⁸²

In the same vein, section 82 states that in a criminal trial, evidence of bad character is admissible if such bad character is in issue or a defendant had given evidence of his good character. Therefore, if section 41 is read together with section 82 (2) a and b, it means that a bad corporate culture can be used as evidence against a corporation in a criminal proceeding. Thus, sections 41, 81 and 82 can be applicable to a corporation.

FACTS IN ISSUE AND RELEVANT FACTS:

Parts I and II provide generally that evidence may be given of facts in issue or relevant facts and determines what constitutes relevant facts.

Relevant fact is defined as facts which are not in issue but forming part of the same transaction.⁸³ Section 6(2) makes admissible such relevant fact which can be in the nature of previous or subsequent conduct. By the provisions of section 6(1) and (2), evidence can be led to the corporate culture of a corporation. This is because it makes relevant, facts which show the past or present conduct of a party or agent of a party to a proceeding. Therefore, the culture of a corporation through its past conduct or evident through the manner in which the corporation is managed or organised; or evident through the actions of the agents of a corporation becomes relevant in prosecuting a corporation for a crime.

Also, section 9 (a) makes an otherwise irrelevant fact relevant if, when considered in connection with other facts makes the existence or non- existence of other facts likely or unlikely. The effect of the combined provisions of sections 6(2) and 9(a) is that the fact that a corporation has a poor or bad corporate culture can be admitted in evidence in proving a case against it.⁸⁴

Thus, the evidence Act is adequate for corporate criminal prosecution. There are no evidential challenges to prosecuting a corporation for a crime in Nigeria.

CONCLUSION AND RECOMMENDATIONS

It seems that there are limited procedural challenges to prosecuting corporations under the Nigerian legal framework. It is realised that the constitutional powers conferred on the Attorney General are too wide and thus may be subject to abuse. Secondly, both the Criminal Procedure Code and Criminal Procedure Act are silent on the approach to a situation when a summons is issued and served but not honoured by a corporation. In the same vein, the Administration of Criminal Justice Act is silent on how to compel the appearance of a corporation to trial.

However, it is submitted that the dearth of cases on prosecution of corporations is not necessarily as a result of procedural challenges but may be as a result of some other factors like inadequacy of the substantive law, lack of political will on the part of the government or weak prosecutors.

Thus, it is recommended that there should be more definitive checks on the Attorney General's powers. In addition, both the Criminal Procedure Act and Code should address the lacuna in the situation where a corporate body to which a summons is issued and served refuses to respond to the summons. Lastly, Part 47 of the Administration of Criminal Justice Act should be amended to provide for means of compelling the appearance of a corporation.

⁸² Corporate culture means the practices, policies, ethos and the unwritten rules of a corporation.

⁸³ Section 6(1).

⁸⁴ Section 12 also provides that the fact that the act resulting in death is part of a series of occurrences by that same person becomes relevant in evidence.