CHAPTER ONE

INTRODUCTION

1.1 Background to the Study.

Large corporations have come to dominate the national and global economic scene. The scale of their operations is enormous. The process of globalization and the growth of interdependence in economic, social and environmental activities by corporate entities require greater international cooperation between countries.[1] Imposing adequate controls over corporation's conduct and achieving accountability by multinationals for their conduct both at home and abroad should be a major objective of every industrialised power.

Corporate criminal liability has become a problem which a growing number of prosecutors and courts have had to face. The fact that crime has shifted from almost solely individual perpetrators, to white-collar crimes on an ever increasing scale has not yet been taken into consideration in many legal systems. At the same time, crime has also become increasingly international in nature. Corporate criminal liability became one of the most debated topics especially following the 1990s, when both the United States of America and Europe faced an alarming number of environmental, anti-trust, fraud, worker death, bribery and financial crimes, involving corporations.[2]The outcome of these events was the creation of judicial regimes that could deter and punish corporate wrongdoing.

Globally, a growing number of legal systems around the world have included corporate criminal liability for international crimes into their criminal codes and are poised to

[1] W Markus, 'Corporate Criminal Liability, National and International Responses', (2010) 25 *Commonwealth Law Bulletin*, 600-608.
[2] S Kumar, 'Criminal Liability of Corporation: An Indian Perspective'<http://www.academia.edu accessed on 10 July, 2017.

adjudicate such liability before their domestic court.[3] Moreover, international treaties have increasingly featured corporate criminal liability provisions.[4] It is difficult to pay deaf ears to the growing international trend where courts and regulators are trying to grapple with fundamental questions of corporate personality, corporate guilt and corporate criminality.[5]The usual approach to the criminal law and the establishment of criminal liability is often achieved by looking at natural persons and their criminal culpability with reference to *actus reus* and *mens rea*. However, this model of analysis does not fit the nature of the corporation very well. Because corporations have "neither bodies to be punished, nor souls to be condemned," these questions create unique challenges especially with regard to the criminal liability of legal persons.[6]

It is worthy to note that the criminal liability of corporations has been controversial. While several jurisdictions have accepted and applied the concept of corporate criminal liability under various models, other law systems have not been able or willing to incorporate it. This is based on their particular historical, social, economic and political developments. Based on these developments, each country finds it appropriate to respond to the criminal behaviour of companies in different ways. In the common law world, following standing principles in tort law, English courts began sentencing corporations in the middle of the last century for statutory offences. On the other hand, a large number of European continental law countries have not been able to or not been willing to incorporate the concept of corporate criminal liability into their legal system.[7]

[3] J Kyriakakis' 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) 56 *Netherlands International Review*, 336-391.
[4] S Idhiarhi , 'An Examination of the Scope of Corporate Criminal Liability in Nigeria', (2007) <https://www.researchgate.net> Accessed on 10 July, 2017.
[5] B Swart , 'International Trends Towards Establishing Some Form of Punishment for Corporations' (2008) *International Criminal Justice Journal*, 947-949.
[6] C Kaeb , 'The Shifting Sands of Corporate Liability under International Criminal Law' (2017) *The George Washington International Law Review*, vol. 49 < http://www.gwilr.org> Accessed on 10 July, 2017.
[7] *Ibid.*

The imputation of criminal liability to corporations raises numerous theoretical problems. Though reasonably satisfactory practical rules have been evolved, it is not easy to reconcile these rules either with the basic notions of corporate personality or without criminal law requirement of *mens rea*.[8] Firstly, a corporation is restricted by the doctrine of *ultra vires* to the activities enumerated in the Memorandum of Association. Logically, therefore, it would seem that any criminal activity would hardly come within the express powers of the corporation as such activities would be *ultra vires* and void. Secondly, a corporation, strictly speaking does not have a *mens* (mind) let alone *mens rea* (guilty mind) and even if it did many of the sanctions of criminal law such as hanging, imprisonment and scourging are absolutely inappropriate to the corporation.[9]

The first attempts to impose corporate criminal liability were taken by common law countries, such as England, the United States of America and Canada, which is at least in part due to the earlier beginning of the industrial revolution in these countries.[10] Despite an earlier reluctance to punish corporations, the recognition of corporate criminal liability by the English courts started in 1842, when a corporation was fined for failing to fulfill a statutory duty.[11]There were a number of reasons for this reluctance. The corporation was deemed to be a legal fiction, and under the doctrine of *ultra vires*, could only carry out acts which were specifically mentioned in the corporation's charter. Other objections include the lack of the necessary *mens rea* and the ability to appear in court personally.

The general belief in the early 16th and 17th centuries was that a corporation could not be held criminally liable. Thus, Lord Holt was quoted to have said in 1710 that "a corporation

[8] P C Heerey, 'Corporate Criminal Liability- A Reappraisal', (1958-1963) 1. *Tas. U. L. Rev*. 677 <http://www.austlii.edu> Accessed on 6 July 2011.
[9] *Ibid.*
[10] W Markus, *op cit.*
[11] *Birmingham v Gloucester Railway Co*. (1842) 3 Q B 223.

is not indictable, but the particular members of it are".[12] However during the 19th century this principle was steadily whittled down, starting with the conviction of corporations for the nonfeasance of statutory duties and later extended to cases of misfeasance.[13] However, it proved difficult to punish the corporation for lack of adequate sanctions. Over time, the English courts followed the doctrine of respondeat superior or vicarious liability in which the acts of a subordinate are attributed to the corporation.[14] However, vicarious liability was only used for a small number of offences and later on replaced with the identification theory. Under the identification theory, subject to some limited exceptions, a corporation may be indicted and convicted for the criminal acts of the directors and managers who represent the directing mind and will and who control what it does.[15] This concept has developed over decades.

There are several difficulties to the traditional approach of imposing liability on a corporation based on identification and vicarious liability theory from a prosecutorial perspective. It provides for 'derivative liability' in the sense that corporations can only be culpable if the liability of an individual is established. From a practical perspective, it can be very difficult to identify the employee who committed the wrongful act or had the culpable state of mind. From a conceptual perspective, this approach does not reflect the complex interactions between human actors and the corporate matrix. Recently, some jurisdictions have contemplated a new basis for criminal liability 'organizational liability' that has the

[12] V S Khanna, 'Corporate Criminal Liability: What Purpose does it Serve? (1997) *Harvard Law Review*, 1477 at 1478.

[13] Nonfeasance and misfeasance and occasionally malfeasance are used in English law with reference to the discharge of public obligations existing by the common law, custom or statute. Nonfeasance is to ignore and take no action while misfeasance is to take inappropriate action or give intentionally incorrect advice.

[14] This doctrine prescribes that the master is responsible for the acts carried out by the servant in the course of the servant's employment. It was justified because the master acquires the benefits and should therefore also carry the burden for wrong doings. See G Ferguson , 'Corruption and Corporate Criminal Liability'paper presented at Corruption and Bribery in Foreign Business Transactions: A Seminar on New Global and Canadian Standard. February 1999,Vancouver, Canada p 4 - 5.

[15] C M V Clarkson , H M Keating & S R Cunningham, *Clarkson and Keating Criminal Law: Text and Materials* (London: Sweet & Maxwell, 2007) p.48.

potential to address this interaction more squarely.[16]Australia, in particular, has introduced provisions holding corporations directly liable for criminal offences in circumstances where features of a corporation, including its "corporate culture' directed, encouraged, tolerated or led to the commission of the offence.[17]

1.2 Statement of Research Problem

In recent years, there has been an increasing focus on the ways in which corporate policies and conduct interact with the environment, government and communities, as well as the lives and rights of individuals. In particular, many countries have examined whether and how corporations can be held criminally liable directly for wrongful conduct. However consideration of the basis on which corporations may be criminally liable is also relevant to other laws and norms, including those protecting human rights. The key problem of corporate criminal liability is forging a coherent link between the corpus of criminal law, which has been developed in the context of natural persons, and to reflect the psychology of human beings and the realities of the corporate form, which is a complex fabric of human actors, on one hand and corporate hierarchies, structures, policies and attributes on the other hand.

In a legal sense, the question is whether, and to what degree, particular acts, necessarily committed by human beings, may constitute crimes committed by corporations in Nigeria. In most legal systems, criminal offences have a physical element and a mental or fault element otherwise known as *mens rea* and *actus rea*. Generally, the physical element of offences can be imputed fairly easily to a corporation. The real difficulty arises in relation to the mental/fault element which is the guilty mind (*mens rea*). When can the state of mind of particular human beings be imputed to the corporation, such that the corporation itself may be

[16] A Robinson , 'Corporate Culture, As a Basis for the Criminal Liability of Corporations' <http://www.business-humanria.org> Accessed on 20 July, 2017.
[17] *Ibid.*

said to have the state of mind-knowledge or recklessness for example (together with the physical element) that constitutes an offence? It is not known whether the corporation can have a fault element in its own right in Nigeria.

While there is a substantive law on Criminal Act and Companies Act, there is no law on Corporate Manslaughter, Corporate Homicide and/ or holding Corporations directly liable criminally in Nigeria as is obtainable in other climes. Thus, it is not known through research if the laws and regulation guiding corporate criminal liability in Nigeria are adequate. Additionally, it seems not to be clear which of the model of corporate criminal liability that the courts apply while determining the criminal liability of corporations in Nigeria. Notwithstanding the different models/theories of determining criminal liability of corporations, there appears to be no clear cut model used by Nigerian courts in determining the corporate criminal liability. Although a plethora of research has been conducted on the legal personality of corporations and instances where the veil of incorporation can be lifted by the courts and under the statutes, none seems to have been carried out as it pertains to ascertaining/determining the criminal liability of corporations in Nigeria. It is glaring that the adequate legal structure for doing so is not in place in Nigeria. Hence, the urgent need to undertake this study.

It has also been observed that most corporations undertake activities that lead to manslaughter or homicide but hide under the concept of corporate veil or at most are made to pay fines which are not heavy enough to deter the commission of these offences. Thus, the victims of such actions are left without adequate redress. This study seeks to hold corporations directly liable for all their criminal activities, the provisions of the law notwithstanding. This study attempts to provide answers to some pertinent question as follows-

i. What are the existing legal frameworks available to aid in the determination of criminal liabilities of corporations?

ii. What is the best approach to determination of corporate criminality in Nigeria?

iii. Can a corporation be said to have *mens rea*? And how can the courts determine the *mens rea* of a corporation?

iv. To what extent does our present law deter corporations from incurring criminal liability?

v. Can criminal liability of corporations be made a statutory offence?

1.3 Aim and Objectives of the Study

This study is aimed at analyzing the different theories and approaches to corporate criminal liability. Specifically the study sought to:

a. Evaluate the concept of corporate criminal liability.
b. Examine the arguments for and against the concept of corporate criminal liability.
c. X-Ray the extant laws guiding corporate criminal liability in Nigeria.
d. Espouse the different theories on corporate criminal liability.
e. Analyse the approaches taken by different legal systems in both common law and civil law countries.
f. Undertake some comparative analysis to illustrate the strengths and weaknesses of various different approaches.

1.4 Significance of the Study

This study will contribute to the overall concept of corporate criminal liability and offer some fresh perspective on the regulatory design of corporate criminal penalties not merely to achieve deterrence and retribution, but also to ensure organisational change at the firm level.

It is anticipated that this study will be useful to; companies and will serve as a powerful incentive for them to take all reasonable measures to prevent criminality by their employees. This will be achieved by implementing policies and procedures and to monitor them assiduously as a shield from criminal exposure if an employee nevertheless commits a crime.

This study will reveal the legal framework gap which exists with respect to our laws on corporate criminal liability. Thus, it will serve as a guide to our lawmakers in the enactment of laws with respect to corporate criminality, so as to fill the long existing lacuna.

The Nigerian judiciary will also find this study useful on how courts in other jurisdictions adopt and apply the various theories of corporate criminal liability and also ascertain the best form of punishment which will be meted out on corporations to forestall future reoccurrence.

The general public will also benefit from the study as it will bring to their awareness that corporations can be held criminally liable and as such should not hesitate to sue them when necessary.

1.5 Methodology

Corporations are juristic persons in law. As such they are artificial persons that do not possess a body and mind of its own. Establishing criminal liability from time past under criminal law was and is still achieved by looking at natural persons. Thus, under criminal law for a person to be liable of a crime, the person must possess both *actus reus(*physical element) and *mens rea* (mental element) so as to be capable.

Corporations along the line started engaging in criminal activities. It became a problem establishing the criminal culpability of corporations using criminal law in existence.

This problem was as a result of a number of factors. Firstly, corporations do not have a physical body or soul to be punished. Secondly, most of the sanctions under the criminal law cannot be given to corporations, as human beings were had in mind while making the law. Even when fines were prescribed for corporations, it could not deter them from committing further crimes. Thirdly, for a person to be criminally liable under the criminal law there must be *actus reus* (guilty act) and *mens rea*(guilty mind) to grounf a conviction. This criminal law requirement made it practically impossible to convict a corporation of crimes requiring intent like murder in Nigeria.

In Nigeria, our extant laws held corporations vicariously liable; this has not in any way diminished the criminal activities of corporation rather it has continued to increase on daily basis. Scholars began to look for ways to hold a corporation directly liable not through attribution of liability to human beings associated to the corporation but imposing liability o the corporation itself. Assuming without conceding to the fact that a corporation is held liable directly for crimes requiring guilty intent, there are no sanctions appropriate to be meted out to the corporation itself. Thus it became necessary to have a legal framework whereby the appropriate punishment fit for a corporation can be drawn up and implemented.

The research methodology adopted in this work is doctrinal method. The analytical and comparative approaches were adopted with regards to what is obtainable in other legal jurisdictions. Data materials include primary sources such as enabling laws, statutes, and Acts and secondary sources such as relevant textbooks, case laws, conventions, journal articles, legal dictionaries, newspaper publications were used. Internet materials were extensively used also.

1.6 Scope and Limitations of the study

The geographical scope of this study will be mainly Nigeria. But a look will also be taken at the legal framework of some other jurisdictions such as Britain, America, Australia etc, to ascertain what is obtainable in those climes with respect to similarities and differences of the concept of corporate criminal liability.

In terms of the subject matter, the scope shall basically concern the concept of corporate criminal liability and the various corporate crimes and its regulation in Nigeria jurisdiction. However, the research on these concepts cannot be treated in isolation; therefore, references may be made of other aspects of law from time to time. The study was limited in the area of dearth of Nigerian literature on holding corporations liable directly for manslaughter or murder, without attributing the mental element of any of its employees to the corporation.

1.7 Organisational Layout

This research work gives a very general overview of the concept of corporate criminal liability. A distinction was made of the various theories of corporate criminal liability as applied in common law systems like U. S. and U. K and theories in civil law system countries. These theories or models have their advantages and disadvantages, however, some elements of each model should be considered for the purpose of creating a better model. This work is organized in six chapters. The first chapter describes the concept of corporate criminal liability. The second chapter provides a review of relevant literature on the concept of corporate criminal liability in Nigeria. It also gives the theoretical basis for corporate criminal liability as well as nature, causes and theories on corporate crime. The second chapter also dealt with the importance of corporate criminal liability. Although corporate criminal liability is a concept belonging more to criminal law than corporate law, this research emphasized its importance towards corporate law, whereas, the third chapter provides deals with the extant laws with respect to regulatory offences in Nigeria and

corporate crime regulation. In addition chapter three x-rayed the enforcement challenges of corporate crimes control in Nigeria. Chapter four deals with an elaborate overview, of the different traditions in the common law and civil law jurisdictions in relation to the principle and the form of corporate criminal liability.

Chapter five is the conclusion, which provides a summative evaluation for corporate criminal liability, emphasising the fact that powerful legal entities, such as corporations or companies must accept and abide by rules like natural persons. Hence, recommendations were also proffered.

1.8 Definition of Terms

Corporation:

A corporation is an artificial person or legal entity created by law.[18] It is an association of individuals, created by law and having existence apart from that of its members as well as distinct and inherent powers and liabilities.[19] The term corporation can also be used interchangeably with the word company.[20]

Statutory Offences:

Statutory offences are also strict liability offences.[21]Statutory offences are crimes that are not inherently wrong, but are illegal because they are prohibited by legislation[22]. They are crimes created by statutes and not common law.

[18] Definition of Corporation, (Black's Law Dictionary) < https://www.thelawdictionary.com> Accessed on 22Nov, 2017.
[19] The meaning of Corporation in the U.S.A, Available at <htpp://www.thefreedictionary.com. Accessed on 27th October, 2018.
[20] M Arlette, The Difference between a Corporation and a Company, Available at <htpp://www.smallbusiness.chron.com Accessed on 28th October, 2018.
[21] V Akpotaire, 'Strict Liability and the Nigerian Criminal Codes: A Review', <https://www.nigerianlawguru.com> Accessed on 10 December, 2017.
[22] What does Statutory Offence Mean? Law Dictionary available at https:www.law.academic.ru accessed on 10 December, 2017.

Corporate Crime:

Corporate crime is the conduct of a corporation or employees acting on behalf of a corporation, which is proscribed and punishable by law".[23] Corporate crimes are illegal acts, omissions or commissions by corporate organizations.[24]

Fine:

Fine is monetary charges imposed upon individuals who have been convicted of a crime or a lesser offense. [25]

[23] J Braithwaite, *Regulatory Capitalism: How it Works Idea for Making it Work Better*, (London:Edward Elgar Publishing 2008) p 10.

[24] A O Popoola and O O Ajai, 'The Military and Economic Crimes in Nigeria' Proceedings of the 27th Annual Conferences of the Nigerian Association of Law Teachers held at Nike Lake Resort Hotel, Enugu, April 9-12, 1989, 130-134 .

[25] Fine: Legal Definition of Fine, <http://www.legal-dictionary.the free dictionary.com> Accessed on 10 Nov, 2017.

CHAPTER TWO

LITERATURE REVIEW: CORPORATE CRIMINAL LIABILITY IN PERSPECTIVE

2.1 Conceptual Framework

2.1.1 The Concept of Corporate Criminal Liability under the Common Law

Corporate criminal liability draws from the concept of separate legal entity of corporations. It is looked at from the point of view of the origin of the separate identity of a corporation and the need for such a distinction along with the capacity and liability of a corporation. Corporations were not initially held criminally responsible for corporate activities. A corporation was considered to be a legally fictitious entity, incapable of having the *mes rea* necessary to commit a criminal act. Thus, the liabilities of a company were to be treated as separate and distinct from the shareholders. The very concept of corporations and their functioning, duties and responsibility has developed at different stages of history. In this chapter a humble effort has been made to study such development during ancient era, medieval era and modern era so as to understand corporate liability under the law.

Corporate criminal liability as a concept was absent in Britain before the advent of industrialisation. The rationale behind the same was based on the traditional understanding of criminal law, where a person was convicted if he had a guilty mind (*mens rea*) [26]and the concept of victimisation. Thus, if corporations didn't have a soul, they couldn't be held criminally liable.[27] Similarly, they could not be sued for treason since treason was the offense of disloyalty, which sprang from the violation of the oath of fealty.[28] Since corporations

[26] M D Dubber, 'The Comparative History and Theory of Corporate Criminal Liability', (2015) vol 16, no 2, *New Criminal Law Review*, 203-240.
[27] *R v Birmingham & Gloucester Railway Co.,* (1842) 3 Q B 223, 114 E R 492, *Evans & Co. Ltd v London County Council*, (1914) 3 K B 315.
[28] W Blackstone, *Commentaries on the Laws of England*. (1765) vol. 1 at 464.

cannot take oaths, they cannot commit treason. [29] Proof of this may be seen in Coke's 1612 report of the Sutton's Hospital Case.[30] Thus, the settled approach was to subject the corporation to liability only for crimes of non treasons such as failure to make necessary repairs, but to render it immune from crimes requiring misfeasance.[31]

It must be noted that this traditional concept of the lack of corporate criminal liability was infused by canon law.[32] The church had insisted that as a corporation (universitas), it was distinct from the individual persons constituting it, who might commit wrongs and sins. At the same time, it was itself a merely fictional entity, a personal ficta incapable of wrong and sin.[33] The roots of the so-called *mens rea* requirement in English criminal law have often been traced back to canonical origin that explains the lack of corporate criminal liability.[34]

At this juncture, it must be noted that traditionally, a corporation is understood as an entity that served to manage church property.[35] It was only in the 16th and 17th centuries that the scope was expanded to include hospitals, universities etc.[36]

However, this stress on the requirement of *mens rea* reduced considerably with the advent of the industrial revolution.[37] The development of strict liability offences did away with the concept of a guilty intent altogether (e.g bigamy), [38] and *mens rea* became a tool of statutory interpretation[39] rather than a mandatory requirement.[40] With an unprecedented rise

[29] F Pollock & F W Maitland, *The History of English Law Before the Time of Edward*, (London: Sweet and Maxwell,1898) 2nd edn vol 1 at 502-504.
[30] (1612) 77 E R 960, 973.
[31] K F Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation', (1982) 60 *Washington University Law Journal* 393.
[32] *Ibid.*
[33] *Ibid.*
[34] R Sethia, 'The Development of Corporate Criminal Liability in the Common Law- An Overview', (2016) *International Journal of Law and Legal Jurisprudence Studies*, 212.
[35] W Holdsworth, *A History of English Law*, (London: Sweet & Maxwell, 1923) p 478-479.
[36] W Holdsworth, 'English Corporation Law in the 16th and 17th Centuries', (1922) 31 *Yale Law Journal*, 382.
[37] F P Lee, 'Corporate Criminal Liability', (1928) 28 *Columbia Law Review* 1, 4.
[38] *Ibid.*
[39] M D Dubber, 'Policing Possession: The Waron Crime and the End of Criminal Law, (2002) *Journal of Criminal Law and Criminology* 829, 915-961.
[40] J F Stephen expressed the same view in *R v Tolson* (1889) 16 Cox C C 629 at 644.

in corporations, there was little respect for the required standard of care, making it only prudent to issue strict liability standards to protect human health and deter corporations from getting away with any crime committed. The 19th century saw a gradual shift in the rules applicable to corporate criminal liability, the courts finally held corporations liable for the actions of their agents, acknowledging that doing otherwise would lead to "incongruous" results.[41] Thus, the concept of vicarious liability was borrowed from tort law to justify the same. However, there were still limitations. English courts repeatedly rejected the idea that *respondeat superior* theory should apply as a blanket rule to criminal acts. Thus, corporations could still not be held liable for "moral" crimes such as rape and murder owing to the restricted personification of a company.[42]

In layman's terms, the doctrine of corporate criminal liability is essentially the doctrine of respondeat superior which has been imported into criminal law from tort law. This doctrine states that a corporation can be made criminally liable and convicted, for the unlawful acts of any of its agents, provided those agents were acting within the scope of their actual or apparent authority.[43] Apparent authority is that authority which an agent can be inferred to have by an average reasonable person, whereas actual authority is authority that a corporation knowingly entrusts to its agent or employee. To simplify matters, if a rational relationship can be established between an employee's criminal conduct and his corporate duties, the corporation will be held criminally liable for the employee's conduct. The criminal liability of corporations has been much debated topic since the 20th century.[44] This problem became especially pressing because of the huge changes with regard to the environment, food, employment, justice etc, which are part of our life and involve

[41] R Sethia,' The Development of Corporate Criminal Liability in the Common Law-An Overview', (2016) *International Journal of Law and Legal Jurisprudence Studies* < https:www.ijlljs.in.wp-content.com> Accessed on 22 November, 2017.
[42] A Weissmann, 'Rethinking Criminal Corporate Liability' (2009) *Indiana Law Journal*, 82 (2).
[43] A Mahesh, 'Corporate Criminal Liability', < http://www.lawctopus.com accessed on 20 November, 2017.
[44] V S Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?, (1996) *Harvard Law Review* No 7, vol 107.

corporations. Some corporations have falsified financial disclosures, while others have breached environmental or health and safety laws, which resulted in great losses. The consequences that most directly affect our society are the huge losses of money, or even lives. In response to the above, juridical regimes have been created in order to punish corporate wrong doing.[45]

2.1.2 Corporate Criminal Liability in Nigeria

The Nigerian Criminal jurisprudence recognises the offence of involuntary manslaughter which may result from an unlawful act (constructive) manslaughter, or gross manslaughter which results from a breach of a duty of care. Criminal liability for the former involves an unlawful act in itself which results in death, while liability for the later arises where the defendant's conduct though lawful, is carried out in such a way that it is regarded as grossly negligent and therefore a crime.[46] It is this second aspect of involuntary manslaughter that companies are often liable for, that raises concerns. In circumstances where a company's conduct could be regarded as grossly negligent and therefore a crime, the present law in Nigeria, requires the invocation of the provisions of the general criminal law so as to prove either the offence of manslaughters (under the Criminal Code) or homicide (under the Penal Code).[47] However, corporate criminal liability intersects both company law and criminal law, and problems have traditionally arisen in imposing liability on an artificial legal construct such as a company. This has been reiterated in a plethora of cases. In the case of *Armah v Horsfall,*[48] the Supreme Court made it clear that a company has no soul or body through which to act, it can only do so through human agents, but which acts they cannot be personally held liable. Mainly, the challenge is that legal concepts such as *actus reus, mens*

[45] K A Groskaufmanis, 'Minimising Corporate Civil and Criminal Liability: A Second Look at Corporate Code of Conduct', (1990) *Georgetown Law Journal*, No 78, 1559.
[46] S Erhaze & D Momodu, 'Corporate Criminal Liability: Call for a New Legal Regime in Nigeria' (2015) *Journal of Law and Criminal Justice* vol 3 no 2, 63-72.
[47] *Ibid.*
[48] [2015] All F.W.L.R Pt 912, p. 709.

rea and causation, designed with natural actors in mind, do not easily lend themselves to inanimate entities such as companies which are distinct and separate from their owners.[49]

As a former British colony, the Nigerian legal system was modeled after the English legal system; hence the common law position represents the law in Nigeria. In Nigeria, corporate criminal liability is a recent development and as a result, the cases are quite few. However, in *Ogbuagu v Police*,[50] the appellant was the proprietor and publisher of a newspaper in Jos, Northern Nigeria. When leaving Jos, he instructed the man he left in charge not to publish the paper while he was away. The man, however, published the paper, which contained a seditious libel in one issue. Here the court refused to impute the state of mind of the employee to the proprietor of the newspaper. However, in *R v African Press*,[51] a case with nearly the same facts as *Ogbuagu,* the article was written by and under the responsibility of the editor and the court held both the defendant company and the editor jointly liable since the article was written by and under the responsibility of the editor. In *R v. Zik Press*,[52] a corporation was found guilty of an offence of contravening Section 51 (1) (c) of the Nigeria's Criminal Code. Similarly in *Mandilas & Karaberis v COP*,[53] a corporation was convicted of the offence of stealing by conversion under Section 390 and 383 of the Nigerian Criminal Code. While in *A.G. Eastern Region v Amalgamated Press of Nigeria Ltd*,[54] the preliminary objection raised by the defense counsel on the ground that an offence could not be committed by a corporation in the absence of *mens rea* was overruled by the court. However, there are certain 'human crimes', to which a corporation has not been held criminally liable in Nigeria. For example, a corporation cannot be charged with the offence of personal violence or with offences for which the only punishment is imprisonment. But in Nigeria, the notion of

[49] C E Enem and P Uche, 'A New Dawn of Corporate Criminal Liability Law in the United Kingdom: Lessons for Nigeria' (2012) *African Journal of Law and Criminology*, 2(1) 86-98.
[50] (1953) 30 NLR 139.
[51] (1957) WRNLR 1.
[52] (1947) ENLR 12.
[53] (1958) WM LR 147.
[54] (1956) FSCN.

holding corporations directly criminally liable being a recent development, cases are rare and there are yet no known cases of corporations being charged for the offences of manslaughter or murder. There is no doubt that as a former British colony, the principle of corporate criminal liability in Nigeria is still governed by the old common law doctrine.[55] The common law, it must be remembered, makes it more intractable to prosecute corporations because of the identification doctrine which requires that all the blame be linked at least to a director of a company usually identified as the "directing will".[56] As company's responsibilities are commonly spread across the board, it is an obvious difficulty to pin all the blame of the corporation on only one person. Invariably, it is also not possible to incriminate a company by the aggregation of the fragmented faults of the directors. To be liable for the common law corporate manslaughter, criminal liability of a company must be attributed with the culpability of the human element known as the corporations directing mind and will. Because the directing mind of a corporation may partly or wholly delegate its function to individual members of the senior management of the corporation, the attribution of authority becomes very integral factor in the establishment of the criminal liability of a corporation for the common law offence of corporate (involuntary) manslaughter.[57] Accordingly, under the Nigerian law, a corporation cannot be convicted of the common law offence of involuntary manslaughter except a separate conviction is also sustained against an individual who was part of the company's directing mind and will[58]. Under the current law in Nigeria, the task for the prosecution pursuing a possible charge of corporate manslaughter or homicide is twofold: they must prove the *actus reus* of gross negligence on the part of the corporation, second, and more challenging, they must prove *mens rea***,** and in this regard, they must show that the act

[55] N Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) *Journal of Criminal Law*, 75(5), 422-435.
[56] R M Sanger, 'Respondeat Superior in Criminal Cases'< http://www.sangerswyen.com> Accessed on 29 November, 2017.
[57] *Ibid*.
[58] G Slapper, 'Corporate Punishment', (2010) *Journal of Criminal Law*, 73 (4), 181-184.

of an individual or group of individuals is attributable to the corporation, for the later to be held criminally responsible.[59] These burdens are no doubt very difficult if not impossible to discharge. It becomes very pertinent to revisit our laws on corporate manslaughter and homicide. However, it is worthy to note that the Nigerian central legislature has been making effort to bring into law a bill that seeks to criminalise the actions or inactions of a corporation and penalise same accordingly where death of a person results or a breach of such duty of care designated as "relevant duly of care". The bill specifically disregarded any rule of the common law that has the effect of preventing a duty of care from being owned by one person to another by reason of the fact that they are jointly engaged in unlawful conduct. It is worthy to note that the proposed legislation is a welcomed step in the right direction. As corporations continue to enjoy all civil rights including the enforcement of their fundament human rights, yet they continue to elude some legislative control and accountability for criminality.

2.1.3 The Theory of Corporate Personality and Its Relevance to Corporate Criminal Liability.

A company is a legal entity distinct from its shareholders, directors, officers or employees. Once a company is incorporated it acquires its distinctive nature, thus this is one of the effects of registration.[60] The concept of the legal entity of the company distinct from its members became finally established at common law in the locus classicus case of *Salomon v Salomon and Co Ltd,*[61] In that case Lord Macnaghten stated the position as follows:

> When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate "capable forthwith to use the words of the enactment, of exercising all the functions of an incorporated company; those are strong words. The company attains maturity on its birth. There is no period of minority-no interval of incapacity. I cannot understand how a body corporate

[59] S Erhaze & D Momodu, *op cit.*
[60] *S T B Plc v Olusola* [2008], NWLR (pt. 160) 561 at 595-596.
[61] (1897) AC 22 .

> thus made "capable" by statute can lose individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers; and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. ,

The Act has in principle accepted and independently given effect to the same principle in Section 37,[62] which provides thus:

> As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may: from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of expressing including the power to hold land, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act.

Also in the case of *Lee v Lee's Farming Ltd,*[63] it was held that Mr Lee, who formed a company in which he was the beneficial owner of all the shares and was also "governing director", was nevertheless a separate entity from his company and that he as governing director could on behalf of the company, give orders to himself as servant. The consequence of this status is that a company, upon incorporation, automatically acquires a legal existence that becomes vested with capacity to enjoy rights and of being subject to duties which are not the same as those enjoyed by its members.[64] One of the most popular Nigerian decisions affirming the separateness of a corporation from its constituents is the case of *Marina*

[62] Companies and Allied Matters Act, Cap C 20 LFN 2010.
[63] (1961) AC 12 P C. See also *Afribank (Nig) Ltd Ltd v M. Ent* (2008) 12 NNLR (pt 1098) 223, *Okatta v Regd. Trustees, O. S. C.* (2008) NNLR (pt 1105) 632 at 645.
[64] J A Dada , 'The Organic Theory as a Basis of Corporate Liability'<(http://www.dspace.unijos.edu.ng> Accessed on 20 September,2017.

Nominees Ltd v FBIR,[65] where Nnamani JSC, reiterated that it has long been settled that a company has a separate personality from its corporations.

Although a company is a legal entity and has an independent legal personality, it is of course, an artificial person or entity. The reality; however is that it is indeed not a natural person and cannot act by itself. In other words, unaided, the corporation can neither enter into contracts nor carry out several responsibilities and obligations imposed on it. Hence, the corporation cannot act independently, however it can act through the instrumentality of some human organs or agents, who will engage in correspondences, attend meetings and other obligations on behalf of the corporation. Thus, like equity and law, the corporation and the individual (be they subscribers, managers or employees) constituting it, flow in the same channel, but their water do not mix, in that they retain their individuality. An illustration of this principle was encapsulated in the statement of Lord Denning MR in the case of *Bolton Engineering Co. Ltd v Graham & Sons,*[66] in the following words:

> A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers, who represent the directing mind and will of the company and controls what it does. The state of the mind of these managers is the state of mind of the company and is treated by law as such.

In *Williams v LSDPC,*[67] the above postulation was adopted by Nigerian Supreme Court stating that, a company although a legal person, is an artificial one which can only act through its human agents and officers. Viscount Haldane L.C, in *Lennard's Carrying Co v*

[65] [1986] 2 NWLR (pt. 20) 48.
[66] (1957), I Q B 159.
[67] (1978) 3 SC (Reprint) 8 Per Aniagolu JSC. See also *Trenco (Nig) Ltd v African Real Estate & Investment Co. Ltd & Anor* (1978) All NLR 124 and *Olalekan v Wema Bank* [2006] 13 NWLR (pt. 1998) 617. 41) (1915) AC 705.

Asiatic Petroleum Co. Ltd,[68] reiterated the above assertion. With the reality that the corporation can only act through human agents attend the actuality that the corporation may also be liable for all the frailties of the human person. Thus, liabilities for tortuous acts, contractual breaches and criminal conduct ordinarily attachable to human conduct become attributable to the corporation through human agency. This fact is well established by the provisions Section 65 of the CAMA,[69] in the following terms: Any act of the members in general meeting, the board of directors or of the managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person.

2.1.4 Lifting the Veil of Corporate Personality

Although the legal personality of the company is distinct from those of the members, however there are certain exceptional circumstances in which the law disregard the corporate entity and pays regard instead to the economic realities behind the legal facade[70]. The law goes behind the corporate personality to the individual members to lift the "veil" of incorporation in accordance with statute or by the court in the interest of justice. When this is done, it is said that the corporate veil has been lifted or pierced.[71]

In *Aderemi v Lan and Baker Nigeria Ltd*,[72] Aderemi, JCA explained thus: Since a limited liability company exists in the eye of the law, it can only operate by means of human beings. But it's now settled in law that the directors or the managers are those whose decisions can be attributed to the legal fiction. …. Thus, if it is discovered from the material

[68] (1915) 1 AC 705.
[69] Cap C20 LFN 2010.
[70] O J Orojo, *Company Law and Practice in Nigeria* (5th edn, South Africa: Lexis Nexis Butterworths, 2008) p 88.
[71] See the case of *Octopus Invest. & Finance Co. Ltd v Vaswani* (2015) All F.W.L.R Pt 806, p 390.
[72] [2000] 7 NWLR (pt.663) 33 at 51.

before the court that a company is the creature of a biological person, be he a managing director, and it is a device or sham-mask by the eye of equity, the court must be ready and willing to pierce the veil of incorporation to see the character behind it, if justice must be seen to be done…."

2.1.4.1 Instances When the Veil May Be Lifted Under the Statute

a. Number of Members below Legal Minimum

Where membership of a company falls below legal minimum (at least two members) and the company carries on business for more than 6 months, every director or officer of the company during the time that the company so carriers on business after 6 months and who knows that it is carrying on business with only one or no members shall be liable jointly and severally with the company for the debts of the company contracted during the period.[73]

This Section 93 does not create an offence but only prescribes the consequences that follow when a company carries on business for more than six months after the number of members has fallen below the legal minimum. It warns the directors and officers of the consequent liability to which they are exposed, but it does not proscribe the company or deny its existence.[74]

b. Number of Directors Less than Two

Where a director or member of a company knows that a company carried on business after the number of directors has fallen below two for more than 60 days, such director or member shall be liable for all liabilities and debts incurred by the company during that period when the company so carried on business.[75]

[73] Section 93 of CAMA, Cap C20 L.F.N. 2010.
[74] *Iro v Park* (1972) 12 SC 93, 102.
[75] Section 246 (3) CAMA , Cap C20 L.F.N 2010.

c. Personal Liability of Directors and Officers for Fraud

Where a company receives money by way of a loan for a specific purpose, or receives money or other property by way of advance payment for the execution of a contract or other project, and with intent to defraud fails to apply the money or other property for the purpose for which it was received, every director or other officers of the company who is in detail will be personally liable to the party from whom the money or property was received, for a refund of the money or property so received and not applied for the purpose for which it was provided and that nothing in the section will affect the liability of the company itself.[76]

d. Reckless or Fraudulent Trading

If in the course of winding-up of a company, it appears that any business of the company has been carried on in a reckless manner or with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of the company, declare that any persons who were knowingly parties to the carrying on of the business in that manner shall be personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct. This remedy is available only on winding-up.[77]

e. Investigation into Related Companies.

When an inspector is appointed by the Commission to investigate the affairs of a company, the inspector may, if he thinks necessary for the purpose of his investigation, investigate also the affairs of any other related company, and report on the affairs of the other company so far as he thinks the results of his investigation thereof are relevant to his main investigation.[78]

[76] Section 290 CAMA Cap C20 L.F.N. 2010.
[77] Section 506(1) CAMA Cap C20 L.F.N. 2010.
[78] Section 316 CAMA Cap C20 L.F.N. 2010.

f. Company not Mentioned on Bill of Exchange

Every company is required to have its name mentioned in legible character *inter alia*, in all bills of exchanges, promissory notes, endorsements and cheques.[79] If any officer of the company, or any person on its behalf, issues or authorizes the issue of any bill of exchange, promissory note, endorsement, cheque or order for money or goods without the name of the company being so mentioned, he will be liable to the holder of any such bill of exchange and so forth for the amount thereof, unless it is duly paid by the company.[80]

g. Other Statutes

Apart from the CAMA, the veil of incorporation can be lifted under other statutory provisions to take care of certain exigencies as they present themselves in the management of companies. A ready example is the Failed Bank (Recovery of Debt and Financial Malpractice in Bank Act.[81] The essence of this Act is to examine the activities of banks as to ascertaining the cause of failure via the activities of directors and other officers; so that the veil of incorporation might be lifted to discover who are behind the fraud and malpractice, which had crippled these banks. A tribunal was established under the Act to take care of these duties.

2.1.4.2 Instances When the Veil may be Lifted by the Court

a. Fraud or Improper conduct

The court would not hesitate to use it sledgehammer to pierce though the corporate mask as to reveal the identity of those behind any fraud or improper conduct. It is a common thing that the managers of companies have hidden under the corporate personality to commit fraud

[79] Section 548 (1) *Ibid.*
[80] Section 548 (4) *Ibid.*
[81] 1994 Cap F 2 L.F.N 2004.

with the feeling that it is the company and not they personally would bear the burden. However, the principle of lifting the veil of incorporation has reduced the losses of companies by the court, finding the culprit personally responsible. In the case of *Gilford Motor Co Ltd v Horne*,[82] the court held that it will not allow a company to be used as a device to mask the carrying on of a business by a former employee of another person and to enable the former employee to break a valid covenant in restraint to trade contained in the contract under which he was formerly employed.

In the case of *Aminu Oyebanji v State*,[83]in this case on the application of the provisions of Section 35 of the Criminal Code,[84] as regards lifting the veil of incorporation. By this provision, the allegation of crime lifts the veil of corporate or voluntary associations and unmasks the face of the suspected criminal to face prosecution. Where the veil is lifted the law will go behind the corporate entity so as to reach out to individual members of the company whose conduct or acts are criminally reprehensible. Per Galadima, J.S.C. (p.2) para A-F

The circumstances in which the veil of incorporation may be lifted was succinctly stated in the case of *Alade v ALIC (Nig) Ltd & Anor*,[85] where this court held that one of the occasions when the veil of incorporation will be lifted is when the company is liable for fraud as in the instant case.

b. Where the Company is a Sham or Company acting as Agent for Shareholders.

The courts also lift the veil where a company is a mere cloak or sham. In *Jones v Lipman*[86], a vendor of land in order to evade or specific performance of the contract of sale, conveyed the

[82] (1933) CH 935 (CA).
[83] (2015) LPELR 24751 (SC).
[84] Cap 38 Vol 11 Laws of Oyo State 2000.
[85] [2010] 19 NWLR (pt 1226) 111 at 130 E-H.
[86] (1962) I WLR 832.

land to a company which he had brought for the purpose. The corporate veil was lifted to discover the intention for which the new company was bought. This act was described by Russel J. to be a device a sham, a mask which was held to cover the face in an attempt to avoid recognition by the eye of equity. Where the shareholders of a company use the company as an agent, they will be liable for the debts of the company. But it is a question of fact whether an agency exists or whether a subsidiary is carrying on the business of its parent company or its own.[87] The court at times uses the doctrine of agency to prevent companies from evading legal duties since an agent with bonafide powers can enter into contract on behalf of his principal and the principal is bound by it, in the same vein, the principle company may be stopped from pleading no liability simply because another company undertook the business in its behalf.[88]

In *FDB Financial Services Ltd v Adesola*,[89] the court Per Muntaka-Coomassie, JSC at 142 C-E held, "it must be stated unequivocally that this court, as the last court of the land, will not allow a party to use his company as a cover to dupe, cheat and or defraud an innocent citizen who entered into a lawful contract with the company only to be confronted with the defense of the company's legal entity as distinct from its directors".

c. Public Policy

Corporate veil will be lifted if it is in the public interest to do so. There are situations such as during war period, if it is known that an enemy company still does business in the country of the other enemy country, the owners of such company will be exposed as to know the presence of such foreign interest in the company. In *Daimler Co. Ltd v Continental Tyre and Rubber Co. Ltd,*[90]it was held in respect of an action brought by a company incorporated in

[87] *Smith, Stone and Knight v Birmingham Corporation* (1939) 4 All ER 116.
[88] *Ibid*.
[89] [2000] 8 NWLR (pt. 668) 170 at 174.
[90] (1916) 2 A C 307.

England all of whose shares except one were held by German nationals, and all of whose directors were German nationals resident in Germany. The company was held to possess an enemy character.

d. Where there is Illegality

In a situation where illegality is discovered in the operation of a company, the veil of incorporation will be lifted. In the case of *Wagbatsoma v F.R.N,*[91] the court held that the consequence of recognizing the separate personality of a company is to draw a veil of incorporation over the company. One is generally not entitled to go behind or lift the veil. However, since a statute will not be allowed to be used as an excuse to justify illegality or fraud. It is a quest to avoid the normal consequences of the statute which may result in grave injustice that the court as occasion demands will have to look behind the veil. In *Merchandised Transport Ltd v British Transport Commission,*[92] where a parent company wanted to apply for vehicle licenses, but on studying the regulations, it was found that it could not apply. It then used its subsidiary company to apply for the licenses. The licensing authority refused to grant the license on the ground that both the parent and subsidiary company is a single commercial unit. This argument was upheld by the court to stop illegality.

e. Where Legal Duty is being Evaded.

The veil of incorporation may also be lifted in a situation where a legal duty imposed is evaded by a company hiding under another company. It is explained in the case of *Marina Nominee v Board of Inland Revenue.*[93] In this case, it is statutory for every registered company to pay company tax but this was evaded by the plaintiff company, which was

[91] [2015] Pt 812, p. 598.
[92] (1962) 2 Q B 173.
[93] [1986] 2 NWLR (pt 20) 48.

incorporated by one parent one, called "Peak Marwick Casselton Eliot & Co." to take care of secretarial duties for its numerous clients. But all the employees of the parent company were used in the new company and every bill of exchange was in the name of Peak Marwick, by acting as an agent of the parent company, marina nominees never paid company tax. In an action brought by the defendant it was held that because the plaintiff was full registered company, it couldn't evade its statutory obligation of paying tax in the circumstances the veil of incorporation will be lifted to stop a registered company from shying away from its responsibility.

d. Trust

Where shares in a company were held upon trust and the management of the company is in the hands of the trustee, the court may lift the veil of incorporation so as to reconcile the company's property with the terms of the trust.

2.1.5 The Nature of Corporate Criminality

Corporate criminality extends to those instances when an employee or agent acted, or acquired knowledge, within the scope of his or her employment, seeking, at least in part, to benefit the corporation.[94] The law is somewhat uncertain when a corporation's liability is fixed not upon the knowledge or the intent of a single employee but upon cumulative actions or knowledge of several others who have acted upon in a collaborative way.[95] Collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. The acts of a corporation are after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this. Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. Corporations compartmentalise knowledge,

[94] *United States v LaGrou Distribution Systems*, 466 F. 3d at 591.
[95] *United States v Bank of New England* (2000) 821 F. 2d at 856.

subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitute the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation. A corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.[96]

2.1.6 Legal Entities and Corporate Crime

It is debated most of the times: whether or not it is feasible to hold responsible for crime a non-natural entity such as a corporate body which unlike a natural person, it is not capable of thinking for itself, or of creating any intention of its own. It is also contemplated that the very idea of fault and blameworthiness inherent in the concept of criminal capability embedded in this latin maxim "*actus non facit reum, nisi mens sit rea*" pressures personal responsibility.[97] This is an element which an abstract entity such as a corporate body lacks. The corporate body has no physical except the mortar buildings and its does not think for itself. The actions that its takes or the acts that it undertakes, and the thinking that goes behind these acts is done for it by its directors or employees. There is a view that guilty servants of the corporation ought to be punished. The situation is otherwise complex when the guilt has to be fixed on someone. Within complex organisation it becomes very difficult to track down the individual offender. An official can very easily shift the whole blame or responsibility on another worker of lower rank. In case of any such event there are other branches of the law like the

[96] *United States v Philip Moris USA* (1996) 566 F. 3d at 112. see also J G Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Atrocity, Commerce and Accountability', A paper presented at the University of Toronto Workshop on Corporate Criminal Liability, 2012.

[97] M S Wattad, 'Natural Persons, Legal Entities, and Corporate Criminal Liability under the Rome Statute, (2016) 20,*UCLA* Journal *of International Law and Foreign Affairs*, 391.

law of contract, which recognize that a corporate body is very much capable of thinking and of exercising a will. This form of acceptance of liability is especially necessary where failure to perform specific duty imposed by the statute on a corporate body for example the duty to draw up and submit the tax returns or annual report submissions etc constitutes a crime.[98] "Like defendants and other courts, the US court has also observed that "we are dubious of the legal soundness of the "collective intent" theory[99] Corporate knowledge of certain facts [can be] accumulated from the knowledge of various individuals, but the proscribed intent (willfulness) depends on the wrongful intent of specific employees".[100] and for purposes of determining whether a statement made by the corporation was made by it, the researcher believes it is appropriate to look at the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment). There is no single universal rule as how to declare that a corporation should be held as a criminal defendant. The aggregation of mass capital it represents caters a bigger risk of harm if that power is used for criminal purposes. Such a rationale would for sure supp ort a decision to make the corporation not only civilly liable for its misconduct and misdeeds, but also step a little farther towards its criminal implications. This rationale however reinforces the practices of holding a company for its criminal misconducts by mainly American federal laws.[101]The decision to criminalise cannot be made so casually keeping in view the role and position a corporation enjoys in our lives. Jurists like Henry Hart reminded us, "Criminal conduct is the conduct which, if duly shown to have

[98] S Sadhana , 'Corporate Crime and Criminal Liability of Corporate Entities, Resource Material Series No 76, 137th International Training Course Participants Papers (2010) p 5.
[99] *Saba v Compagnie Nationale Air France* (1996) D C Cir., 78 F. 3d 664, 670.
[100] Southland Securities v Inspire Insurance Solutions (2004) 5th Circuit, 365.F 3rd 353.
[101] M E Tiga, 'It Does the Crime but Not the Time: Corporate Criminal Liability in Federal Law', (1990) *American Journal of Criminal Law* Vol 17,211.

taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community".[102] At the same time it cannot be overlooked that holding a corporation criminally liable for offences otherwise acceptable in the business conduct belittles the criminal sanction in place and breeds contempt for them openly.

Over the years companies have learnt new tactic whereby they bring in a whole team of their advisors and the use of some of their finest lawyers and accountants to wriggle out of a situation where they have been charged of misconduct. Their whole agenda is to save their skins by accepting the fines and compensations due or to comply with any other regulatory measure so that they can steer away from the ambit of criminal law. They take every step possible through administrative or legislative regulations to keep the clutches of criminal law away. There are legislative histories of the countries where a strong lobbying has been used to keep the corporate illegal behavior and misconduct under the purview of the civil jurisdictions only.[103]

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

[102] *Ibid*, p 213.
[103] L Snider, 'The Regulatory Dance: Understanding Reform Processes in Corporate Crime', (1991) *International Journal of the Sociology of Law*, 209.

doing criminal wrongs with intent to gain profits and increase the margins of corporate gains.[104] Most criminal statutes worldwide are applicable to any "person" who violates the legal provisions. Although ordinarily, the world "person" usually refers to a human being but the law gives it a much broader ambit and meaning.[105] The Dictionary Act of United States, provided that in determining the meaning of any Act of Congress, unless the context indicates otherwise… the words 'person' or 'whoever' includes corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals. Many courts have used the above said definition to award meaning to the words person in the context of a criminal statute under the federal legislations as it provides enough space to incorporate the wrongs of a company. [106]

The law is somewhat uncertain when a corporation's liability is fixed not upon the knowledge or the intent of a single employee but upon cumulative action or knowledge of several others who have acted upon in a collaborative thought. A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. The acts of a corporation are, after all simply the acts of all its employees operating within the scope of employment.

2.1.7 Rationale and Policy of Corporate Criminal Liability

Criminal law is known especially as a mechanism for responding to individual wrongdoing. It seems to be obvious that natural persons can think, make decisions, commit crimes and be held criminally liable. Because of the fact that this individualistic notion of responsibility

[104] R Tomasic, 'Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalisation Solutions', (1992) 2 *Australian Journal of Corporate Law* 82.
[105] *Clinton v. City of New York* (1998) 524 U. S. 417, 428 .
[106] Example, Violation of Interstate Commerce Commission Regulations (1958) former 18 U. S. C. 855; *United States v Hougland Barge Line Inc* (1974) 387 F. Supp. 1110, 1114, *United States v A & P. Trucking Co* (1958) 358 U. S. 121, 123.

cannot automatically be assigned to legal entities such as companies, some argued that corporations cannot be held liable.[107]

Firstly, it should be pointed out that corporations have legal capacity in the majority of areas of law, own real estate and goods distinct from those of their members, and have their own rights and obligations. While it seems to be obvious that a corporation can be held liable for pollution offences, or offences involving financial irregularities, it seems to be less obvious that a company could be said to commit crimes.

There are three systems for determining which crime corporations can be held liable for. Under the first system,[108] general liability,[109] or plenary liability, the juristic person's liability is similar to that of individuals, with corporations being virtually capable of committing any crime. The second system requires that the legislator mention for each crime whether corporate criminal liability is possible.[110]The third system consists of listing all the crimes for which collective entities can be held liable. The first system has been adopted by England. It should be highlighted that company liability does not extend to human actions such as sexual offences and bigamy. Under the same principle, corporations are not liable for crimes expressly excluded by the legislator, or crimes that, due to their nature cannot be committed by corporations. Hence, corporation cannot commit bigamy, incest, perjury, or rape. However, critical point must be stressed. The above argument is that companies should be capable of being held criminally liable. This does not mean that individuals within the company should be exempted from liability. In appropriate case, where the individuals have committed the *actus reus* with the *mens rea* of the offence, they should be liable. Imposing

[107]B Fisse, J Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability', (1988) *Sydney Law Review*, No 11 p 468.
[108]T S Jankwoska, Corporate Criminal Liability in English Law, <https://www.pressto.amu.edu> Accessed on 20 November, 2017.
[109]C de Maglie, 'Centennial Universal Congress of Lawyer's Conference'- Lawyers and Jurists in the 21st Century. Models of Corporate Criminal Liability in Comparative Law', (2015) *Washington University Global Studies Law Review* No 4 p 547, 552.
[110] *Ibid.*

criminal liability on corporations through these various means has been justified through several theories. Firstly, it is contended that a corporation has duties, rights and obligations just like citizens, especially in the modern technological world.[111] However, the only way for it to act is through human beings that control its operations i.e., their organs. Thus, it is only fair to hold companies liable for acts done on these humans that act on its behalf and exercise the rights and obligation imposed on it.[112] Secondly, a policy based argument states that liability for corporate offences is either on the company or none at all. In the latter circumstance, if no company is held liable for *mens rea* offenses etc; then a large number of individuals who may have been victims of those crimes will not be allowed to avail of any financial compensation and will not get any retribution for their loss.[113] Thus, it is only fair to impose liability on them (companies) for acts done to benefit their goals versus no liability at all. Thirdly, corporate liability enables a collective accountability for an accumulation of the corporation's criminal activity conducted by different individuals. This accountability is of essential consideration in today's time and age where corporations are capable of being party to crimes against humanity such as genocide or war crimes that requires a large number of people to be involved in the commission of such crimes. Thus, holding a corporation accountable, as a collective will ensure a certain level of deterrence against involvement in such crimes.[114]

Fourthly, a marginal benefit of this move aims to ensure that shareholders and employees take a major interest in the governing of the corporation. If liability is imposed on the corporation for crimes committed by the board of directors or senior officers, there will be an automatic backlash on the shareholders in the form of monetary losses and the employee

[111] M Kermnitzer and H Genaim , 'The Criminal Liability of a Corporation', in A Barak (ed) *Shamger Book*, Vol B (Tel Aviv: Israel Bar Association, 2003) 33-113, p.57.
[112] *Ibid.*
[113] R Slye , 'Corporations, Veils and International Criminal Liability', (2008) 33 *Brooklyn Journal of International Law* 955-974, 96.
[114] M Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law', (2010) 83 *Journal of International Criminal Justice* at 909-918.

in the form of lost jobs. Thus, there is some incentive to elect management wisely and engage with the overall functioning of the corporation.[115]

2.1.8 Requisites of Crime and Criminality

A crime is said to be committed when a person has committed a voluntary act prohibited by law, together with a particular state of guilty mind. A voluntary act means an act performed consciously as a result of effort or determination of an individual with an active intent. The state of mind referred to here can be an act committed after due deliberation alone or deliberation and with intent together or recklessly with criminal negligence. The main concern here is that the proof of the act alone is not sufficient to prove that the wrongful act committed by a person had the required guilty state of mind. Under the criminal laws, the state of mind is very much an element of the crime, as the act itself and must be proven beyond reasonable doubt in the court of law, either through direct or incidental evidence.[116]

It cannot be denied that the criminal liability is what unlocks the logical structure of criminal law. Each element of a crime that the prosecutors need to prove beyond a reasonable doubt requires a principle of criminal liability to be fixed for that criminal act. There are some crimes that only involve a subcategory of the principles of liability, but such incidences are rare and are called crimes of criminal conduct. Theft or kidnapping, for example, are such crimes because all you need to prove beyond a reasonable doubt is the presence of *actus reus* along with *mens rea.*[117] It is this concept of intent or guilty mind called the *mens rea*, which along with other principles, is taken into account that is the principle of strict liability. Here the liability without fault may arise in cases of corporate crimes or

[115] S Raveena , 'The Development of Corporate Criminal Liability in the Common Law-An Overview', (2016) *International Journal of Law and Legal Jurisprudence Studies* <https://www.ijlljs.in.wp-content.com> Accessed on 22 November, 2017.

[116] Requirements for Criminal Liability: In General', State of Colorado Judicial Department (US), <https://www.courts.state.co.us> Accessed on 27 November, 2017.

[117] Principles and Theories of Corporate Criminal Liability < https://www.shodlganga.inflibriet.ac> Accessed on 27 November, 2017.

environmental crimes. In such evident acts of strict liability, the *mens rea* needs not be specifically proved. Many legal systems follow the general rule that the corporations may be held liable for a specific intent offences based on the knowledge and intent of their employees.[118]

2.1.9 Arguments for and against Corporate Criminal Liability

Considering the criminal liability of a corporation as a whole, not merely the liability of its constituent members, is important for several reasons. Firstly, the power of a corporation is greater than the power of its members only. Therefore, it is logical to consider corporate accountability to be attributed to the corporate entity as a whole rather than merely its constituent parts. This is particularly important when corporations may structure themselves specifically to avoid legal liability.[119] As a result, the recognition of corporate personality, followed by the imposition of criminal liability of the corporate entity, ensure that individuals cannot hide themselves behind corporate activity, nor can the corporate entity as a whole shelter behind the criminal liability of individual members.[120]

Secondly, recognising that the corporate entity as a whole is criminally liable allows for more effective legal and moral sanctioning of wrongful corporate activity. As such, criminal liability of corporations through the recognition of legal personality directly encourages the adoption of better standards, more responsible corporate behaviour and deterrence from future misconduct.[121] The recent development in the European civil law jurisdictions provides strong arguments for the effectiveness of this kind of reasoning. It has

[118] J G Stewart, 'A Pragmatic Critique of Corporate Criminals: Theory, Atrocity, Commerce and Accountability; A Paper Presented at the University of Toronto Workshop on Corporate Criminal Liability, 2012.
[119] C A Williams, 'Corporate Social Responsibility in an Era of Economic Globalization', (2002) 35 *University of California Davis Law Review* 769.
[120] N Gotzmenn , 'Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute', (2008) *Queensland Law Student Review, The University of Queensland, Australia,* 43.
[121] S Beale and A Q Safewat , 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability', (2004) 89 *Buffalo Criminal Law Review*, 154.

been documented in several European countries that criminal sanctioning of corporate activity plays an important role in reinforcing norms of acceptable corporate conducts.[122] Thirdly, recognizing the corporate entity as having legal personality for purposes of criminal law ensures the availability of effective means of punishment. For instance, it has been noted that the criminal sanctioning of corporate actors leads to effective shaming and stigmatization.[123] Punishments for criminal activities engaged in by a corporation may include fines and, in extreme cases, dissolution.[124] In many, cases, such means of punishment may be more effective than imposing tortuous liability or imprisoning individual members of the corporation, both of which effectively allow the corporate entity as a whole to continue its business relatively unimpeded.[125]

Corporations are a part of the community which enjoys a range of similar rights, although certainly not identical, as those accorded to individuals. As a result, corporations can be considered to be bound by the same laws and social norms like any other individual.[126]When corporation's engage in criminal conduct, the consequences that follow are usually of considerable costs. Therefore, the types of harm inflicted by a corporation are far beyond what any individual could produce, both in terms of the amount of money involved and the impact of the misconduct on broad portions of society. For example, as part of its guilty plea to violating the FCPA, German conglomerate Siemens A. G. admitted to paying approximately $ 1.4 billion in bribes, over a six-year period, through subsidiaries in France, Turkey and the Middle East to obtain contracts.[127] Similarly, pharmaceutical giant

[122] *Ibid.*
[123] *Ibid.*
[124] B Fisse, 'Restricting Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions', (1983) 56 *California Law Reveiw*, 1165.
[125] S Beale and A Q Safwat , *op cit.*
[126] P Henning, 'Should the Perception of Corporate Punishment Matter?' (2011) *Journal of Law and Policy, Wayne State University Law School*, 82.
[127] Siemems A. G. and three subsidiaries plead guilty to Foreign Corrupt Practices Act Violations and agreed to pay $ 450 million in combined criminal fines, United States Department of Justice, 15 December, 2008< http://www.justice.gov/opal/pr/2008/decembre/08-Crm-1105.html>Accessed on 19 August, 2017.

Pfizer paid $ 2.3 billion, including a criminal fine of $ 1.195, billion to settle civil and criminal investigations for promoting "off-ideal" uses of its drugs.[128] It is obvious that the fines put on the companies, in the above mentioned cases, are of an enormous amount. Corporate unlawful activity is punished considerably and the company has to pay a lot. The considerable fines make the companies more aware of what they have to pay if they risk acting unlawfully during their activities.

One of the main purposes of punishment is deterrence which is the prevention of future crime by the wrongdoer (specific deterrence) and other (general deterrence). Corporate criminal liability would not be needed if administrative fines and penalties were sufficient to keep corporations in line, but they are not. Corporations tend to treat fines as a cost of doing business; if the benefits of socially irresponsible behavior outweigh the potential cost (times the likelihood of getting caught) they will undertake it. The prospect of a criminal conviction, however, is different in kind. A corporation's reputation is one of its biggest, and a criminal conviction tarnishes that reputation in a serious and often unpredictable way. The corporation has an immense incentive to avoid this outcome.

Corporate criminal liability also serves the purpose of punishment: rehabilitation. Punishing a few wrongdoers is not likely to change the atmosphere of a big corporation, but collective entity liability will. By holding the corporation liable, prosecutors (and judges) can ensure that corporation puts in place compliance programs with real teeth in them. In recent times, corporations have even agreed to place outside "watchdog" directors on their boards to help with the oversight process. Overtime, compliance programs and careful over sight can reform the organization.[129] One part of rehabilitations is the paying of restitution to the

[128] Justice Department Announces Largest Health Car Fraud Settlement in its History, United States Department of Justice, 2 September 2009 < http://www.justice.gor/usao/ma/press office-press release files / Pfizer> Accessed on 19 August, 2017.
[129] B Fisse, *op cit.*

victims of one's crime often, white collar prosecutions involves millions, even hundreds of millions or billions of dollars of fraud. Convicted individuals do not have at their disposal anything near the amount of money necessary to pay restitution to the victims. The corporate entity however does.

Corporate criminal liability has some very significant benefits in deterring corporate crime and forcing corporations that commit crime to clean up their act. These benefits should not be underestimated, given the extent to which our economy is dominated by corporations, without such liability, white collar crime could very well run rampant throughout our business sector.

On the other hand, in holding corporations criminally liable, some innocent people are harmed. Where the corporation suffers monetarily because of the punishment and reduces in size or in rare situation, goes bankrupt as a result, innocent employees will be hurt financially. Also where the corporation raises its prices to offset the cost of a criminal conviction, innocent consumers will literally pay the price, although market forces should act to keep this harm to a minimum.

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

There is a distinction between criminal offences and regulatory offences. The first, also referred to as *mens rea* offences,[130] are usually contained in penal codes and require proof of both an *actus* reus and *mens rea* in the sense of some culpable state of mind. On the other hand, regulatory offences encompass those offences that consist of an omission to discharge a specific duty of affirmative performance imposed on corporations by law.[131] The differences

[130] S Idhiarchi, 'An Examination of the Scope of Corporate Criminal Liability in Nigeria' (2017), <htpps://www.researchgate.net> Accessed on 25 Nov., 2017.

[131] E K Ainslie, 'Indicting Corporations Revisited: Lessons of the Arthur Anderson Prosecution (2007) 43 *American Criminal. Law Review,* 107 at 121 <http://www.schnader.com >Accessed on 20 August, 2017. These categories of offences were also referred to as "quasi-criminal".

between these types of offences are that sanctions for criminal offences may only be imposed by court whereas sanctions for regulatory offences may also be imposed by administrative authorities (at least at the first instance imposed by administrative authorities unless an appeal was made to a court). There are also differences between criminal and regulatory offences as regards the stigma effect of sanction: while such effect is clearly present in sanctions for criminal offences, it is not present (or only present to a smaller extent) in sanctions for statutory offences.[132]

The most significant point about this distinction between the two is that in respect of regulatory offences it is unnecessary for the prosecution to specify any individual whose conduct will be attributed to the corporation for criminal purposes, and therefore a sort of strict liability is thus imposed.[133] Thus, it may be argued that the dialectics about the appropriateness of attribution of mental element to an artificial entity do not apply to statutory/regulatory offences.

2.2 Theoretical Framework

There are various theories used by different jurisdictions in the determination of corporate criminal liability. These theories will be looked at under this heading.

2.2.1 Theories of Corporate Criminal Liability

It‘s true that the principles of criminal law were developed in the traditional times to punish the guilty and to deter the wrongdoing of an individual. Whereas at the same time, a company is traditionally, said to be a fictitious and a nonfigurative social entity, which is incapable of a physical action or any knowledge or intention to commit wrong.[134]The Commonwealth

[132] Lex Mundi Business Crimes and Compliance Practice Group, Business Crimes and Compliance: Criminal Liability of Companies Survey. February 2008<www.lexmundi.com>Accessed on 10th August, 2017.
[133] E K Anislie, *op cit*, at 121.
[134] A Beck and A Borrowdale, Guidebook to New Zealand Companies and Securities Law, 7th ed. (2002) 85.

jurisdictions,[135] so far have traditionally approached this difficulty through a nominalist perspective that is, by treating the corporation as a mere collection of individuals and locating its criminal culpability as a derivative of the guilt of the individual players of the firm. The widely accepted common law basis of corporate responsibility where the courts and legislations of these countries have used many theories like the theory of vicarious liability of a company and the likes of identification theory to establish the guilt of the corporation for the criminal offences that it undertakes as an extension of the nominalist view only.[136] For the regulatory offences, legislation makes the imposition of corporate liability easier. Complexity arises with providing culpability of corporations in *mens rea* offences. Several theories have been advanced to tackle this challenge. Whereas, a company is traditionally and authoritatively said to be a fictitious entity that is incapable of a physical action or any knowledge or intention to commit wrong.[137]

The principles adopted by different countries to interpret the concepts and principles of corporate criminal liability have been established by certain theories. Therefore, keeping in view the foregoing discussions the emergence and recognition of various theories of corporate criminal liability are discussed hereunder.

2.2.1.1 Identification or Directing Mind Theory

This is also known as the 'organic theory' as the corporation is viewed as a body with various organs with the directors being the brain.[138] Under this theory, the principle basis on which a company is responsible for a criminal act is that a person whose is the directing mind and will of the company and who control what it does has committed an offence in the course of the company's business. Such a person is treated in law as being the company. Lord Reid stated

[135]The Commonwealth Countries adhering to the jurisdiction.
[136] E Colvin, 'Corporate Personality and Criminal Liability'. (1995) 6 *Criminal Law Forum* 1, p 1-2.
[137] A Beck and A Borrowdale, *op cit.*
[138] E Lederman, 'Models for Imposing Corporate Criminal Liability: From Adoption and Imitation Toward Aggregation and the Search for Self-Identity', (2002) 4(1) *Buffalo Criminal Law Review* 641 at 655

the principle in *Tesco Supermarkets Ltd v Nattrass*[139] thus; a living person has a mind which can have knowledge or intention or be negligent and has hand to carry out his intention. A corporation has none of these: it must act through living persons though not always one or the same persons. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his act is the mind of the company… he is an embodiment of the company, or one could say, he hears and speaks through the persona of that company within the appropriate sphere and his mind is the mind of the company. If it is a guilty mind, then that guilt is the guilt of the company. Also in the case of *M.M.A Inc. v National Marine Authority,*[140] the Supreme Court reiterated that a company is only a juristic person; it can act through an alter ego, either its agents or servants. It may in many ways be likened to a human body. It has a brain and a nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, these managers are the state of the mind of the comp-any and are treated by the law as such.

Lord Pearson also added that some officers are identified with the company as being or having its directing mind and will, its centre and ego, and its brains.[141] This directing mind theory was a reaffirmation of the principle laid by Viscount Haldane in *Lennard's Company Co. Ltd. v Asiatic Petroleum Company,*[142] the theory equates the corporation with certain key personnel who may be considered the directing mind includes directors, the managing director or the person to whom the particular functions had been delegated so that they may

[139] (1972) AC 155 at 170.
[140] (2013) All F.W.L.R Part 678, p.796. See also *Igwem & Co. Ltd v Igwebe* (2010) All F.W.L.R Part 540, p. 1293.
[141] *Tesco Supermarkets Ltd v Naltrass* (1972) AC 153 at 190.
[142] (1915) AC 705 at 713.

be performed without supervision, independently and without instruction from the board of directors.[143]

The theory has been criticized on several grounds. It was criticized as unduly restricting corporate criminal liability to the conduct or fault of directors and high level managers, thereby creating a discriminatory rule in favour of large corporations where the range of persons who will possess the relevant characteristics to make the company liable will inevitably be a small percentage of its work force.[144] The theory also fails to recognize that offences committed on behalf of large organizations often occur at the level of middle or lower tier of management.[145] When in fact many decisions of large corporations are made at the level of branches or units, the identification theory insulates corporations form liability for decisions made at those levels.[146] The identification theory has also been criticized as too broad and perhaps too simplistic in that it automatically attributes the actions of certain individuals to the corporation. Prior efforts by the company to prevent illegal activity by senior employees may not count much.[147]

The identification theory has to grapple with the concepts of *acts reus* and *mens rea* as they are transposed (or not) from individual criminal onto the corporate body. The theory is widely applied in common law jurisdictions, but Canadian courts had extended it by locating the 'directing mind' at much lower levels in the corporations than the English courts were willing to.

[143] See Lord Hailsham of St. Marylebone (ed) *Halsbury's Laws of England* (4th edn, Butterworth & Co. (Publishers) Ltd, 1976) 451.
[144] J Gobert, 'Corporate Criminality: Four Models of Fault', (1994) 14 *Legal Studies* 393 at 400 and B Fisse, 'Attribution of Criminal Liabilities to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 227.
[145] *Ibid* .
[146] *Canadian Dredge and Dock Co v The Queen* (1988) I. S. C. R. 662.
[147] D Markus , 'The Comparative History and Theory of Corporate Criminal Liability, New Criminal Review'(2013) *International and Interdisciplinary Journal*. Vol 16, No 2 240.

2.2.1.2 Vicarious Liability Theory

The first obvious attempts at ascribing criminal liability to corporations were done on the back of the established civil law doctrine of vicarious liability; Criminal vicarious liability naturally has its origins in the civil law agency concept. It is often rationalised on the basis of the proximity of relationship between the corporation and its individual human actor. Vicarious liability concept has been borrowed from tort law wherein there is automatic liability for the offences committed by officers acting within the scope of their employment.[148] Criminal vicarious liability may arise because some statutory offences may expressly or impliedly impose vicarious liability on all employers and principals for the act of employees or agents, especially for offences of strict or absolute liability. It may also arise because some countries by statutes expressly subject companies to vicarious liability for the conduct of its officers and directors (such as in Australia though the defense of reasonable care is permitted), and lastly, it may arise because some Jurisdictions embrace vicarious liability as a general principle for corporate liability even for *mens rea* offences. Compared to the identification theory, it extends liability to cover criminal wrongs committed by even lower level officers.

In respect of corporations, vicarious liability may be justified because it is directed to ensuring more internal policing.[149]The deterrence inherent in vicarious liability revolves round greater shareholder and corporate officer attention to the selection of officers and subordinates. As a model of liability, it certainly has utilitarian value in obviating problems of ascribing liability where the wrong is committed by the lower level official.[150] Because liability transmits through the wrongdoer to the corporation, individuals need not be

[148] J D Greenberg and E C Brotman, 'Strict Vicarious Criminal Liability for Corporations and Corporate Executives: Stretching the Boundaries of Criminalization', (2014) *American Criminal Law Review*, Vol 51.
[149] L H Leigh, The Criminal Liability of Corporations In English Law, (1969), at p 75; see also *James and Sons Ltd v Smith* [1954] 1 QBD 273 per Lord Parker at p 279.
[150] A J Duggan, 'The Criminal Liability of Corporations For Contraventions Of Part V Of The Trade Practices Act',1977 5 *Australian Business Law Review*,222.

prosecuted.[151] That may not be a good precept on which to operate in all circumstances; there will be many instances where the individual should rightly be prosecuted in addition to the corporation. Vicarious liability may also be justified on the basis of criminal law's chief aim of prevention and on the legitimate criminal goal of compensation. While an additional deterrent effect might be gained by applying respondent superior to all crimes of corporate agents, no characteristic peculiar to corporations demands exceptional measures. Justification for the application of the vicarious liability is on basis of deterrence as corporations may undertake much more rigorous internal policing and greater shareholder and corporate officers' attention is paid to the selection of officers and subordinates. Besides, the employers engaged the employees for economic gain. Therefore it is fair for the law to demand that the employer bears the losses (in this case usually fire) occasioned because of the employment relationship, for it is the employer who is going to reap the benefits of the relationship. Courts generally hold that a corporation is subject to strict vicarious liability for a criminal act by one of its employees if the later acted within the scope of his employment and intended at least in part to benefit the corporation.[152]

The relationship between vicarious liability and identification doctrine has been described as one in which the identification doctrine is actually a modified and limited version of vicarious liability theory. Identification doctrine holds the corporation liable only for the faults of senior employees or officers (the directing mind) rather than for the fault of all employees as occurs under vicarious liability.[153] Again the identification theory is used to attribute *mens rea* to the corporation itself, whereas in the case of vicarious liability, no

[151] J S Parker, 'Criminal Sentencing Policy For Organization's', (1989) 26 *American Criminal Law Review* 523
[152] *United States v Ionia Mgmt. S. A.*, 555F.3d 303, 309 (2d Cir. 2009) see also U. S. Department of Justice, United States Attorney's Manual 9-28. 200 (b) (2008) < http://www.justicce.govaccessed on 18 September, 2017.
[153] S Idhiarhi, 'An Examination of the Scope of Corporate Criminal Liability in Nigeria; <http://www.researchgate.net/publication/31521270 70 accessed on 18th September, 2017.

distinct or separate 'corporate' *mens rea* by those who control or run the corporations is required.[154]

Vicarious liability theory has been criticized as unfair as it subjects a corporation to criminal liability when a single rogue employee engages in misconduct, even if the misconduct directly violate corporation's policies and the violation occurred despite a rigorous compliance program.[155] Vicarious liability theory treats responsible corporations the same as corporations that fail to take reasonable efforts to prevent misconduct. The two are not similarly situated, however, insofar as a corporation can be blameworthy, a corporation that has implemented a robust compliance policy is less deserving of blame than a corporation which failed to adopt a compliance policy. Yet strict vicarious criminal liability treats the two equally.[156] It has also been argued that vicarious criminal liability reduces corporations' incentives to implement rigorous and effective compliance policies as the absence of such polices has no effect on whether a corporation is subject to vicarious criminal liability for its employees' criminal acts. Indeed, vicarious criminal liability may actually deter corporations from having robust compliance policies. When a compliance policy yields information about criminal acts, that information can end up being used by the government to indict the corporation.[157]Corporations may decide that they are better off without compliance policies that could produce evidence that would support holding the corporation vicariously criminally liable. Finally, when the employee who committed the misconduct is convicted of a crime, convicting the corporations as well results in duplicative liability. This is inconsistent with the doctrine of respondeat superior that underlies vicarious corporate

[154] *Ibid.*
[155] J Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability, (1994) 23 *Journal of Legal Studies,* 833.
[156] *Ibid.*
[157] D R Fischel & A O Sykes, 'Corporate Crime', (1996) 25 *Journal of Legal Studies*, 319,335.

criminal liability.[158] Whereas, the person who is actually responsible for the crime; could be punished without the unfair punishing shareholders and employees, by holding the corporation criminally liable. In the civil context, a tort plaintiff also cannot obtain a full recovery from an agent of a corporation and also recover from the corporation itself under a respondeat superior theory; the corporation's 'obligation is discharged when full satisfaction is obtained against the agent'. With vicarious criminal liability however, the corporation and the offending employee can each be punished for the same crime.

2.2.1.3 Aggregation or Organisation Theory

The aggregation model of corporate criminal liability extended the identification and vicarious liability doctrines by aggregating into one criminal whole the conduct of two or more individuals acting as the company (or for whom the corporation is vicariously liable) in order to impose corporate criminal liability on the corporation where the acts combined establish that liability but each act is in itself insufficient to do so.[159] Aggregation of employees' knowledge means that corporate liability does not have to be contingent on the individual employees satisfying the relevant culpability criterion.[160]

American courts developed the aggregation model, sometimes referred to as the doctrine of collective knowledge. In *United States v Bank of New England,*[161] in a charge of willfully failing to file report relating to currency transactions exceeding a certain statutory amount, the direction to the Jury was: " the bank knowledge is the totality of what all of the employees know within the scope of their authority, so if employee A knows one facet of the currency reporting requirement and B knows another facet of it, and C a third facet of it, the bank knows them all… the Court of Appeal affirmed the decision. Thus:

[158] *Ibid.*
[159] E Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Review*, 1
[160] *Ibid.*
[161] (1987) 821 F. 2d 844.

> A collective knowledge is entirely appropriate in the context of corporate criminal liability… corporations compartmentalize, knowledge, subdividing the elements of specific duties and operation into smaller components. The aggregate of those components constitute the corporation's knowledge of a particular operation. It is irrelevant wither employees administering one component of the operation knew the specific activities of employees administering another aspects of operation.[162]

In *Andersen LLP v U S,*[163] the Jury was instructed that it need not unanimously agree on the same Andersen employee having committed obstruction of justice so long as each Juror agrees that an employee obstructed justice. The aggregation model is rejected in common law[164] and there is an on-going debate whether the principle apply to and is an adequate test of liability in those forms of corporate crime that require proof of will or intent.[165]. The idea of aggregation has found the greatest favour where negligence is at stake and a decision has to be made about whether a collective failure to exercise reasonable care was culpable or about how great the measure of culpability was.

It must however be noted that whereas knowledge may be capable of aggregation, emotions (tied to intents) may not be equally capable of aggregation. Also the aggregation model fails to lift the corporate veil. It ignores the reality that corporations has a duty to put in place measures to ensure that not only must individuals be prevented from committing offences but it must put in place polices in order to prevent commission of crime by a group of persons.

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[162] *Ibid* at 856.

[163] No. H. 02-121 (S. D. Tex. 2002). see also A Weissmann and D Newman, 'Re-thinking Criminal Corporate Liability' (2007) 82 (2) *Indiana Law Journal* 411 < http://www.law.indiana.edu accessed on September, 18, 2017.

[164] Gobert, *opcit*.

[165] *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr. App. Rep 72: Here a seaman, Captain and five other crews failed to close the main Loading doors on a cross channel ferry. The ship sank and several hundred persons drowned. The court refused to follow the aggregation doctrine, holding that in the circumstance of the case there was insufficient evidence that the 'controlling mind' of the company had been reckless and the judge directed the Jury to acquit them.

Under the aggregate theory more junior officials and other servants of the company can form part of the collective knowledge or mind of the company, secondly, the aggregation theory has appeal where no single individual within the company is in possession of all the facts or individual.[166] Only by aggregating knowledge can the full picture emerge.

One of the consequences of this approach may be that the sum of the knowledge may be greater than the parts.[167] Another worrisome question is 'whose knowledge should be aggregated? Would the court adopt the directing mind theory and simply view senior executive as the individuals whose mind could be aggregated to form the necessary *mens rea*? In many respects such an approach mistakes the perceived benefit of aggregation as a model of criminal liability.[168] Another critical argument against this theory is that it might lead to the conviction of legal bodies under far reaching and absurd circumstances claiming that 'the trend allows the conviction of a corporation by piecing together the conduct of different agents so as to form the elements of one offence is the result of over personification of corporate bodies.[169] The real merit of aggregation theory lies in the somewhat more collectivist approach than either vicarious liability or the identification theory. Nevertheless, in common with those approaches, it suffers from the fact that it is but another search for the essence of corporate liability rooted in and routed through, the individual within that organization.[170]

2.2.1.4 Corporate Fault Theory

All of the foregoing three theories suffer from limitations; they are atomistic rather than holistic. They rest on the premise of designation of individuals whose acts and mental states

[166] Gobert, Corporate Criminality: Four Models of Fault, (1994), 14 *Legal Studies* 395.
[167] *Ibid*, p 405.
[168] *Ibid.*
[169] Ledermna, 'Criminal Law, Perpetrator and Correlation: Rethinking a Complex Triangle', (1985), 76 *Journal of Criminal Law and Criminology* 288.
[170] R May, 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations'; *Mountbatten Journal of Legal Studies* < http://www.ssudl.solent.ac.uk.accessed on 20th September, 2017.

can be attributed to the company. Corporate criminal liability is in all three a derivative form of liability.[171] All three theories suffer from the linkage of individual liability to corporate liability through the concept of juristic person. It is because of these limitations and from the desire to have an equitable premise for corporate criminal liability extendable to all forms of corporate criminal activity that scholars have considered 'corporate fault' as a model. The perception is that the attribution of fault or blame in corporate crime more properly requires focusing on collective corporate blame, rather than via the blameworthiness of individuals. If fault underlines individual liability, why should it not precede corporate liability? The nexus between the corporations and the individuals within them needs to be broken or, in any event, redefined. The preoccupation of fitting individualized liability to the corporate form is fraught with difficulty. History points to problems with all three of the foregoing 'atomistic' models of corporate liability. These models have limited success in providing a juristic basis of liability for corporations' criminal acts. It is dissatisfaction with all three that has led commentators to offer a fourth basis on which criminal liability can be attributed to the corporate form. The theory of corporate fault is one essentially based on collective fault. The company as a whole has liability not by the actions or intentions of individuals within but rather through expressions of the collective will of the company. The most obvious place for such expressions of intent to be found is in company policies and procedures. This model attempts to discover a touchstone of liability in the behavior of the corporation itself rather than in the attribution to the corporation of the conduct or mental states of individuals within the corporation. That Touchstone is the blameworthy 'organizational conduct (the 'fault') of the corporation such as failure to take precautions or to exercise due diligence to avoid the commission of a criminal offence. In other words, the determination of liability focuses on the role that a company's structure, policies, practices, procedure and culture (corporate

[171] Gobert, *opcit*, 407.

culture) play in the commission of an offence.[172] Corporate fault is then a conceptually different approach to corporate criminality:

The company is treated as a distinct organic entity whose 'mind' is embodied in the policies it has adopted. Corporate policy is often different from the sum of the inputs of those who helped to formulate the policy, and typically is the product of either synthesis of views or a compromise among competing positions. Policy may reflect the company's corporate ethos. This ethos which is often unwritten may have been forged by founders of the company who are no longer actively involved in its day-to-day affairs. When company policy or corporate ethos leads to the commission of crime, the company should be liable in its own right and not derivatively.[173]

This model recognizes that corporations have distinct public personae and possess collective knowledge. The model advocates a fundamental shift in the conception of corporate criminal liability as a 'transition from derivative to organizational liability', because of the increasing acceptance of the notion that corporations are moral and responsible agents.[174] A major assumption of this model is that a corporation, especially a large one, is not only a collection of people who shape and activate it, but also a set of attitudes, positions and expectations, which determine or influence the modes of thinking and behavior of the people who operate the corporation.[175]

This model was justified on the ground that is better equipped to regulate the modern corporation, especially a large one, which is typically decentralized. It was observed that harm from corporate crimes may have, in many situations, little or less to do with misconduct or incompetence of individuals, but more to do with systems that fail to address problems of

[172] *Ibid.*
[173] Gobert, 'Corporate Criminality: New Crimes for the Times', (1994), *Criminal Law Review*, 734.
[174] Lederman, *opcit*. p 686.
[175] J Gobert, and E Mugnai, 'Coping with Corporate Criminally some Lessons from Italy (2002) *Criminal Law Review* 621.

risk.[176]The attraction of this approach is that it takes away from the *actus reus/mens rea* problem. Individualism is supplanted by what Gobert calls a more expansive view of causation.[177] It also has appeal in the fact that it moves away from the application of conventional criminal liability to the corporate form. It will also take away the problems associated with the courts attempts to squeeze corporate square pegs into the round holes of criminal law doctrines which were devised with individuals in mind. Under the corporate fault model the focus would be on the creation of risks likely to lead to the occurrence of serious harm. If the harm in fact materialized, the company's liability would be for the failure to prevent harm rather than for the substantive crime itself. The company has the obligation to prevent crime under this model. In practice this means their development of policies and their implementation and the establishment of corporate ethos. As Gobert argues '*Mens rea* is one way, but not the only way, of getting at the issue of blameworthiness'.[178] The defence for a company facing criminal liability under the corporate fault model would be that of due diligence. The burden of proving due diligence should fall on the corporation. In satisfying the test of due diligence, the courts should adopt a test which clearly has its origins in health and safety law, with a balance being struck between the risk created against social utility of the activity weighed against the cost and practicability of eliminating the risk. Due diligence should be evidenced not just by senior management but rather by the organizational structure.[179]

Interestingly, the new proposal for an offence of corporate killing seeks to develop the concept of organisational blame worthiness.[180]While this is a welcome development, it still requires definition and elucidation. One danger may be the desire to equate this, simply with

[176] N Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault, (2011), *The Journal of Criminal Law* < http://www.journals.sagepub.com accessed on 20th September, 2017.
[177] Gobert, *op cit*, p 724.
[178] *Ibid*, p 729.
[179] French, 'The Corporation as a Moral Person', (1979),16 *American Philosophical Quarterly* 207-215.
[180] Ridley & Dunford, 'Corporate Killing-Legislating for Unlawful Death', (1997) 26 (2) *Industrial Law Journal*, 99-113.

managerial failings. In the process we may simply be reinventing the *Natrass* philosophy by the back door. The organisation as a collectivity is more than its managers. Corporate fault must look at collective failing rather than the failings on one section of the organisation.

2.2.2 The Concept of Corporate Crime

The origins of the concept of corporate crime can be traced to the larger concept of white collar crime, which was first introduced in the social sciences by American criminologist Edwin Sutherland in a 1939 presidential address to the American Sociological Association.[181]He defined white-collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation" Sutherland noted that while "crime in the streets"[182] captured the newspaper headlines, "crime in the suites" continued unnoticed. While white-collar crime was far more costly than street crime, most cases were not even covered under criminal law but were treated as civil or administrative violations.

Corporate conduct has been regulated by the corporate laws for a while. It's time that the liability of a company for criminal wrongs is addressed. The corporate environment of any company today, effects and includes many aspects. Every aspect is indeed affected when this environment get vitiated. There are so many people who get affected by the acts of the company both directly and indirectly. The first party that gets affected is the consumers or stakeholders who are its main beneficiaries and are at maximum risk. Then comes the employees of the corporation; who are twin roles; one role is of the victim and the other hand it is the main project against of crime. Then the State, that receives the economic reforms from it and also faces a dual loss when a corporation is guilty of a crime in the shape of employment and revenue loss and loss faced by the society. There are many other categories

[181] F E Hagan, 'Corporate Crime' < http://www.britannica.com> Accessed on 21 September, 2017.
[182] *Ibid.*

also who are involved in the corporate environment and get affected by the corporate crime like the international community, the NGO's working in those areas, the independent contractors, the shareholders, the creditors, the close society where the company operates and the environment surrounding the company etc. hence, it becomes pertinent to understand the nature of crime and criminality in the corporate sector.[183]

The perpetrators perceive themselves and are also seen by the society as sharp, fast intelligent and crafty citizens who have been able to maximally and beneficially exploit the available economic opportunities.[184] Over the years some sociologist and criminologist have sought to broaden the concept of corporate crime to include any misconduct involving a corporation, whether it is a breach of a criminal or civil law or regulatory rule. Some have even seen the concept of corporate crime as convening any announced legal actions against a corporation. Thinkers like Kip Schlegel have clearly pointed out the dangers of creating a very wide parameter of the concept of corporate liability will nullify the impact of it and believes in the confinement of its definition to the bare minimum. He lays down in his book the simple and short boundaries of the concept of corporate crime as; "any act that violates the criminal law".[185]

Thinkers like Bauchus and Dworkin take the similar new format in the twenty-first century and argue on the same lines that the ambiguity in relation to the concept of corporate criminal liability is because of the confusion that lives in the handling of definitions of corporate misconduct and illegal behavior of the companies. It can also be said so because, justifiably it is clear that all illegal corporate act or misconduct is criminal in nature.[186] It's

[183] R Krame, 'Corporate Criminality: The Development of An Idea' in Hochstedler E, (ed) *Corporate as Criminals* (Beverly Hills: Sage Publication, 1984) p 5.
[184] A K Ubeku, 'The Social and Economic Foundations of Corporation and other Economic Crimes in Nigeria' in A U Kalu and N Osinbajo (ed) *Perspectives on Corruption and other Economic Crimes in Nigeria*, Lagos Federal Ministry of Justice, 1991, 39, 46-47.
[185] R Krame , *op cit* .
[186] F E Hagan, *op cit.*

been long that the principles of the criminal law have distinguished between the so called petty crimes and the white collar crimes prevalent in the society including their differentiation from the other street crimes as well. It becomes pertinent to note that many convictions of research believe in separate existence of the corporate crime as a branch but eventually it remains a sub-set of white collar crime with occupational crime on the other hand being taken as the other importance sub-category of white collar crimes. The notion of the ambit of corporate criminal liabilities definition is clearly detained by Kramer, where he concluded that the corporate crime involves:

> Criminal acts (of omission or commissions), which are the result of deliberate decision making (or culpable negligence) by persons who occupy structural positions within the organisation as corporate executives or managers. These decisions are organisational in that they are organisationally based-made in accordance with the operative goals (primarily corporate profit), standard operating procedures, and cultural norms of the organisation and are intended to benefit the corporation itself.[187]

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

[187] R Krame, *op cit* p 6.

civil law jurisdictions instead of the criminal law. This blurriness may a times takes away the strictness of applicability of the principles of corporate liability.

2.2.3 Goals of Corporate Criminal Punishment

Many of the crimes most dangerous to society originate from an organization's activities and incentives. The criminal aggressiveness of organisations can be so devastating that it requires the implementation of new control techniques that exceed punishments for individual offenders. Corporate crime experts have thoroughly studied the rationales that justify punishing organizations.[188] Some basic points on the advantages of corporate criminal liability deserve brief analysis with respect to the goals of punishment. These goals can be characterized as retributive, rehabilitative, deterrent and incapacitation.

2.2.3.1 Retribution

This prevents future crime by removing the desire for personal avengement (in the form of assault, battery and criminal homicide), for example against the defendant. When victims or society discover that the defendant has been adequately punished for a crime they achieve a certain satisfaction that our criminal procedure is working effectively, which enhances faith in law enforcement and our government.[189] The U.S system insists on retribution and deterrence, the punishment must be just and fit. Under retributive theories (sometimes called just deserts) wrong doers are sanctioned because they deserve to be, not simply because their penalty is likely to have particular consequences such as reducing future offending.[190] The company is therefore sanctioned irrespective of whether it reforms its character (policies and

[188] C de Maglie, 'Models of Corporate Criminal Liability in Comparative Law, (2005) *Washington University Global Studies Law Review*, Vol 4 <http://www.openscholarship.wuslt.edu/lawg_globalstudies> Accessed on 20th September, 2017.
[189] The Purposes of Punishment < http://www.open.lib.umn.edu> Accessed on 5 Nov, 2017.
[190] A Ashworth, 'Sentencing' in M Maguire, R Morgan and R Reiner (ed) *The Oxford Handbook of Criminology* (Oxford: OUP, 2nd edn, 1994) p.1096-1097.

procedure) deters their conduct or sets an example to other.[191] Although retributive theories are sometimes associated with the political right, just desert is formed on respect for the individual, ensuring that sanctions are fair, determinate and proportionate.

2.2.3.2 Rehabilitation

This prevents future crime by altering a defendant's behavior.[192] The court can combine rehabilitation with incarceration or with probation. Rehabilitation traditionally focuses upon the idea of reformation of the offender's lawbreaking tendencies. To that extent rehabilitation involves a kind of transformation of character in which offenders are turned into law-abiding citizens by the application of some generalisable penal technique.[193]

There is a fuzzy line between rehabilitation and restoration. Some researchers argue that restorative and reparative theories are not theories of sanctioning or punishment as such; rather, their argument is that sentences should move away from punishment of the offender towards restitution and reparation, aimed at restoring the harm done to the victim and to the community.[194] There are two elements of restorative theories. First, there is restoration as restitution or reparation. Here a sanction is imposed to correct the damage done. If a sanction leads to customers being compensated and profits from wrong doing removed, it fulfils an important objective. The second element is restoration as rehabilitation. To the extent that restorative theories are concerned with the restoration of offenders, they are based on a behavioral premise similar to rehabilitation. Where adverse publicity leads to a change of polices as well as procedure, it may be characterized their as rehabilitative or restorative. A company guilty of wrong doing may find that to redeem itself, it need to acknowledge its

[191] D D Dobbs, 'Ending Punishment in Punitive Damages: Deterrence Measured Remedies' (1989) *ALA Law Review*. 831 at 844.
[192] A Ashworth, *opcit*, p 1098.
[193] R A Duff and D Garland, *A Reader on Punishment* (Oxford: Oxford University Press, 2005) p 24.
[194] A Ashworth, *op cit*, p 1100.

wrong doing, express remorse, and explain its intention to remedy the problem leading to the misconduct.

Adverse publicity which is a form of corporate sanction may lead to 'collective soul searching' and examination of the reasons the conduct occurred… this re-evaluation furthers the rehabilitative goals of punishment.[195] One aim of sanctioning companies is to ensure that they correct errors, such as inadequate controls or supervision, which have led to the commission of an offence. This involves a form of rehabilitation, although one that focused more on deeds than remorse. Thus, a company will put up measures in place to make such mistakes less likely to occur in future.[196]

2.2.3.3 Incapacitation

One of the aims of sanctioning is incapacitation. This prevents further crime by removing the defendant from the society. Examples of incapacitation are incarceration, house arrest, execution pursuant to a dealt penalty or dissolution and other forms of sanctioning companies. Where wrong doing continues after litigation public notification of the wrong doing would allow market forces to dictate whether the conduct needs to change…consumers may not purchase the product or do business (with the wrong doer).

For the general population, an individual convicted of a crime must not be allowed to mingle with the rest of the society without any guarantees that the person will not do the same crime again.[197] In incapacitating the goal of criminal law is to effectively protect the public from the criminal acts of the defendant. In some societies, this is carried out in the

[195] *Ibid.*
[196] P Cartwright, 'Publicity Punishment and Protection: The Role (s) of Adverse Publicity in Consumer Policy' (2012*) Legal Studies*, 32(2) p 179-201.
[197] A Barton, 'An Overview of the 5 Objectives of the Criminal Justice System', (2015) <https://www.Isfma.com> Accessed on 30 November, 2017.

form of a death sentence or banishment or in most case life impressments for individual. With respect to organization, it would mean winding up of the company.

Proponents of the incapacitation theory of punishment advocate that offenders should be prevented from committing further crimes either by their (temporary or permanent) removal from society or by some other method that restricts their physical ability to reoffend in some other way. The overall aim of incapacitation is to prevent the most dangerous or prolific offender from reoffending in the society. The concern here is with the victim or potential victim. The rights of the offender merit little consideration. Incapacitation has long been a significant strategy of punishment.[198] The most severe and permanent form of incapacitation is capital punishment. Capital punishment is often justified through the concept of deterrence but, whether the death sentence actually deters potential offenders is highly contested. Other types of severe or permanent incapacitation punishments include dismemberment, which is practiced in various forms. For example, the physical permanent removal of a company or firm from bidding public tenders. Less severe forms of incapacitation are often concerned with restricting rather than completely disabling offenders from reoffending. These include sentences such as disqualification from a particular activity. According to this incapacitation theory punishment is not convened with the nature of the offender, as it is the case with retribution. Rather, punishment is justified by the risk individuals/ (companies) are believed to pose to society in the future. As a result individuals/companies can be punished for "hypothetical" crimes. In other words, they can be incarcerated, not for crimes they have actually committed but for the crimes it is anticipated or assumed they will commit.

[198] H Ball and L Friedman, 'Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View', (1965) *Stan. Law Rev*. 197 at 2169-217.

2.2.3.4 Specific and General Deterrence

Deterrence prevents future crime by frightening the defendant or the public.[199] The two types of deterrence are specific and general deterrence. Specific deterrence applies to an individual defendant. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear or another similar or worse punishment. General deference applies to the public at large. When the public learns of an individual defendant's punishment, the public is less likely to commit a crime because of fear of the punishment the defendant experienced.[200] The most obvious aim of sanctioning is to prevent future harm through deterrence. Most corporate crime theory has been deterrent-based, in the sense that the purpose of instituting sanctions has been to discourage violations and encourage good practice. A distinction might be drawn between deterrence and compliance. "Deterrence" implies that in the absence of the threat of a sanction, traders will decide rationally to engage in wrong doing where that is financially beneficial. But traders may want to comply with the law for a range of reasons. First, habit may lead to compliance. Most corporate actors comply with the law most of the time because it is the law.[201] Secondly there is the symbolism attached to breaches of the law, particularly criminal, law, which lead firms to try to comply. The word crime has symbolic meaning for the public and the criminal law is stained so deeply with notions of morality and immorality, public censure and punishment, that labeling an act as criminal often has consequences that go far beyond mere administrative effectiveness. Thus, businessmen abhor the idea of being branded a

[199] C Wells, *Corporations and Criminal Responsibility* (2nd edn, New York: Oxford University Press, 2001) p.31.
[200] *Ibid.*
[201] P Cartwright, *op cit.*

criminal.[202] The language of deterrence might be used here, but compliance results in part form a desire to be seen as acting within the law.[203]This is viewed as a search for prestige[204].

2.2.4 Sanctions for Criminal Corporations

The first attempts to impose corporate criminal liability were taken by common law countries, such as England, the United States and Canada despite can earlier reluctance to punish corporations. There were a number of reasons for this reluctance such as lack of necessary *mens rea*, the inability to appear in court personally and the lack of adequate sanctions corporations cannot be incarcerated. Nor can they be put to death. Otherwise, corporations and individuals face many of the same consequences following conviction. Historically, the only practical sanction available for corporations convicted of a criminal offence has been a fine.[205] Essentially, there are two reasons for this limitation in sentencing. First, corporations are legal fictions, and as such have not been subject to sanctions designed for individuals. Second, courts are reluctant to use dissolution of a criminal corporation as a sanction.[206]

In the United States, corporations and individuals alike are sentenced in the shadow of the Federal Sentencing Guidelines. The Sentencing Guidelines for organisations measure punishment according to the seriousness of the offense as well as the defendant's culpability and history of misconduct. On the other hand, they reward self-disclosure, cooperation, restitution and preventive measures. The guidelines supply special corporate sentencing directions for fines, probation, forfeiture, special assessments, and remedial sanctions.

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[202] *Ibid.*
[203]I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) p 19.
[204] H Ball and L Friedman, *op cit* p 216.
[205] 'Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing', (1979) 89 *Yale Law Journal* 354.
[206] *Ibid.*

The issues of what sanctions are appropriate for corporate criminal activities has been the constant subject of the doctrinal debates and often times, has been the argument for rejecting corporate criminal liability. The first issue raised in the debate was the individual character of criminal responsibility. The critics argue that by sanctioning the corporate entity, all its members are sanctioned regardless of whether they had any participation in the criminal offence. Thus, sanctioning a corporation to pay a criminal fine would have the indirect effect of diminishing the income of the stockholders, or the corporation would be forced to reduce the number of innocent employees who would lose their income.[207] This would amount, in the critics' view, to a criminal liability for another's crimes, which would be unacceptable. The only person suffering the direct effect of criminal sanction is the corporation. Members are not unusually personally liable for the corporation's activity, and liability being covered by the corporation's patrimony. The side effects of losing profits are risks that members have taken from the beginning. As members may benefits from the advantages resulting from the corporations' activities, they also may suffer some inconveniency.[208] It has also been argued that corporate criminal liability would result in double sanctioning when both the individuals and the corporation are convicted for the same criminal offences.

Thus, the convicted individuals who acted on behalf of the corporation would be sanctioned through the individual penalty and also by losing income from the corporation. However, as shown above, there is no risk of violating the *non bis in idem* principle because the corporation and the individuals have separate patrimonies and identities. When a

[207] J Gobert, 'Controlling Corporate Criminality: Penal Sanctions and Beyond', (1998) 2 WEBJCLI P. 6 < http://webjcli.ncl.ac.uk/1998/issue/gobert 2.html> Accessed on 20 November,2017.
[208] I P Anca , *op cit.*

representative of the corporation commits a criminal offence we can distinguish two separate liabilities-individual liability and corporate liability which are based on separate elements.[209]

2.2.4.1 Fine

A fine is a criminal sanction while a civil sanction is called a penalty.[210] Non-payment of a criminal fine can result in incarceration, whereas nonpayment of a civil penalty cannot.[211]The amount of a fine varies with the severity of the offence. Fines are the most common type of sentence given. Fines can be given to organizations or companies as well as people. However, fines have been the primary method used to control corporate criminal liability. For example in the U. S, the Corporate Fine Guidelines began with the premise that a totally corrupt corporation should be fined out of existence, if the statutory, maximum permits.[212] A corporation operated for criminal purposes or by criminal means should be fined at a level sufficient to strip it of all its assets.[213] On the other hand, a fine need not be imposed at all if it would render full victim restitution impossible.[214] On the other side, a fine below the recommended range should be imposed when necessary to permit restitution or may be below that range, when the corporation will be unable to pay a higher fine even on an installment basis.[215] A below-range corporate fine may also be fitting in light of individual fine imposed upon the owners of a closely held corporation. The criminal fines are the most common sanction. The rationale behind the use of fines in sentencing is deterrence. Corporations are presumed to act rationally in their profit-making ventures. The establishment of a system of

[209] J Gobert, *op cit.*
[210] Fines-Sentencing Council < http://www.sentencingcouncil.org.uk> Accessed on 10 Nov. 2017.
[211] United States Sentencing Commision Guidelines Manual (1992). Hereinafter referred to as (U.S.S.G.) Section 8 (1) I. The Guideline calculation that falls short of a statutory minimum or exceeds a statutory minimum must be adjusted accordingly.
[212] *United States v Najjar* (2002) 300 F.3 d 466. Tri-city was exposed to $ 500,000 fine under the statute and what has been called a death penalty fine under Section 8 (c) (1) (1) of the Sentencing Guidelines…it is clear that Tri-city was conceived in crime and performed little or no legitimate activity.
[213] 18 U.S.C 3572 (b), U.S.S.G Section 8(C) 2.2
[214] U.S.S.G. Section 8(C) (3) 3.
[215] U.S.S.G. Section 8 (C) (3) 4.

fines is also designed to make corporate crime unprofitable, thus deterring rational corporations from criminal conduct. Unfortunately, the use of fine as a deterrence is rendered ineffective through a phenomenon known as the "deterrence trap". The "deterrence trap" occurs when the size of the fine that is necessary to deter criminal conduct by a corporation is larger than that which the corporation is able to pay. A description of the 'deterrence trap' is as follows:

> The crux of the dilemma arises from the fact that the maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth. Logically, a small corporation is no more threatened by a $5million fine than by a $500,000 fine if both are beyond its ability to pay. In the case of individual offender, threat of fines cause no serious problem because we can still deter by threat of incarceration. But for the corporation, which has no body to incarcerate, this wealth boundary seems an absolute limit on the reach of deterrent threats directed at it. If the "expected punishment cost "necessary to deter a crime crosses this threshold, adequate deterrence cannot be achieved…In short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment coat which does not exceed the corporation's resources.[216]

A Pecuniary sanction has the advantages of directly affecting the corporation, it generates the capital necessary for compensation or restitution to the victims, it can be executed with minimum costs, and when appropriately individualized, it has a sufficiently strong impact to accomplish the scope of the punishment (especially the retributive and deterrent scopes).[217] Whereas the greatest threat to an individual may be loss of liberty, the greatest threat to a company is the loss of profitability. Because such a loss strikes at the essential purpose of the company, a fine holds the potential to be an effective deterrent[218]. A corporation will balance the momentary gain from the offence with the loss from the potential

[216] J D Curran, 'Probation for Corporations under the Sentencing Reform Act', (1986) *Santa Clara Law Review*Vol 26 No 3 < htpp://www.digitalcommonlaw.scu.edu. accessed on 29 Nov., 2017.
[217] I P Anca , 'Criminal Liability of Corporations-Comparative Jurisprudence, < http://www.law.msu.edu> Accessed on 25 November, 2017.
[218] J Gobert, 'Controlling Corporate Criminality: Penal Sanctions and Beyond, 2 Web JCU p. 7 (1998) <http://www.webjcli.nd.ac.uk/1998/issue/gbert2.html> Accessed on 20 November, 2017.

criminal fine. Therefore, the fines must be sufficiently high to have an impact on the corporations: the amount of the fines should also take into account the financial resources of the corporation.[219]

At the same time, fines have some disadvantages. A very high fine would have a negative effect on innocent third parts. Although a corporate manger usually commits the crime, he will be the last one to suffer the impacts of his actions. Even if adequate fines are imposed, however, other problems arise when monetary penalties are the sole sanction used to control corporate behavior. The use of fines may also work injustice on innocent parties. The real cost of a fine may be borne not by the corporation, but by the shareholders through lower dividends and by the consumers through the increase of the prices for the corporation's products. Neither of these parties has significant control over corporate-decision making. Furthermore, depending on the characteristics of the relevant market, heavily fining a corporation may lead to non-management employee layoffs as well as other forms of detriment to innocent third parties.[220] Thus, raising the level of fines will not prevent a corporation from passing along the penalty.

Profit maximization is not a complete explanation of corporate criminal behavior. People still make decision and take the action for criminal conduct.[221] An individual manager may perceive illegal conduct to be in his interest, even if such conduct exposes the corporation to potential costs which far exceed the potential benefits. Thus, the behavioural perspective suggests that "it may be extraordinarily difficult to prevent corporate misconduct by punishing only the firm (with a fine).[222]

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[219] *Ibid* p. 8.
[220] *United States v Danilow Pastry Co.* (1983) S.D.N.Y 563F. Supp 1159, 1166-1167.
[221] Coffee, 'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment, (1981) 79 *Michigan Law Review* 393.
[222] *Ibid.*

The multi-divisional and often radically decentralized structure of the modern corporation also acts to weaken the deterrence value of fines. While it is the top management which sets the directives of the corporation, it is often up to the middle-level managers to meet those directives. This tends to insulate the top management (which may well desire that the sordid details of 'meeting the competition' not filter up to its attention) and intensify the pressures on those below.[223] As a result, the top management, which is generally the most concerned with profit maximization, is often unaware of the criminal conduct by the middle-level managers.

Fines alone do not address the complexities of corporate criminal behavior. Although a monetary penalty is a useful sanction in sentencing a criminal corporation, it is not adequate as a sole remedy to control corporate criminal activity. In response to this inadequacy, new sanctions were developed and employed in sentencing criminal corporations. Despite all its drawbacks the fine is the least expensive and most frequently applied sanction.

2.2.4.2 Community Service

This is one of the innovative criminal sanctions. Community service is paying the community back for harm done, through doing work that benefits the public, is the essence of community service. Sentencing courts can require corporate offenders to engage in community service that is 'reasonably designed to repair the harm caused by the offense'.[224] Community service should not be used as an indirect means to impose financial burdens on a convicted firm since a community order is a less efficient means to achieve this end than a direct fine.[225] Rather, courts should impose community service orders only when "the convicted organization possesses knowledge, facilities or skills that uniquely qualify it to repair damage caused by

[223] C Stone, 'Where the Law Ends- The Social Control of Corporate Behaviour'. (1975) *Criminal Law Reviev*, 36.
[224] U.S.S.G. Chapter 8, Section 8 B 1.3.
[225] However, community services may constitute a sensible sanction when a firm is unable to pay its full fine.

the offense.[226] The U.S. Guidelines endorse community service when a corporate offender can efficiently repair offense damage through its own efforts. However, the U.S. Guidelines do not identify the features that distinguish corporate community service order from remedial orders. The former are described as requiring a convicted corporation to "repair the harm caused by the offense," while the latter entail efforts to "remedy the harm caused by the offense".[227] While the common remedial focus is certainly present, there is little difference in the description of these types of orders other than the labels used. The Sentencing Guidelines do not recommend community service for punitive or deterrent purposes alone. The Guidelines provide that compelled community service should remedy offense harm, suggesting that community service imposed for purely punitive or deterrent reasons is inappropriate.[228]Even with this restriction, courts can tailor community service obligations provide for some impact on corporate reputations along with remedial benefits and thereby serve punitive or deterrent goals as well as remedial ends. Corporate community service has previously entailed service obligations imposed on specific executives who were not themselves convicted of an offense. The involvement of high-level mangers in corporate community service activities may be necessary for community service to have the types of reputational impacts that will have significant punitive and deterrent value. The reputation of a firm and the attitudes of its managers will be less likely to change if a firm can designate a low-level employee to perform its community service than if that service must be performed by a high-ranking corporate officer.[229]

[226] R Gruner, 'To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders through Corporate Probation (1988) 16 *American Journal of Criminal Law*, 39.
[227] U.S.S.G., Section 8 B1.3 and Section B. 1. 2 (a).
[228] B Fisse, 'Community Service as a Sanction against Corporations', (1981) *Wisconsin Law Review*, 970.
[229] *Ibid.*

2.2.4.3 Remedial Order

A remedial order is also one of the innovative criminal sanctions that serve important sentencing goals that are often unsatisfied through other criminal sentences. The Sentencing Reform Act of 1984,[230] places remedial goals at the heart of federal sentencing in the U.S. The Guidelines reflect the U.S. Sentencing Commission's view that in sentencing an organizational offender, a court must, whenever practicable order the organization to remedy any harm caused by the offense.[231]If for example the company involved in the corporate crime deals on delivering health and safety services, they would be required to provide health and safety services to the community or to families or to workers, that have been affected by a workplace death (s). Remedial orders were intended by the Sentencing Commission to be fallback sanction for corporate offenders, imposed only when restitution orders are insufficient to address victim injuries[232]. Reasons why restitution might be inadequate and remedial orders correspondingly justified include difficulty in identifying crime victims and the scope of their economic damage, the presence of small damage to numerous victims making individual recoveries procedurally inefficient, or the involvement of aesthetic or other non-pecuniary harm in an offense.[233] Two areas where these orders may be particularly important are food and drug violations and environmental offenses.[234] For example where a firm is convicted of illegally marketing drugs, the firm must be required to recall the unsold products and content users of the drug to prevent further usage. The firm also might be compelled to provide medical screening to past users of the drug to help them recognize the harm resulting from the use of the drug. In an environmental context, remedial order might be

[230] The Sentencing Reform Act of 1984 was enacted as part of the comprehensive Crime Control Act of 1984.
[231] U.S. Sentencing Commission, Sentencing Guidelines Manual (2001) 413.
[232] M Jefferson, 'Corporate Criminal Liability: Sanctions and Remedial Action', (1996) *Journal of Financial Crime* Vol 4 Issue 2, 176 available at https://www.doi.org accessed on 28 November, 2017.
[233] *Ibid.*
[234] R S Gruner, 'Beyond Fines: Innovative Corporate Sentences under Federal Sentencing', (2013) *Washington University Law Quarterly* Vol 71, 261 < https//openscholarship.wustl.edu accessed on 22 Nov, 2007.

used to require an offender to clean up after an illegal oil spill,[235] to conduct follow-up studies of related environmental damage and to take affirmative action's to aid in the restoration of plant and wild life populations.[236]

2.2.4.4 Adverse Publicity

The publication of the decision or the adverse publicity order (which consist in the publication at the company's expense of an advertisement emphasizing the crime committed and its consequences) are also sanctions for corporate criminal activity.[237] This has an important deterrent effect because of the incidental loss of profits that negative publicity can cause.[238] By its nature, this sanction can be only an auxiliary sanction accompanying another corporate penalty.[239] This sanction also has a possible spill-over effect, the losses can cause the corporations to close plants or even go out of business, which in turn will negatively affect innocent employees, distributors and suppliers.[240]

Adverse publicity diminishes corporate prestige by stigmatizing the corporation and by pulling it in an undesirable spotlight thereby facilitating unwanted investigation and regulation. In certain circumstance, adverse publicity may also cause financial loss to the company. The unique value of a publicity sanction, however, lies in its ability to target aspects of corporate welfare that cash fines cannot directly affect.[241] Adverse publicity can also exploit the sensitivities of corporate management who value prestige and autonomy as end in themselves, not merely as means to profits. Corporate executive are thought to be

[235] *United State v Allied Chem.Corp* (1976) 420 F. Sup. 122 (where a firm guilty of illegal pollution discharges was required to clean up affected river).
[236] *United State v Seest* (1980) 631 F. 2d 107 (The Defendant was required to restore wetland destroyed for irrigation).
[237] J Gobert, *op cit*.
[238] *Ibid.*
[239] I P Anca , 'Criminal Liability of Corporations – Comparative Jurisprudence, <http://www.law.msu.edu> Accessed on 22 November, 2017.
[240] *Ibid.*
[241] K Yeung, 'Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?' Australian Institute of Criminology < https://www.aic.gov.au> Accessed on 20 Nov. 2017.

highly deterrable by adverse publicity because those in high status occupations have more to lose in social standing and respectability by having their reputations tarnished.[242] Large scale market-surveys of consumer attitudes also support the existence of a direct relationship between corporate reputation and firm performance.[243] They report that most consumers claim that brand quality, company image and reputation have a significant impact on their purchasing decisions. Companies fear the string of adverse publicity attacks on their reputation more than they fear the law itself.[244]

2.2.4.5 Corporate Probation

As part of Federal Organisational Sentencing Guidelines enacted on November 1, 1991, the United States Sentencing Commission included organizational probation. This sanction allows courts to place convicted corporations on probation, with conditions designed to reduce the likelihood of future law violations and remedy the effects of the original offense.[245]

Organisations cannot be incarcerated. Probation is one of the criminal sanctions available to them.[246] Probation for organisations was formally codified into Federal law in November 1991, when the U.S Sentencing Commission added Chapter 8 to the U.S Sentencing Guidelines. According to Lofquist, before its codification in the guidelines, organizational probation was used for the first time in a federal criminal case of *United States v Atlantic Richfield Co.,*[247] a U.S District Court judge James B. Parsons, Jr., broke jurisprudential

[242] A Cowan , 'Scarlet Letters for Corporations? Punishment by Publicity under the New Sentencing` Guidelines (1992) 65 *Southern California Law Review*, 2387.
[243] I Devine and P Halpern, 'Implicit Claims: The Role of Corporate Reputation in Value Creation' (2001) 4 *Corporate Reputation Review,* 42.
[244] B Fisse and J Brithwaite, *The Impact of Publicity on Corporate Offenders* (New York State University of New York Press, 1984) p. 10.
[245] W S Lofquist, 'Organisational Probation and the U.S Sentencing Commission, *Sage Journals*, <htpps://www.journals.sagepub.com accessed on 29 November, 2017.
[246] G Green, Organisational Probation under the Federal Sentencing Guidelines, <http://www.uscourts.gov accessed on November30, 2017.
[247] (1971) 465 F.2d 58.

ground by placing Atlantic Richfield on probation so that he could monitor the company's progress in complying with his order to develop an oil spill response program. Judge Parson's innovation was widely copied by his colleagues and by the middle 1980's; probation was ordered in approximately a fifth of all federal corporate convictions. Unfortunately, the legal soil in which Parsons tried to root his precedent, the Federal Probation Act of 1925 was tenuous because it was intended originally for the rehabilitation of individuals, not organisations. As a result of this weakness, probation sentences for organisations often were successfully appealed on the grounds that they were not aimed solely at monitoring fine collection. Successful appellants generally argued that their probation conditions had nothing to do with the offense, that organisations were not properly subject to the intent of the Federal Probation Act and that organisational offenders had the right to refuse the 'grace of probation'.[248] It therefore became clear by the later 1980s that if additional conditions of organisational probation were to be allowable, such as those mandating structural changes within convicted organisations, codification into law was necessary. Although the Commission had no mandate to do so, it nevertheless developed sophisticated guidelines for the use of organisational probation.[249]

The result was the Commission's Section 8 D1.1 of the guidelines which states that the U.S district court "shall" order a term of probation for organisations if it deems any of the following to be true:

a. Such a sentence is necessary to monitor the payment of restitution, enforce an order to remedy the cause of the offense, or ensure the completion of community service.

b. There may be problems in the collection of any monetary penalties (e.g fine, restitution, special assessment) that remain unpaid at the time of sentencing.

[248] R Baldwin, 'The Application of the Federal Probation Act to the Corporate Entity'. (1974) 3 *Baltimore Law Review*, 294.
[249] Lofquist, *op cit* p.160-161.

c. The organisation has 50 or more employees and does not have an effective program to detect and prevent future violations.

d. The organisation within 5 years before sentencing engaged in any similar misconduct, as determined by a prior criminal adjudication

e. An individual within high-level personnel of the organisation participated in similar misconduct during the instant offense and at another time within 5 years before sentencing (as determined by a previous criminal adjudication).

f. Such a sentence is necessary to ensure that changes within the organisation are made to reduce the likelihood of future criminal conduct.

g. The sentence imposed does not include a fine.

2.2.4.6 Dissolution or Winding Up

Dissolution or winding up represents the capital punishment for corporations. Winding up of a company involves the liquidation of the company so that the assets are distributed to those entitled to receive them. In the case of *Oredola Okoya Trading Co v B.C.C.I.*,[250] the court held that liquidation is distinguishable from dissolution which is the end of the legal existence of a corporation. Liquidation may precede or follow dissolution. However, the court went ahead to state that mere revocation of banking license of a bank without more cannot bring to an end the juristic life of a bank or corporation. Due to its drastic effects, some authors argued that the sanction of dissolution should be applied only when the corporation committed very serious crimes, or when the corporation was created for illegal purposes[251]. Others argue that such punishment should be completely eliminated from the category of corporate sanctions[252]. Firstly, too small or closely held corporations, dissolution alone does not prevent the controlling parties from simply regrouping in a new form. Secondly, as to

[250] [2015] F.W.L.R Pt 806, p. 248.
[251] J Gobert, *op cit.*
[252] I P Anca, *op cit.*

large corporations, the socially disruptive effects of the dissolution of a whole corporation would generally be so great as to outweigh its benefits. Winding up or liquidation is putting an end to the life at a company. A winding up may be effected in any of the following ways; by the federal High court, voluntarily; or subject to the supervision of the court.[253]

2.2.5 Sanctioning Culpable Corporate Managers, Directors and Officers.

At the expense of prolixity, it is pertinent to reiterate that as an artificial or fictional entity, a corporation cannot form any intent to commit an act, criminal or otherwise. Instead, it acts only through its officers, employees and agents. Traditionally, courts have held corporations vicariously liable for torts committed by their agents acting within the scope of their employment duties. Thus, in the U.S, the Supreme Court extended this concept to criminal acts, holding that a corporation may be held criminally liable for the acts of its agents that were motivated to benefit the company.[254] If there are adequate grounds to impute criminal intent to a corporation, it may be held vicariously criminally liable for any act or omission an agent commits:

a. Within the agent's scope of employment
b. With some intent to benefit the Corporation

A. Conduct Committed within the Scope of Employment

The doctrine of vicarious liability can only be adduced if the act of the employee was done in the course of his employment and this does not really mean during the hours of his employment.[255]

In Salmond on Torts,[256] the test stated was as follows:

[253] Section 401 CAMA Cap C20 L.F.N 2010.
[254] *New York Central & Hudson River R.R. Co. v United States* (1909) 212 U.S 481, 494-495.
[255] A Mahesh, Corporate Criminal Liability (2015) < https://www.lawoctopus.com> Accessed on 27 Nov., 2017.

> …the master is responsible for acts actually authorized by him, for liability would exist in the case, even if the relation between the parties were merely one of agency, and not one of service at all… on the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act of the mode of doing it, but is an independent act, the master is (not responsible; for in such a case, the servant is not acting in the course of employment but has gone outside of it.

From the above it seems that for an act to be in the course of employment that the act must be authorized and if not authorized, the act must be closely connected with the act which he (the employer) has authorized that they may be regarded as improper or wrongful modes of doing authorized acts. In *Innocent Okafor v John Okiti-Akpe*,[257] where the master of the driver specifically prohibited the act which gave rise to the action and did not directly acquiesce in the breach of the order, the Supreme Court upheld the judgment of the High Court which held the company vicariously liable for the acts of its employee, the driver. It is worthy to restate that this theory was borrowed from torts law.

Generally, the scope of employment is met if the agent has actual or apparent authority to engage in the act in question. Apparent authority is the authority that 'outsiders would normally assume the agent to have, judging from his position within the corporation and the circumstances surrounding his past conduct.[258] The term 'scope of employment' has been broadly defined to include acts committed on the corporation's behalf in performance of the agent's general course of work.[259] Therefore, if the agent is performing some job-related duty, the scope of employment element can be established. This is true even if the agent's actions contradict the corporation's policies or compliance programs.[260] It becomes a question of fact whether the corporation took sufficient and adequate measures to enforce its

[256] (London: Sweet & Maxwell 1898)18th Edition, p. 437-438.
[257] (1973) 1 MNLR 317, (1973) 255 S C 49.
[258] *United States v Bi-Co Pavers, Inc.* (1984) 5th Circuit 74441 F. 2d 730,737.
[259] *United States v Hilton Hotels Corp*. (1972) 9th Circuit. F.2d 1000.
[260] *United States v Twentieth Century Fox Film Corp*. (1989) 2nd Circuit 882 F. 2d 656, 660.

policies or compliance programmes to place criminal acts outside the scope of the agent's employment.[261]

In the United States, there are two conflicting systems which approach issues differently, namely the Common law and the Model Penal Code (MPC). Common law states that a corporation is liable for its agent's activities irrespective of the employee's status or position in the corporation's bureaucracy. In the case of *Dollar Steamship Co. v United States,*[262] the common law system upheld the criminal liability of a steamship company for polluting the waters even though the employee dumping refuse overboard was a mere kitchen worker. MPC on the other hand states that the illegal act must be 'authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.[263]Thus, the Model Penal Code allows corporations to evade liability as long as the top managers in their hierarchy exhibit due diligence in the monitoring and stamping out of wrongdoing.

b. Intent to Benefit the Corporation

A corporation is accountable for an agent's conduct if that conduct is motivated at least in part by a desire to serve the corporation, but this need not be the sole motivation[264]. If the agent acted with the intent to benefit the corporation in some way, the act is imputed to the principal whether the corporation benefitted or not, or even if the result adversely affected the corporation's interest.[265] The government must also show that the employee's illegal conduct furthered the corporation's business; i.e benefited the corporation, in order to equate the employee's action with that of the corporation. At first look, it would appear that a requirement that the corporation somehow benefit from an employee's misdeeds-which

[261] *United States v Beuch* (1979) 9th Circuit 596 F. 2d 871,878.
[262] (1999) 9th Circuit 101 F.2d 638.
[263] Section 2. 07 (1) c of the Model Penal Code, 1981.
[264] *United States v Gold* (1984) 11th Circuit 743 F.2d 800, 823.
[265] *Standard Oil Co. of Tex. v United States* (1962) 5th Circuit 307, F. 2d.

misdeeds will likely result in a federal criminal investigation of the corporation, would all but swallow the rule. However, that is untrue, because this requirement, like its counterpart has been emasculated through broad judicial interpretation.[266] Courts have held that the corporation need not actually benefit to satisfy this requirement. Rather, the employee must have only intended to benefit the corporation and the illegal act must not be contrary to corporate interests. This has been elaborated on because it is extremely rare that an employee commits an illegal act selflessly with no intention to make any personal gain.

c. Imputing the Agent's Intent to the Corporation

For criminal liability to attach to the corporation for an act an agent committed, the courts must have a basis on which to impute the agent's act and intent to the corporation. Courts have taken various approaches and imputed this intent using several theories. Under willful blindness doctrine, a corporation can be held criminally liable for deliberately disregarding the criminal activity in issue.[267]

The Companies and Allied Matters Act in Section 63(1) provides thus, as company shall act through its members in general meeting or its board of directors, or through officers, or agents appointed by or under authority derived from the members in general meeting or the board of directors.

In Section 63(3)[268] the general power of management rests in the Board of Directors. CAMA also recognizes a further third organ, the Managing Director. In *H.L Bolton (Engineering) Co Ltd v Graham & Sons Ltd,*[269] Lord Denning succinctly points out that the people whose actions can be considered those of the company itself are not mere servants and

[266] *Ibid.*
[267] *United States v Bank of England* (1987) 1st Circuit 821 F.2d 844.
[268] Companies and Allied Matters Act Cap C20 L.F.N 2010.
[269] (1957) 1 Q B 159.

agents who are nothing more than hands to do the work but directors and managers who represent the directing mind and will of the company and control what it does. CAMA seems to have adopted the common law position when it provided thus; Any act of the members in general meeting, the board of directors or of a managing director while carrying on in the usual way the business of the company, the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person.[270]

From the above, where any of the persons above does any criminal act in the course of the business of the company, the company shall be criminally liable. It is worthy to note that the fact that a corporation is liable for corporate crime is not a bar to managerial or official culpability for the same crime, where this can be established. According to Stessen [271], this is by cumulative prosecution of corporate and individual offenders. The directors or officers' liability may be analogous to that of a natural person who has aided and abetted the commission of a crime, and in this case, the person abetted or aided is the corporation which is an artificial person.

2.2.6 The Current State of Corporate Liability for Homicide.

Early effort to prosecute corporations for homicide were grounded in a pragmatic desire to balance increasing corporate power over social and economic life with the public's need to hold corporate entities accountable for their actions.[272] Reflecting this desire a federal appellate court held in the *United States v Van Schaick,*[273] that a corporation can be guilty of causing death by its wrongful act'. *Van Schaick* arose after a steamship disaster left hundreds dead and the corporate ship-owner was indicted for manslaughter under a federal maritime

[270] Section 65 CAMA Cap C 20 L.F.N 2010.
[271] G Steesen, 'Corporate Criminal Liability: A Comparative Perspective', (1994) *International and Comparative Law Quarterly*, 493 .
[272] J Harlow, 'Corporate Criminal Liability for Homicide: A Statutory Framework'. (2011) vol 61, *123 Duke Law Journal*, 129.
[273] (1904) C. C. S. D. N. Y. 134 F. 592.

statute that prohibited fraudulent and negligent safety practices. The court unhesitatingly dismissed the arguments against corporate liability,[274] finding that Congress had not intended to give the owner immunity simply because it happened to be a corporation. The *Van Schaick* court declined to absolve "corporate carriers by sea (that) kill their passenger through misconduct that would be a punishable offence if done by a natural person".

Several years later, in 1909, the Supreme Court echoed the pragmatic reasoning of *Van Schaick* in its seminal decision in *New York Central and Hudson River Railroad v United States,*[275] basing federal corporate criminal liability on the principle of respondeat superior. The court justified its extension of corporate criminal liability by highlighting the centrality of corporations to the country's economic life, the corporation's ability to commit the charged offence and the public policy benefit afforded by criminal liability.[276] Although the federal court in *Van Schaick* and *New York Central*[277] were willing to construe federal statutes to cover corporate conduct, the state courts were fractured in their application of general homicide statutes to corporate entities. In *State v Lehigh Valley Railroad,*[278] the Supreme Court of New Jersey permitted a negligence based prosecution of a railroad for involuntary manslaughter. The court held that it would accept corporate criminal liability unless there is something in the nature of the crime, the character of the punishment prescribed therefore or the essential ingredients of the crime, which makes it, impossible for a corporation to be held liable. As the capacity for corporate criminal liability in negligence-based crimes was elementary the involuntary manslaughter charge easily fit within that scheme. The court however cautioned that voluntary manslaughter involves ingredients quite

[274] It was argued that the corporate defendant could not be indicted because the sole statutory penalty was imprisonment, which it could not serve.
[275] (1909) U.S. 481 212.
[276] The court warned that if corporate criminal liability was impossible many offences might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy.
[277] *Supra* .
[278] (1917) N. J. 103 A. 685.

different from those involved in involuntary manslaughter, suggesting that it would not so readily permit an indictment for the more serious homicide charge.

As drafted, homicide statute implicitly reflected the belief of policy makers that there were some crimes for which corporations simply could not or should not be liable. Even the Supreme Court, as it was broadly expanding corporate criminal liability in *New York Central,* acknowledged that 'there are some crimes, which in their nature cannot be committed by corporations; this reluctance to permit corporate prosecutions for homicide persisted at the time of Model Penal Code's (MPC) drafting in the 1950's.[279] In the course of promulgating an alternative standard to respondeat superior for corporate criminal liability, the MPC'S drafters surveyed past corporate prosecutions and found that they were 'restricted for the most part to thefts including frauds and involuntary manslaughter' there had been no case in which a corporation was sought to be held criminally liable for… murder.

2.2.7 Historical Development of Corporate *Mens Rea.*

The expression *mens rea* is of foreign origin deriving from two Latin words "*mens-mentis*" (mental) and "*res-rea*" (thing). Therefore, *mens rea* literally means "the mental thing".[280] In the case of *Abeke v The State*,[281]the Supreme Court stated that *Mens Rea* means a guilty mind. And *Actus Reus* means a guilty act. Put in another language the guilty mind instigates the guilty act or flows into the guilty act. However, Robinson notes that the phrase *mens rea* appears in the Leges Henria[282] description of perjury-*reum non facit nisi mens rea,* the offence (perjury) is not committed without the mental thing). Which expression was taken from a sermon by St. Augustine concerning crime. The sermon is also thought to be the

[279] The MPC predicates corporate liability upon the conduct of corporate employees of sufficient standing within the corporation's power structure. See Model Penal Code (1962) Section 2.07 (1) (c).
[280] H.D.P Simpson, Cassell's New English Latin Dictionary, Cassell, (London, 1962) pp. 368 and 517.
[281] (2007) LPELR 31 (S.C). Per Tobi J.S.C., P. 18 Paras C – E.
[282] This is a book among written between 1114 and 1118 containing Anglo-Saxon and Norman Law. Full title is Leges Henria Primi Cf. G Garner, (ed) *Black's Law Dictionary* (9th edn, West Group: Minnesota, 1999.p. 909.

source of the similar maxim in Coke's Third Institutes, the first major study of English criminal law: "*actus non fact leum nisi mens sit rea*" (the act is not guilty unless the mind is guilty). It seems from the foregoing that the church exercises a no mean influence on the development of this aspect of English law.

That apparent incongruity of requiring corporations to possess a state of mind when corporations have no minds may cause one to wonder why we started with corporate *mens rea* in the first place. The historical development of corporate *mens rea* provides us with some useful insights into why courts might have imposed liability on corporations for wrongs requiring *mens rea* and whether that rational still persists. One of the earliest case subjecting corporations to liability for a tort requiring *mens rea* was *Goodspeed v The East Haddam Bank.*[283] In this case the East Hadden Bank, had originally brought suit alleging that Goodspeed "had made certain false deceitful and fraudulent representations, with the intention of defrauding (the bank of $5,000)". The court[284] found for Goodspeed and awarded cost as well. Goodsspeed then brought a tort action against the bank for bringing a "vexatious suit".[285] The trial court found for the bank, awarding a non-suit, which Goodspeed appealed. The appellate court, however, decided that a corporation could be held liable for a tort, such as bringing a vexations suit, which required malice. The court found that no permitting suit against a corporation because of its lack of actual *mens rea* would defeat enforcement of this tort. The court said, to turn the plaintiff round to pursue the proposed remedy (against the directors)… would be equivalent to declaring him remediless…" because many directors might be judgment proof or difficult to identify. Corporate liability would be thus needed to provide an effective remedy. However, it appears that imposing a liability on the corporation for bringing a vexatious suit was only available via the tort action which required malice.

[283] 22 Conn. 550 (1853).
[284] *Ibid* at 531.
[285] *Ibid* at p. 535.

Thus to ensure that enforcement of law and deterrence did not suffer the court held, over the protections of the dissenters, that a corporation could possess *mens rea*. *Mens rea* principle is a product of the historical development of criminal law. It may be surprising to learn that criminal law did not always require *mens rea* for liability. Robinson observes that early Germanic tribes imposed liability upon the causing of an injury without regard to culpability.[286] In English law, the early stages of the development of *mens rea* are illustrated by the decision in *Regina v Prince.*[287] In this case, the defendant took an underage girl out of the possession of her father, reasonably believing she was over the age of consent. For Lord Barnwell, the fact that the defendant's conduct was generally immoral was sufficient to find that the defendant had the *mens rea* necessary for criminal liability. However Lord Brett, would require that the defendant would at least have intended to do something criminal not just immoral. But in *Regina v Faulkner,*[288] a somewhat more demanding requirement is stated. Thus, in the process of stealing rum from the hold of a ship a sailor named Faulkner accidentally set the ship ablaze destroying it. Building upon Lord Prett's conception of a more specific and demanding *mens rea,* Lord Fitz gerald and Palles conclude that the *mens rea* requirement means that Faulkner must have intended to do something criminal that might reasonably have been expected to have led to the actual harm for which he is charged.

In *Abeke v State,*[289] *mens rea* was defined simply as a guilty mind. It is the state of the mind that the accused person must possess at the time of performing whatever conduct requirements that are stated in the *actus reus*. In relation to the offence of murder, for

[286] P H Robinson, '*Mens Rea'*, 1999 , p. 2. < http://www.law.uppen.edu/fac/.> Accessed on 15, June 2010.
[287] I K, Oraegbunam & R Onwunkwo, '*Mens Rea* Principle and Criminal Jurisprudence in Nigeria', (2011) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* vol 2,p.5.
[288] (1875) L.R.2 C.R.C 154.
[289] (2007) 9NWLR (Part 1101) 411 at 429-430.

instance, *mens rea* can be likened to malice afore thought, which has been defined in *Ibikunle v State*[290] as a

> Pre-determination to commit an act without legal justification or excuse. It is the intentional doing of an unlawful act which was determined upon before it was executed; it is intent at the time of killing willfully at act in a callous and want and is regard of the consequences to human life.

Also in *Sherras v De Putzen,*[291] accepted as correct the classic statement of the doctrine of *mens rea* the prove council had this to say; …there is a presumption that *mens rea*, or evil intention or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered.

The criminal law insists that the person who commits the physical act (*actus reus*) must also have *mens rea*, a gulity mind before that person can be found guilty of the offence. The criminal law does not, for example, permit the conviction of a person suffering from a mental disorder and incapable of appreciating the nature of the act. Moreover, the criminal law is loath to let a person responsible for the actions of another person. Canadian courts have generally rejected the concept of holding an accused liable for the criminal wrongdoing of another person[292], holding an accused liable for the criminal wrongdoing of another person. In its landmark per-charter ruling in *R v City of Sault St. Marie,*[293] he United States Supreme Court held that, even for regulatory offenses (in that case, a provincial pollution offence), "the principle that punishment should in general not be inflicted on those without fault applies".

[290] (2005) I NWLR (Part 907) 387 at 409 to 410.
[291] (1895) I Q. B. 918.
[292] Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights; Corporate Liability, Department of Justice Canada, available at https://www.justice.gc.ca accessed on 25 Nov. 2017.
[293] (1978) 2 S. C.R. 1299.

> Under the Charter of Rights and Freedoms,[294] in contrast to the situation in the United States of America or Australia, there is an important constructional standard of fault, which makes absolute liability extremely rare and unbuildable in the criminal content. The motion that there should always be fault at least in the form of negligence is an important and well-justified required of just punishment by the state.

Much of the complexity in the area of corporate criminal liability revokes around the question of who in a corporation must have *mens rea* so that the corporation itself can be said to have *mens rea*. The question is not difficult when the corporation is small and the owner is also the manager clearly, the mind of the owner can be said to be the mind of the corporation. However, modern corporations may have structures that often bear only a passing resemblance to the simpler models considered by the courts in developing the common law. It is not easy to decide who the corporation is for the purposes of attributing criminal liability when a corporation has a head office in one city regional operations around the globe and various subsidiary corporations with their own subsidiaries and regional operations. The situation is more complicated further when a board of directors meets only infrequently and issues only the broadest guidelines for senior management. When the components of the acts done by a company are broken down to understand what the corporation is doing today in many cases its *mens rea* is evidently involved and the principle of criminality can be easily associated with these acts. Issues like intent; specific or general, the circumstantial proofs, the confessions of workers etc may be clearly present to demonstrate the acts or omissions done by the corporation. There are member of approaches adopted by different countries all over the world to decipher and decode the acts of a corporation and find the intent behind it.[295] It pertinent to note that civil law and common law countries all have different means of

[294] It codifies many of the rules of common law and establishes strict norms that the state must observe in any prosecution.

[295] M Coffee, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiring Into the Problem of Corporate Punishment', (1981) *Michigan Law Review* 386 at p.8 Quoted in M E Tigar, 'It Does the Crime but not the Time: Corporate Criminal Liability in Federal Law; *American Journal of Criminal Law* (1990) vol. 17, p. 211.

handling the criminal intent of a body corporate, hence the criminal intent and crime of corporations is not overlooked.

A look at the common law countries would reveal instances where Baron Thurlow, the Lord Chancellor of England and a great lawyer and a politician at the same time, have expressed the presence of guilt on the part of the corporate body. He towards the late eighteenth century took up this issue and laid down that", did you ever expect a corporation to have a conscience, when it has no soul to be dammed and no body to be kicked and by God, it ought to have both".[296] There are other opinions too like the significant stand taken up regarding the onus of guilt on the part of the corporations by judges like Chief Justice Holt who stated that "a corporation is not indictable, but the particular members of it are".[297] Black Stone's Commentaries also picked up the same version as depicted by Justice Holt to the same effect.[298]

2.2.8 Historical Development of *Actus Reus*.

During its early stages, criminal law was concerned with only the act in question premised on the theory that "the thought of man shall be tried". In time, however, perhaps due to a growing sense of community and the influence of the church this perspective altered. The understanding that a crime involved a combination of intent and action *mens rea* and '*actus reus*' became accepted. The depth and degree of this intent would determine the culpability, and thereby the appropriate sentence. Thus, by the end of the 15th century, the crime of homicide was divided into murder and manslaughter.[299] The critical difference lay in the intent, deemed "malice aforethought' in judgments of homicide. It is not a crime merely to

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[296] *Ibid.*

[297] M E Tigar, 'It Does the Crime but Not the Time: Corporate Criminal Liability in Federal Law', (1990) *American Journal of Criminal Law*, vol. 179.p 211.

[298] *Ibid.*

[299] Collen Swan, Evolution of Criminal Law, March 21, 2016 <https://www.owlcation.com> Accessed on 5 Dec., 2017.

think guilty thoughts. Guilty thoughts must be linked to an act. An act that is not the result of a guilty mind is not a crime.

Actus reus is sometimes called the external element or the objective element of a crime. It is the Latin term for the 'guilty act' which, when proved beyond reasonable doubt in combination with *mens rea*, ' guilty mind' produces criminal liability in the common law based criminal law jurisdictions.[300]The terms *actus reus* and *mens rea* developed in English law are derived from the principle stated by Edward Coke, namely *actus non facit reum nisi mens sit rea,*[301]which means; 'an act does not make a person guilty unless (their) mind is also guilty", hence the general test of guilty is one that requires proof of fault. Culpability or blameworthiness, both in thought and action.

In order for an *actus reus* to be committed there has to have been an act. Various common law jurisdictions define act differently but generally, an act is a 'bodily movement whether voluntary or involuntary. In *Robinson V California,*[302] because a corporation is an association of individuals that act as agents of the fictional entity, it is necessary to specify when a legal person "commits" a crime. In a multi-country comparison, it is common in many domestic legal systems that only criminal acts of organs (as designated by law or the organizational documents) or representatives (that received delegation of power from an organ) can be imputed to the corporation.[303] Thus, courts would attribute criminal offenses by directors and high-level managers to the corporate entity, while acts of low-level employees would generally not give rise to criminal liability of the corporate entity as a whole.[304] The standard of respondent superior, according to which corporations can be held liable for acts

[300] W Schabas, 'Mens Rea, Actus Reus and the Role of the State',< https://www.m.oxfordscholarship.com> Accessed on 10 Dec., 2017.
[301] Coke, Edward (1797) Institutes, Part III chapter 1, P. 10, (1962) 370 U.S. 660.
[302] (1962) 370 U.S 660.
[303] A Triponel, Comparative Corporate Responsibility in the United State and France for Human Rights Violations Abroad, in Proceedings of the New York University 61st Conference on Labour (2010) 59, 78.
[304] C de Magline, 'Models of Corporate Criminal Liability in Comparative Law', (2003) 4 *Washington University Global Study Law Review,* 547,553-554.

of any (even low level) employee as long as the latter was acting within the scope of employment, is still applied in the context of corporate criminal liability in the United States,[305] but this approach is more the exception than the rule in an international context. There is no international consensus yet on element of corporate liability under international law.[306]

2.3 Summary of Literature Review

Corporate criminal liability has been a subject of much academic discourse both nationally and internationally. In recent years, many events have once again brought the issue of corporate criminal liability back into the spotlight. The global financial crises[307] and the British Petroleum oil spill[308] highlighted the devastating harms that can arise out of a misuse of corporate power. These incidents reignited the debate on corporate criminal liability. Khanna,[309] wrote that in the early sixteenth and seventeenth centuries, companies could not be held liable for criminal offences. He stated that corporate criminal liability faced some obstacles that hindered its applicability during that period. First, is the difficulty in attributing an act to juristic entity. A corporation is said to be a 'juristic person' in law. Juristic persons are entities that are recognized by the law as being entitled to rights and duties in the same way as human or natural persons. Criminal law from time immemorial has been tailored in such a way to suit natural persons. Second obstacle according to Khanna was because 'legal thinkers did not believe corporations could possess the moral blameworthiness necessary to

[305] *Egan v United States*, (1943) 8th Cir. 137 FO 2d 36 9, 379.
[306] C Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law, *The George Washington International Law Review* (2009) vol 49. p. 110.
[307] M Oxenford, 'The Lasting Effects of the Financial Crisis', Available at <http:/www.chathamhouse.org accessed on 25th October , 2018.
[308] E Martinez, 'British Petroleum Oil Spill in the Gulf of Mexico', Available at <http://www.therightsofnature.org accessed on 25th October, 2018.
[309] V S Khanna , 'Corporate Criminal Liability: What Purpose does it Serve? (1996) *Harvard Law Review*, 1477-1534.

commit crimes of intent'. It is only natural persons who possess a 'mind' that can only commit crime of intent. The third obstacle was the *ultra vires* doctrine that made corporations only liable for crimes provided in their charter. Khanna,[310] also, stated that although the imposition of criminal liability on companies has generated considerable debate; he was also taken with other angles that may qualify the issue of corporate criminal liability. He compared the costs and benefits of corporate criminal liability with other possible liability parameters such as managers' personal liability or administrative sanctions as options for the state. Khanna, argues that corporate civil liability can capture the desirable features of corporate criminal liability, especially criminal liability's powerful enforcement and information-gathering dimensions. Furthermore, he contends that corporate civil liability avoids the undesirable features of corporate criminal liability. Such undesirable features include criminal procedural protections and criminal sanctions' stigma effects.[311] Khanna focused on the extension of vicarious corporate liability to the criminal context or the extension of corporate criminal liability to crimes of intent. He wondered why there is corporate criminal liability at all, given that corporate civil liability exists. This question according to him is especially perplexing in the light of the fact that courts borrowed most of the doctrines used in corporate criminal liability, such as respondeat superior, from corporate civil liability. Khanna, failed to take into consideration that most of the early instances of corporate criminal liability resulted from public harms, such as nuisance, for which private enforcement was unlikely. As a result, public enforcement was necessary to ensure that the corporation and its actors properly internalized the cost of their activities to society. For activities causing public harm, public enforcement was essential. Holding individuals liable through public enforcement was, of course, one option for addressing public harms. However, when the culpable individual within the corporate hierarchy was judgment –proof

[310] *Ibid.*
[311] F P Lee, 'Corporate Criminal Liability', (2003, 28 Columbian Law Review), 4-5.

or not easily identifiable, maintaining optimal deterrence necessitated imposing liability on the corporation.[312] Given the absence of wide spread public civil enforcement prior to the early1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability.[313]

Khanna, also did not cover the area of intangible costs of corporate criminal liability such as the reputational damage that can result from criminal proceedings even being brought against a corporation let alone the stigma of a conviction. It is these undesirable features of corporate criminal liability that makes it necessary and appropriate. Posner[314] agreed with Khanna and noted that the availability of corporate criminal liability is troubling given that there is corporate civil liability. He argued that corporate criminal liability and corporate civil liability share same characteristics: the imposition of liability on the corporation and the goal of deterrence. In his opinion, the existence of civil liabilities is adequate and the imposition of criminal liability is onerous and excessive. Posner, also failed to advert his mind to the reputational damage and stigma of conviction that goes together with corporate criminal liability. Posner also did not take cognizance of the fact that since corporate civil liability has been in existence, there has been no reduction in the harmful activities of corporations, rather it has increased. Bryan,[315]also aligned himself with Khanna's position and concluded that it is economically inefficient to impose corporate criminal liability as deterrence for corporate behaviours. Hence in his view, there is no benefit to imposing that liability and hesitated to recommend its application. Bryan, did not treat the corporation as an entity capable of causing harm or death by its activities, which is treated in this work. Khanna also stated that although the imposition of corporate criminal liability rather than liability of managers and

[312] A O Sykes, 'The Economics of Vicarious Liability, (1988) *Yale Law Journal* 1241.
[313] *Ibid.*
[314] R A Posner , 'Economic Analysis of Law' (1973) *Washington University law Review*, Issue 2, vol. 1974. p86.
[315] J T Bryan, 'The Economic Inefficiency of Corporate Criminal Liability' (1973) 73 (2) *The Journal of Criminal Law and Criminology*, 582-603.

employees, has generated debate, he was more concerned with the analysis of the costs and benefits of the choices. He was of the opinion that there is need to review the comparative costs and benefits of choosing amongst manager's criminal liability, third party liabilities, corporate criminal liability or mere imposition of administrative sanctions on companies. These options have their costs and benefits that should determine the direction or strategy to adopt. Khanna's work failed to take into consideration that the existence of all these liability parameters has not been able to curtail criminal activities of corporations, hence the need for this research work. But Posner narrowed the debate to his conclusion that the fact that there is corporate civil liability extinguishes even the need for corporate criminal liability and concluded that rather than the corporation, the criminal liability should be focused on the natural persons that committed the acts under scrutiny. Posner's work did not treat corporate criminal liability as can be gleaned from the corporation's policies and structures put in place by them; this is treated in this present work. Bryan also departed from Khanna's work and agreed with Posner in his view of the necessity for corporate criminal liability.[316] Bryan argued in his work that corporate criminal liability is inefficient from the deterrence point of view and serves no purpose and remains more idealistic than practical. Rather he recommended administrative sanctions as a more effective approach that will strengthen regulators to act where there are systematic breaches. Bryan limited his goal of criminal sanctions to deterrence alone; he failed to study other aspects of goals of criminal sanctions other than deterrence. Other goals of criminal sanctions were treated in this research work.

Though Uhlmann,[317] did not align completely with Khanna on the relevance of corporate criminal liability as an option in reviewing acts that may have created a direct liability on the company; Uhlmann wrote that when a criminal violation occurs it should not

[316] *Ibid.*
[317] D M Uhlmann, 'The Pendulum Swings: Reconsidering Corporate Criminal Prosecution' (2015) <http://www.SSRN.COM> Accessed on 17 July, 2017.

be ignored or resolved through non-criminal law options. He opined that expressive functions of criminal law play an essential role in influencing corporate behaviour for several reasons. First, it confers significant benefits on the corporation with the expectations that they exist for legal and lawful purposes only; hence when they betray the public trust and act illegally there must be retribution based on the provisions of criminal law and not administrative sanctions. Secondly, corporations are run based on its policies and internal controls that are built to allow it comply with all laws and where it breaches these policies it has indirectly acted outside the laws of crimes and must face the consequences. Thirdly, corporations cannot be jailed nor have the individual liberties restricted as with natural persons but it is important that its actions can be labeled as criminal and handled as such, rather than classifying such blatant acts as misconducts under civil administrative sanctions, that will only amount to a slap on the wrists of corporate behaviours. The researcher agrees with the postulation of Uhlmann, to the extent that protection of society is the ultimate end of punishment. Traditionally, three purposes have been ascribed to criminal sanctions: deterrence, retribution, incapacitation and reformation. In operation, punishment may control behavior in several ways. Some people will not engage in prohibited behavior for fear of being punished. Others are not deterred by the threat of punishment but punishment serves to remove them from society in order to prevent them from committing further crimes. Another group may not be deterred by the threat of punishment but is deterred when its members observe the actual imposition of punishment on offenders. Finally, some persons will not engage in behavior for which statutes prescribe punishment because they desire to conform their behavior to the norms set by the society. They are not deterred so much by the fear of punishment as they are by the fear of incurring the disapproval of their community. Uhlmann failed to write on the fact that punishment alone is not the purpose of criminal law. The purpose of criminal law is to define socially intolerable conduct, and to hold conduct within

limits which are reasonably acceptable from the social point of view.[318]Hence, this gap was emphasized in this present work.

Society has moved away from using punishment strictly for retribution, and 'rehabilitation' is not generally thought of in connection with corporations. Therefore, deterrence should not only be the main reason that corporations are held criminally liable and punished; this was treated in this work. Today the question is no longer whether it is possible to impute the acts of corporate agents to the corporation; the real question to be asked when determining the criminal responsibility of corporations is one of policy: will the criminal sanction imposed on the corporation deter it from committing these wrongful acts in the future? The researcher feels that the question is not who has the guilty mind, but who should be held criminally responsible in order to best serve this deterrent purpose.

Engle,[319] wrote on the difficulty in determining corporate criminal liability and concluded that "historically a corporation could not be criminally liable in national law because the corporation is a legal fiction which possessed no independent will". [320]He based his statement on the difficulty of ascribing a "guilty mind" to a legal fiction that can only act through its directors, employees and agents. This view was supported by Shkira,[321]who wrote that during the historical evolution of corporate criminal liability this was a genuine concern that affected the attitude of courts when called upon to hold corporations liable for crimes. These concerns were further highlighted by Engle ,[322] who stated in his work that there was an argument during the evolution of corporate criminal liability on the fact that a corporation is not a person and "has no mind". However, a good deal of scholars begins from the premise

[318] B Coleman, 'Is Corporate Criminal Liability Really Necessary?, (2002) *South Western Law Journal* (908).
[319] E Engle, 'Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations' (2004) 40 *Willamette Law Review* (103).
[320] *Ibid.*
[321] E Shkira, 'Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries' (2013) < http://www.SSRN2290878.COM> Accessed on 17 July, 2017.
[322] Engle, *op cit.*

that corporations are fictional entities which have no existence apart from the various individuals who act on behalf of the fictitious entity. This premise can lead quickly to the conclusion that corporate liability is unjust because it effectively punishes innocent third parties (shareholders, employees, and so forth) for the acts of individuals who commit offenses while in the employ of these fictional entities. Their work failed to cover the reality that corporations are not fictions *per se*. Rather, they are enormously powerful, and very real, actors whose conduct often causes very significant harm both to individuals and to society as a whole. In a variety of contexts, the law recognizes this reality by allowing corporations to own property, make contracts, commit torts, and to sue and be sued. Also corporations have their assets, as well as its liabilities. They are expected to pay for their liability through its assets. Is it conceivable that the need to protect innocent shareholders means they may benefit from the corporation's successes, but never suffer the detriment of any error in judgment, misconduct or malfeasance that may result in a breach of contract, a tort, or a regulatory violation by the corporation?[323]

Hasnas, [324]wrote on the issue of determination of corporate criminal liability and took an exception to the conclusion that corporations can be criminally liable. He was of the view that the corporation is not a living thing and punishing it is akin punishing stakeholders and employees; thus fallacious to assume you have death with the corporation alone. There's no 'thing' there to absorb the punishment. Hasnas said in his work, that if you punish a corporation, it necessarily passes through the corporate form and falls on the human beings. The only 'thing' you can punish are human beings.[325]Instead of punishing the corporation as a whole, he opined that the specific people in the corporation who are guilty of the

[323] A Alschuler, 'Two Ways to Think About the Punishment of Corporations', 46 (2009) *American Criminal Law Review*, 1359.
[324] J Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 7 *American Criminal Law Review* 65-70.
[325] *Ibid.*

wrongdoing should be punished. The researcher agrees with Hasnas's work, to the extent that shareholders also bear the burden of a corporate fine and in most cases they have not participated in the crime and not the specific persons who committed the wrongs. Practically speaking, most shareholders have little or no control over the corporate management and are unable to supervise corporate agents to prevent misconduct, hence this research work. However, this line of thought that only corporate fines can be used to deter corporations is wrong. Gurule,[326] wrote that, at least in some cases, the cost of fine isn't a deterrent itself. The corporations fear the label of a criminal conviction, as opposed to the payment of fine which some corporations see as merely the cost of doing business. The threat of criminal conviction is something every corporation wants to avoid, because the stigma of a corporation being held liable of a felony is unique. Though fine is the conventional approach, the work did not clearly stipulate the drawbacks; that a fine whether imposed by an administrative agency or judicial body, has only a limited preventive effect and must be considered to be reactive rather than proactive, or preventive.[327] Apart from imposing monetary sanctions, legislators have the opportunity to introduce a variety of restrictions on corporate entities. This category of sanctions is wide and has led to a number of innovative proposals reaching far beyond the mere imposition of fines. Sanctions which fall under this category can include 'corporate imprisonment' i.e restraining the company's ability to take action by either seizing its physical or monetary assets or restricting its liberty to act in a specific manner. The ultimate restriction of entrepreneurial liberty is the closure or winding up- of the corporation. The aim for such action is the protection of the general public from criminal organizations. Less drastic action includes the prohibition of certain activities, such as participation in public tenders, the production of specified goods, as well as contracting

[326] A Gray, Should Corporate Criminal Liability Even Exist? *University of Notre Dame Law School Journal*,(2017) 31- 34 .

[327] W Markus, 'Corporate Criminal Liability, National and International Responses', (2010) 25 *Commonwealth Law Bulletin*, 600-608.

and advertising. A number of other sanctions are available, such as corporate probation. The probation order for individuals is similar to the probation order for a corporate entity. It can include 'community service' or other reasonable conditions. All the foregoing reasons, made this research work imperative. Further, the publication of the judgment of conviction of a corporation has been proposed in several jurisdictions. While this sanction can 'force' a company to comply for fear of adverse media attention, it can have unpredictable results. It is hard to quantify the consequences that a company could face in such a situation. Velasquez,[328] who wrote on debunking corporate moral responsibility and that it is 'absurd to attribute moral responsibility' on corporations because they are not causally responsible for the actions of their employees' and more so because they lack the capacity for intentions. He stated that the various arguments designed to establish corporate criminal liability are based on wrong premise that assumed that you can transfer act of others to a corporation. He concluded by saying that a corporation only acts when natural persons act on its behalf. Velasquez, failed to take cognizance of the fact that corporate civil liability does not carry much weight needed to deter corporations from embarking on actions that are harmful to the public at large. This gap was taken care of in this present research work.

Khanna went further to view the scope of corporate criminal liability in the United States as broad and opens up possibilities for prosecutors. He said a corporation in the United States can be criminally liable 'for almost any crime, except acts manifestly requiring commission by natural persons[329]. Block[330] wrote on clarity on the applicability of the doctrine of corporate criminal liability, by espousing the three requirements the courts considered before determining corporate criminal liability based on the doctrine of

[328] M Velasquez, 'Debunking Corporate Moral Responsibility' (2003) *Business Ethics Quarterly*, 113 (04), 531-562.
[329] V S Khanna, *op cit.*
[330] M K Block, 'Optimal Penalties, Criminal Law and the Control of Corporate Behavior', (1991) *B.U.L Review*, 71, 395.

respondeat superior. First the agent whose acts are being imputed to the corporation must have committed an illegal act within the definition of existing laws. Secondly the agent must have acted within the scope of his employment or agency and within the expectation of his engagement; lastly the agent must have intended to benefit the corporation, whether in part or in whole. He failed to recall that respondeat superior theory was borrowed from tort law.

Byan,[331]while writing on the economic inefficiency of corporate criminal liability explained the three requirements further by stating that the scope of employment or agency that will meet his requirement included any act that 'occurred while the offending employee was carrying out a job-related activity'. He also stated that the employee need not 'act with the exclusive purpose of benefiting the corporation'. These requirements continued till this day to guide the judicial activity of U.S courts in relation to corporate criminal liability. Wells [332] explained that the U.S courts were swayed to adopt the vicarious liability approach by the principles of *respondeat superior*, which provides for actions of employees during the course of their employment; this serves as a fulcrum for both the employees and employers' liabilities under one roof. Wells, failed to look at corporate criminal liability, especially in the federal system, which imposes liability when there has been no true fault on the part of the corporation. The paradigm case is the misconduct of a single rogue employee; which can be attributed to the corporation by the doctrine of *respondeat superior*.[333] There is generally agreement that the corporation should be held civilly liable for a tort under these circumstances, if the harm was caused by an employee acting within the scope of his employment. The question, then, is whether in sufficiently serious cases where the conduct also breaches a criminal law, the corporation should be held to answer for the criminal

[331] J T Byan, 'The Economic Inefficiency of Corporate Criminal Liability' (1982) 73. *Journal of Criminal Law and Criminology.* 582, 582.
[332] C Wells, 'Corporations and Criminal Responsibility. (New York:Oxford University Press, 2001) 41.
[333] T S Jost & S L Davies, The Empire Strikes Back: A Critique of the Backlash Against Fraud, (1999) 51 American Law Review, 287.

offense. Note that in either the civil or criminal setting, the typical punishment is a judgment of corporate fault and an order to pay fine. This was addressed in this present research work.[334]

Smith, Hogan & Ormerod [335] outlined that under the doctrine of alter ego the persons considered as the 'embodiment of the company' will by their acts and minds exhibit the company's acts and minds thus criminal activities and conducts of these persons, who are considered 'embody of the company's directing minds' will form the 'basis of the company's liability'.

Ferran,[336]opines that twentieth century courts have turned to the directing mind and will test, laid down by Viscount Haldane in 1915 to determine the application of the doctrine of alter ego under corporate criminal liability. Jeberger,[337] looked beyond jurisdictions and stated that the concept of corporate criminal liability applied to some international instruments and it can apply in situations within that purview. For example United Nations Convention against Transnational Crimes (UNTOC) and the United Nations Convention against Corruption (UNCAC) include provisions on the criminal liability of legal persons. However, she conceded that the implementations of these treaties and other similar instruments are left up to countries to enforce and some decide on the use of non-criminal administrative sanctions.

Here in Nigeria, Onale and Odaro,[338] reviewed the approach of determining corporate criminal liability in Nigeria and concluded that the major fulcrum is the Companies and

[334] S Beale, 'A Response to the Critics of Corporate Criminal Liability', Available at <https://scholarship.law.duke.edu. Accessed on 27 October, 2018.
[335] Smith, Hogan, & Ormerod's Criminal Law, (15th edn London: Oxford University Press, 2018), 210.
[336] E Ferran, 'Corporate Attribution and the Directing Mind and Will;, (2011) 127 *L.Q.R.* 239-259.
[337] F Jeberger, 'Corporate Involvement in Slavery and Criminal Responsibility under International Law', (2016) *Journal of International Criminal Justice*, 14 (2), 327-341.
[338] J Onale and A Odaro, 'Director's Liability: The Legal Position in Nigeria', (2016) <http://www.ssrn.com> Accessed on 23 February, 2017.

Allied Matters Act (CAMA) 2004.[339] They stated that the position under Nigerian Legislations is in line with the direction taken by English law, which prescribes that a principal will be liable for the fraud of its agent if committed in the course of employment. They cited Section 66(3),[340] to buttress the similarity they alluded to and they relied on the provisions of that section that stated that: "Nothing in this section shall derogate from the vicarious liability of the company for the acts of its servants while acting within the scope of their employment". They also made copious references to some Nigerian courts' decisions to support their conclusions on corporate criminal liability in Nigeria. In *Yesufu v Kupper International N.V,*[341] the Nigerian Supreme Court held that a director of a company is not personally liable unless he makes a personal commitment to undertake liability. Onale and Odoro also referred to another court[342] decision of the Nigerian Court of Appeal where Niki Tobi JCA,[343] (as he then was) opined on corporate liability by stating that a juristic person has no 'natural or physical capacity to function as a human being' and will need human beings to act on its behalf. Niki Tobi J.C.A, (as he then was) concluded that where such human being acts on its behalf 'the company is liable or deemed to be liable for the act or acts of the person'.[344]Erhaze and Momodu,[345] opined that where a company's conduct could be regarded as grossly negligent and therefore a crime, the present law in Nigeria requires the invocation of the provisions of the general criminal law so as to prove either the offence of manslaughter (under the Criminal Code) or homicide (under the Penal Code). However, corporate criminal liability intersects both company law and criminal law, and problems have traditionally arisen in imposing liability on an artificial legal construct such as a company.

[339] Cap C20 Laws of the Federation of Nigeria 2010
[340] Companies and Allied Matters Act, Cap 20, L. F. N. 2010.
[341] [1996] 5 N.W.L.R. (pt 446), 17.
[342] *Kurubo & Anor V. Zach-Motsion (Nig) Ltd* (1992) 5 NWLR (pt 239), 102.
[343] Tobi JCA was elevated to Supreme Court in 2002 before retiring in 2010.
[344] *Kurubo & Anor v Zach-Motision (Nig) Ltd, supra.*
[345] S Erhaze & D Momodu, 'Corporate Criminal Liability: Call for a New Legal Regime in Nigeria', (2015) *Journal of Law and Criminal Justice*, 3 (2), 63-72.

Mainly, according to them the challenge is that legal concepts such as *actus reus*, *mens rea* and causation, designed with natural actors in mind, do not easily lend themselves to inanimate entities such as companies which are distinct and separate from their owners. On the other hand, they opined that corporations continue to enjoy all civil rights including the enforcement of their fundamental human rights, yet they continue to elude some legislative control and accountability for criminal liability. They ended by saying that corporate criminal liability is a recent development with very few judicial cases on the issues.[346]

Asogwa,[347] wrote that the basis of corporate criminal liability revolves around the notion that the corporation itself has been guilty of crime in the sense that the human agent who performed the act or made the omission constituting the offence is one whose status and authority within the organization can be said to have acted as the organization. Asogwa failed to consider what will be the situation when a criminal act cannot be traceable to any human agent, should the corporation be left to go scot free? This research work sought to fill up this lacuna.

Iyidiobi,[348] noted that it is a historic and undisputed fact that the most predominant means by which the society controls crime is the criminal law. He wrote that the imposition of corporate criminal liability is reasonable and very proper because contrary to the views of the critiques of corporate criminal liability, corporations are not fictional entities; they are rather legal, economic and social realities. The greater percentage of our lives today depends on corporations. To be more precise, there is no aspect of our lives that corporations are not involved in one way or another, ranging from the food we eat , the houses we inhabit, the water we drink, the electricity we use, as well as the environment we live in. It follows

[346] *Ibid.*
[347] F I Asogwa, 'Corporate Criminal Responsibility', *The Nigerian Juridical Review*, vol.(1994-1997). 158-179.
[348] C Iyidiobi, 'Rethinking the Basis of Corporate Criminal Liability in Nigeria', (2015) *The Nigerian Juridical Review*, vol. 13, 104-109

without doubt that our safety is affected more and depends largely on how corporations, large and small, conduct themselves than it depends on the conduct of the next door neighbor. In the light of the above, there is no plausible reason why the criminal law/procedure should not be applied to check the possible and regular excesses of these very powerful entities especially when such excesses amount to crime[349]. What seems to be more important is that modern corporations are inclined to using powerful resources available to them in manners that very often cause serious harm to individuals, communities and the environment in general. In addition, given the resources available to corporations; there is no kind of criminal venture that they cannot engage in comfortably. Iyidiobi, wrote that corporate criminal liability goes to punishing innocent third parties like employers and shareholders[350]. He made an analogy between corporate criminal liability and criminal liability of natural persons *viz a viz* the contention of the opponents of corporate criminal liability. When an individual commits a crime, he may be jailed, fined or sentenced to death as the case may be. Any of these punishments would definitely affect the dependent relatives of the convicted person in so many ways, be it financially, socially, emotionally, psychologically or otherwise. The innocent third party argument when applied in this situation will mean that punishing him will amount to punishing those innocent dependent relatives. If this argument were to stand, then most, if not all criminals will be free because it would be hard to find any person whose punishment will not adversely affect another person totally innocent of his crime.[351]Iyidiobi failed to cover instances where a corporation's criminal activity affects unidentifiable set of people who are many and scattered, hence the need for this work. Iyidiobi,[352] also wrote on corporate criminal liability in that it raises the challenge of punishing corporations for some

[349] *Ibid.*
[350] J Arlen & R Kraaknam, 'Controlling Corporate Misconduct , an Analysis of Corporate Liability Regimes', (1997) 72 *N.Y.U.L Rev*. 682
[351] C Iyidiobi, *op cit.*
[352] *Ibid.*

specific offences. Speaking specifically on this, Okonkwo and Naish,[353] observed that a major difficulty in corporate criminal liability is the physical impossibility of imposing certain punishments on corporations. For example the punishment for murder is fixed by law as death and a corporation cannot be hanged. The above position raises more questions than answers. This research work seeks to address the problem of appropriate sanction for corporations. For instance, where the law fixed imprisonment as the only punishment, (even if such offences are few) can the court impose a fine as an alternative punishment? It has however been opined that where death is the only available punishment, a company can be killed by means of winding up. However, can a court can make an order for "corporate killing" by means of winding up where the Criminal Code has provided for death by hanging? While noting that a company can be liable for an offence for which death is the punishment, it is also clearly recognized that the common law vicarious liability approach to corporate liability is fraught with difficulties. For instance, the problems associated with vicarious criminal liability in Nigeria especially in the States where the Criminal Code operates, lies in the provision of Section 24 of the Criminal Code. The said section provides:

> Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will or for an event which occurs by accident.

The above position makes it preposterous to convict a person (including a company) of an offence involving *mens rea* if the offence is committed by an employee unless it can be shown that, that person participated in the crime directly or indirectly. Iyidiobi,[354] opines that vicarious liability for *mens rea* offences, except within the accepted limits of the principle of "alter ego" is difficult in the light of section 24 of the Criminal Code. Iyidiobi failed to proffer a way out of this fix which is a striking need for this research work.

[353] Okonkwo and Naish, *Criminal Law in Nigeria*, 2nd ed (Ibadan: Spectrum Books Ltd, 1983) p. 67.
[354] C Iyidiobi, *op cit*.

Mohammed,[355]stated that it seems that the application of criminal procedure to an artificial person (the company) has not been easy and the reasons are not farfetched., To start with, criminal law was developed to deter natural persons from committing crimes; Mohammed noted that there is the possibility of mitigation of corporate criminal liability risks by corporations through the building of effective compliance programmes that will drive employees and agents to act within the confines of the law. Mohammed did not write on what will be the case even if the corporation puts in place the necessary internal controls and still one of its employees commits a crime. Thus, this study addressed this gap.

From the foregoing, the position of the law in Nigeria as it pertains to criminal liability of corporations is confusing. This is true considering the issues of holding a company liable for offences with mental elements including murder and manslaughter remains neither here nor there. This is challenging considering the fact that the United Kingdom from where we borrowed the vicarious liability approach has since moved on to a point where companies can be held liable directly for corporate manslaughter under the UK Corporate Manslaughter and Corporate Homicide Act 2007. This is what this research work seeks to address.

In conclusion, scholars have written on holding corporations criminally liable, however, most of the authors failed to appreciate the fact that a corporation can be held "directly" liable for its criminal activities without attribution of liability to a human being as is obtainable in the U.K. A corporation can also be said to have a guilty mind which can be inferred from its policies, culture and conduct, as is obtainable in other jurisdictions. Hence, when this guilty mind is inferred from corporation's policies, then the *mens rea* principle will be put to rest. Most of the authors opined that the corporation can only be held criminally liable by attributing to it the acts of human beings that carry out the mandate of the firm. They failed to consider that a corporation can be held directly liable for its criminal activities

[355] Y Mohammed, Corporate Criminal Liability: Reviewing the Adequacy of Willful Blindness as *Mens Rea*, (2017) *International Journal of Law*, vol. 3, 24-32.

without necessarily having to attribute it to any individual member. This way a company will directly bear the grunt of its criminal activities and consequently take steps to forestall future reoccurrence.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK FOR CORPORATE CRIMINAL LIABILITY IN NIGERIA

3.1 Laws guiding Corporate Criminal Liability in Nigeria

3.1.1 Companies and Allied Matters Act

The first local company law statute in Nigeria was the Companies Ordinance of 1912[356], it was based on the English Companies (Consolidation) Act 1908 and applied only to the colony of Lagos. It was later amended in 1917 and extended to the whole country by the Companies (Amendment and Extension) Ordinance 1917. In 1922, the two ordinances were repealed and replaced by the Companies Ordinance of 1922.[357]

In 1968 the Companies Act was passed and it repealed the Companies Ordinance of 1922. The 1968 Act made substantial improvement on the previous law especially in the area of account and shareholder participation, in corporate affairs[358]. The report of the Nigerian Law Reform Commission was considered by the Ministry of Justice and the draft was enacted into law as the Companies and Allied Matters Act.[359] The enactment of the Companies and Allied matters Act which according to the preamble established the Corporate Affairs Commission (CAC) and also provides for the incorporation of companies and incidental matters, registration of business names and the incorporations of trustees of certain committees, bodies and associations. The Companies and Allied Matters Act is a comprehensive law as it deals with a wide range of issues such as legal personality of

[356] H Bhadmus, *Bhadiums on Corporate Law Practice, (*Enugu, Chenglo Limited, 2009) p 4.
[357] *Ibid* .
[358] O Olakanmi, Companies and Allied Matters Act: Synoptic Guide (Abuja: Law Lords Publications, 2007) p. 2
[359] No. 1 of 1990.

companies, lifting the veil of incorporation, vicarious liabilities of officers, reconstruction and takeovers as well as insider trading.[360]

3.1.2 Criminal Code Act

The Criminal Code has been existing, as far back as 1916 which applied all over Nigeria until 1960 when the Penal Code came on board.[361] The Criminal Code Act and the Criminal Procedure Act[362] as well as the Criminal Code Laws and the Criminal Procedure Law, apply to the southern states of Nigeria except Lagos state.[363] The Criminal Code Act and Criminal Procedure Act are federal legislation penalising criminal acts in southern Nigeria. These legislations made provisions for manslaughter and homicide, however it has been an ardous task convicting a company for the above named offences because of the requirement of "*mens rea*" and *actus reus"*.[364]

Unfortunately, the two legislations did not make provisions on how corporations are to be held liable for offences requiring *actus reus* and *mens rea*. It is here that the problem of corporate criminal liability in Nigeria actually lies.[365]

[360] It can now be found in Cap C20 Laws of the Federation of Nigeria 2010.
[361] C Iyidiobi, 'Rethinking the Basis of Corporate Criminal Liability in Nigeria', *The Nigerian Judicial Review* (2015) vol. 13,p 112.
[362] Cap C. 38 Laws of the Federation of Nigeria (LFN) 2010. The Criminal Code Act and the Criminal Procedure Act are federal legislations.
[363] Lagos state is governed by the Administration of Criminal Justices Law of 2007 which repealed the former Criminal Procedure Law of Lagos State 1999.
[364] P Anyebe, Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shifts, *NIALS Journal of Criminal Law and Justice* (2011) vol. 1, p. 1
[365] The Act came into being as Ordinance No. 42 of 1945, was re-enacted as Ordinance No. 43 of 1948 and was at various times amended by Ordinance No. 16 of 1950, Section 244 and 6th Schedule No. 22 of 1952, No 13 of 1953, No.24 of 1954, No.10 of 1955,No. 22 of 1955, No. 47 of 1955; No.76 of 1955, No.107 of 195, No. 24 of 1956, No. 52 of 1956, No 65 of 1956, No. 100 of 1958, No. 2 of 1959, Cap 128 of 1959; 257 of 1959, 258 of 1959, 30 of 190 Act, Cap 155 of 1960 Act, Cap 40 of 1961, No. v 1962, No. 6 of 1963, No. 112 LN. 1964, No. 139 LN1965: Decree No. 22LN. 1966, Decree No. 84 LN. 1966, Decree No. 5 LN 1967: Decree No. 44 of 1970. It was incorporated as Cap 80 Laws of the Federation of Nigeria (LFN) 1990 and later as Cap. C41, L.F.N 2010.

3.1.3 Penal Code Act

The Criminal Procedure Code[366] and the Penal Code Law[367] are the principal legislations guiding criminal procedure in the northern state of Nigeria. The Penal Code was enacted being the major provisions of the two principal criminal justices legislation in Nigeria that is the Criminal Code and the Penal Code, preserves the existing criminal procedures while introducing new provisions that will enhance that efficiency of the justice system and help fill the gaps observed in these laws over the course of several decades. The Act has 495 sections divided into 49 parts which approved for the administration of criminal justice and for related matters in the courts of the Federal Capital Territory and other federal courts in Nigeria.[368]

3.1.4 Standards Organisation of Nigeria Act

The Standards Organisation of Nigeria is the apex standard organisation body in Nigeria. It was established by the Standards Organisation of Nigeria,[369] with a commencement date of 1st January 1970, when the organisation started to function.[370] The Act has three amendments.[371]The Standard Organisation of Nigeria Act, Cap. 59 of the Laws of the Federation of Nigeria, 2010 and later repealed by Standard Organisation of Nigeria.[372]

It is to be noted that Standards Organisation of Nigeria Act of 2010 did next to nothing in ensuring that standard relating to products are being met; this was due in part to the fact that the law did not impose strict penalties for offences.[373] It was in a bid to cure the defects in the Standards Organisation Act of 2010, that the 2015 Act was enacted. The Act

[366] Cap 491 1990 Laws of the Federation of Nigeria.
[367] Cap P3 2010 Laws of the Federation of Nigeria 2010.
[368] *Ibid.*
[369] No. 56 of December, 1971.
[370] About Standards Organisation of Nigeria, < http://www.son.gov.ng> Accessed on 21 September, 2017.
[371] Act Number 20 of 1976, Act Number 32 of 1984 and Act Number 18 of 1990.
[372] Act No 14, 2015.
[373] Standards Organisation of Nigeria Act, 2015, < http://www.lawpavillion.com> Accessed on 21 September, 2017.

was enacted for the purpose of providing additional functions for the organisation, increasing penalty for violations and for related matters.

3.1.5 Consumer Protection Council Act

The Consumer Protection Council,[374] established the Consumer Protection Council, though it commenced operations only in 1999, when its institutional framework was put in place.[375] The Act created Consumer Protection Council, which is a parastatal of the Federal Government of Nigeria, supervised by the Federal Ministry of Trade and Investment.

Consumer Protection Council is to among others, eliminate hazardous products from the market, provide speedy redress to consumer complaints, ensure that consumer, interest receive due consideration at the appropriate from and encourage trade industry and professional associations to developed and enforce in their various fields quality standards designed to guard the interest of consumers.[376] Although the consumer protection Act makes provision for redress to complaints made by consumers through negotiation, mediation and conciliation of good alternative to court processes, the effectiveness of the Act and the ability of the council to protect the rights of consumers through the monitoring of product manufactured by companies are still in questions.[377] Violation of provision of the Act attracts a fine of N50, 000 or five years of imprisonment or both which is commendable however the fine seems intangible a fine for companies.

[374] Act No. 66 of 1992.
[375] Historical Background of Consumer Protection Council, <http://www.cpc.gov.ng> Accessed on 25 September, 2017.
[376] *Ibid.*
[377] D Sawyerr, 'The Role of the Nigerian Consumer Protection Council Act in Protecting Consumers of FMCES', <http://www.nials.edu.ng > Accessed on September 22, 2017.

3.1.6 National Environmental Standards and Regulations Enforcement Agency Act

The Federal Government promulgated the Harmful Waste Decree,[378] which facilitated the establishment of the Federal Environmental Protection Agency. The Federal Environmental Protection Agency Act was enacted in 1988, No. 58**.** The Act commenced on the 30th December, 1988.[379] It was later repealed by the Federal Environmental Protection Agency (Amendment) Decree No. 59 of 1992 and later by Decree No. 14 of 1999. This Act was later repealed by the National Environmental Standards Regulation Agency (NESREA) Act 2007.[380]

The National Environmental Standards Regulation Agency (NESREA) has the responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's national resources, environmental technology, including coordination and liaison with relevant stake holders within and outside Nigeria on matters of enforcement of environmental standards, regulation of rules, laws, policies and guidelines.[381]

3.1.7 National Oil Spill Detection and Response Agency Act

The National Oil Spill Detection and Response Agency was established by the National Assembly of the Federal Republic of Nigeria vide National Oil Spill Detection and Response Agency Act of 2006.[382]

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[378] No 42 of 1988.
[379] Environmental Policies and Enforcement in Nigeria,< http://www.elri-ng.org> Accessed on 22 September, 2017.
[380] National Environmental Standards and Regulations Enforcement Agency (NESREA) About Us, http://www.nesrea.gov.ng Accessed on 22 October, 2018.
[381] Environmental Law and Policies in Nigeria- Environmental Law Research Institute, < http://www.elri-ng.org> Accessed on 22 September, 2017.
[382] National Oill Spill Detection and Response Agency (NOSDRA) http://www.nosdra.gov.ng Accessed on 22 October, 2018.

It was established with responsibility for preparedness, detection and response to oil spillages in Nigeria. The National Oil Spill Detection and Response Agency was established in 2006, as an institutional framework to co-ordinate the implementation of the National Oil Spill Contingency Plan (NOPRC) for Nigeria in accordance with the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) to which Nigeria is a signatory.[383] Since its establishment, the Agency has been intensely occupied with ensuring compliance with environmental legislation in the Nigerian Petroleum sector. The Agency embarks on Joint investigation visits, ensures the remediation of impacted sites and monitors oil spill drill exercises and facilitates inspection.

3.1.8 Oil in Navigable Water Act

The Oil in Navigable Waters Act is an act to implement the terms of the international Convention for the Prevention of Pollution of the Sea by oil 1954 to 1962, and also made provisions for such prevention in the navigable waters of Nigeria.[384] The Act came into existence on 22 April, 1968 by virtue of Oil in Navigable Waters Decree No. 34 of 1968.[385]

3.1.9 The Administration of Criminal Justice Act

The criminal justice administration regime before the enactment of the Administration of Criminal Justice Act (ACJA) 2015 had each state in Nigeria adopt either the Criminal Code in the Southern States or the Penal Code in the Northern states. Over the many years of the existence and operation of these legislations, the Criminal Justice System in Nigeria was in a state of perpetual decline, the legislations had loopholes, voids and inconsistencies, such that it was effulgent that they could not address the rising needs of society in a democratic

[383] *Ibid.*
[384] Laws of the Federation of Nigeria-Oil in Navigable Waters Act,< http://www.lawnigeria.com> Accessed on 1 November, 2017.
[385] *Ibid.*

government.[386] The ACJA was therefore welcomed with an air of relief as it makes affiances of speedily bringing criminals to book as well as protecting the victims of crime; amongst other things. This was a commitment yearned for by the entire criminal justice system and the society at large.

The ACJA came and merged the main provisions of the Criminal Code (CC), and Penal Code (PC) into one principal Federal Enactment, which applies to all Federal Courts across the Federation as well as all courts of the Federal Capital Territory, but it does not apply to a Court Martial.[387] Section 1 of the ACJA succinctly states that the purpose of the Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of society from crime and protection of the rights and interest of the suspects, the defendants and the victims. The ACJA was signed into law in May 2015; it contains 495 sections divided into 49 parts.[388]

3.1.10 Customs and Excise Management Act

The Customs and Excise Management Act (CEMA)[389] vests legal authority in the Nigeria Customs Service to act on behalf of the Federal Government of Nigeria in all Customs matters. This is supported by various supplementary legislations, including:

a. Customs and Excise (Special Panel and other Provisions)[390]
b. Customs Duties (Dumped and Subsidized Goods) Act[391]
c. Nigeria Pre-shipment Inspection Decree[392]

[386] D Okafor, 'Administration of Criminal Justice Act 2015: Innovations, Challenges and Way Forward', <http//www.thenationonlineng.net> Accessed on 20 November, 2017.
[387] The Administration of Criminal Justice Act, 2015(ACJA), Febuary 8, 2016 , < http://wwwlawpavillion.com> Accessed on 20 November, 2017.
[388] *Ibid.*
[389] Cap 45, Laws of the Federation of Nigeria, 2010.
[390] *Ibid.*
[391] Cap 87 Laws of the Federation of Nigeria, 2010.

d. Decree No. 45 of 1st June, 1992[393]

e. Customs and Excise Management (Amendment) Act[394]

The law relating to customs Agents is contained in the Customs and Excise Management Act (CEMA)[395] and the Customs and Excise Agents (Licensing) Regulations 1968[396]. Sequel to the promulgation of the Customs and Excise Management Act (CEMA) No. 55 of 1958, the affairs of the Department were brought under the management of a Board. Decree No. 7 of 1079 granted additional powers with the definition of the membership of the Board. Customs generally play a pivotal role in the economic life of any country. The functions of the Nigeria Customs Service include but not limited to the following:

a. Collection of revenue (Import/Excise Duties & other Taxes/ levies) and accounting for same
b. Anti- Smuggling activities
c. Generating statistics for planning and [397]budgetary purposes.

3.1.11 Corporate Criminal Liability under the Criminal and Penal Code

Statutory offences which are also referred to as strict liability offences are so conflicting that it is impossible to abstract any coherent principle on when this form of liability arises and when it does not.[398] The concept of strict liability in Nigeria criminal law seems to have veered off the axis charted at common law as the justification for its application. Glanville Williams expresses the view that "in general, the alternatives on strict liability are so

[392] Decree No 36 of November, 1979 further amended by Decree No. 11 of 19th April, 1996.
[393] As amended by Decree No. 77 of 29 th August, 1993.
[394] No. 20 of 2003.
[395] Cap 45 L.F.N 2010.
[396] Notice 95/1968 as amended.
[397] Nigeria Custom Service, Statutory Functions, Available at <htpp:// www.customs.gov.ng. Accessed on 26th October, 2018.
[398] V Akpotaire, 'Strict Liability and the Nigerian Criminal Codes: A Review', <https://www.nigerianlawguru.com> Accessed on 10 December, 2017.

confiscatory that it is impossible to abstract any coherent principle on when this form of liability arises and when it does not".[399] The law of crimes in Nigeria would seem not to have the common law presumption of *mens rea* in offences generally, as applicable.[400] Nigeria, having a codified criminal law generally has provisions in the criminal code as well as penal code[401] which serve as reference points for the question whether or not strict liability exists in this country under our criminal law.[402] Again the Nigerian legislature, it seems, has equally been quite vague as to whether or not offences outside the code require any mental element. Several offences exist in Nigeria today both within and outside the codes which by common law standards should have guilty mind, but are treated purely as strict responsibility offences not by any known and discernible pattern or principle but rather by an ad hoc abstraction from case to case. Statutory offences are crimes that are not inherently wrong, but that it is illegal because it is prohibited by legislation.[403]They are also known as regulatory offense. They are crimes created by statutes and not common law.

Strict liability offences without doubt exist in Nigeria. The only difficulty is that the principles governing it are not on all fours with the ones in England. In the first place, common law offences do not apply in Nigeria. Section 36 (12), of the Constitution of the Federal Republic of Nigeria, [404] provides *inter alia*:

> Subject as otherwise provided by this constitution a person shall not be convicted of a criminal offence unless that offence is defined and penalty thereof is prescribed in a written law; a written law refers to an Act of the National Assembly or law of a state, any subsidiary legislation or instrument under the provision of a law.

[399] D Baker, *Glanville Williams Textbook of Criminal Law*, (London: Sweet & Maxwell, 2015) p. 910.
[400] *Clegg v C.O. P (1949) 12W.A. C.A 379.*
[401] Section 24 of the Criminal Code (Southern States) and Section 48 of the Penal Code (Northern Nigeria)
[402] Section 2 (4) of the Criminal Code Act, actually makes Chapters II, IV and V of the Code dealing with criminal responsibility, punishment and parties to a crime applicable to all offences in or outside the Code. It is however not certain that a similar provision is in the Penal Code Law.
[403] What does Statutory Offence Mean? Law Dictionary available at https:www.law.academic.ru accessed on 10 December, 2017.
[404] (1999) As Amended.

The Criminal Code Act,[405]which is in force in the southern states of Nigeria has a complementary provision which states emphatically in Section 4:

> No person shall be liable to be fined or punished in any court in Nigeria for an offence except under the express provision of the code or some other ordinance, or some law, or of some order in council… or under the express provision of some statute… which is in force or forms part of the law of Nigeria…..

The combined effect of these provisions, it seems, is to eliminate the criminal law of crimes in Nigeria as well as every other form of customary criminal law[406]. The celebrated case on this issue is the case of *Aoko v Fagbemi*,[407] where a conviction for adultery which was not an offence under the criminal code was quashed. In similar vein and to the same effect are the provisions of Section 2 and 3 of the Penal Code Law,[408] in force in Northern Nigeria. It means therefore that criminal law in Nigeria is not only statutory but codified, albeit in principle.

The question which must be resolved in this regard concerning the doctrine of *mens rea* and the question of strict liability offences is whether or not, in the light of the purely statutory nature of our laws, the English law concepts are applicable in Nigeria. One is able to state in principle that the common law presumption of *mens rea* and its exception are not applicable to Nigeria criminal law.[409] The principles governing the physical and mental element of any crime in Nigeria are strictly statute based, and may be extracted upon a true construction of the words of the law creating the offence. A clear picture of the position of strict liability offences in Nigeria would only appear after a proper consideration of the extent

[405] Cap 77 LFN, 2010.
[406] A G Karibi-Whyte, *Criminal Policy: Traditional and Modern Trends*, (Lagos, Bolbay Publishers, (1988) p. 25-68.
[407] (1961) All NLR 400.
[408] Cap 89, Laws of Northern Nigerian, 1963.
[409] Okonkwo and Naish, *Criminal Law in Nigeria* (2nd ed., Ibadan, Spectrum, (1980), p 67.

and scope of the provision of Section 24 of the Criminal Code,[410] and Section 48 of the Penal Code.[411] Section 24 Criminal Code provides;

> Subject to the express provision of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident.…

This section in fact goes on to declare as immaterial the intention to cause a particular result as well as the motive which induced the offender to commit an offence. Section 48 of the Penal Code states:

> Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper core and caution.

The interpretation and construction of the principle of criminal responsibility in Nigeria today are essentially to be gleaned from the clear provision of the codes or the statute creating the offence. Professor Gledhill once wrote: "The Indian, Sudan and Northern Nigerian codes are not intended to be amending Acts, assuming a pre-existing body of laws. They are complete codes in relation to the matters they dealt with".[412] While Okonkwo expresses the view that the provisions of the codes in Nigeria relating to the elements of a crime should be construed in isolation of English Law concepts and doctrines with the latter acting only as guide.[413] The, Hon. Karibi-Whyte seems to suggest that the above views would only be acceptable where the code provisions are clear and unambiguous.[414]

[410] *Supra* .
[411] Penal Code Law (No. 59 of 1959).
[412] Gledhill, The Penal Codes of Northern Nigeria and the Sudan (1963) p 15.
[413] Okonkwo and Naish, *Ibid.*
[414] A G Kabiri-Whyte, History and Sources, *op cit*, p 245

In respect of offences charged under the criminal code, it is submitted that 2(4) of the Criminal Code Law,[415]expressly provides that Chapter 5 of the Criminal Code is applicable to all offences in Southern Nigeria. It states *inter alia*; the provision of Chapter II, IV and V of the Criminal Code shall apply in relation to any offence against any order in council, ordinance, law or statute and to all persons charged with any such offence.

The consequence is that since all offences in Southern Nigeria are presumed to be code offences under the principle of "exhaustiveness" under this provision, it may seem that there are no strict liability offences in the southern states. This is buttressed by the fact that if Section 24 of the Criminal Code applied to all offences, then some form of mental element needs to be proved to secure a conviction for any offence governed by the Criminal Code.

This scenario it seems has not been given the needed recognition it deserves going by the cases available for review on this question. *Clegg v C.O.P,*[416] suggests without more that *mens rea* is required merely because the offence in question is a felony. It is the view of the researcher however, that a different reason could have been advanced for so holding. That is, that the said offence is covered by Chapter V of the Criminal Code subject only to the exception therein contained. The cases of *Efana and Arabs Transport Ltd v Police,*[417] equally seem to have followed this pattern of determination whether or not *mens rea* is required without reference to the strict provisions of Section 24 of the Criminal Code. It seems that the application of Section 24 of the Criminal Code is subject to only one exception. That is, "the express provision of the code relating to negligent acts and omissions". Some writers have used this exception as an excuse for the view that the express words of the statute could not in fact create strict liability offences in Nigeria.[418] The West African Court of Appeal

[415] *Ibid.*
[416] (1949) 12 W A C A 379.
[417] (1972) 8 NLR 81.
[418] Okonkwo, *Ibid.*

stated it thus: "In order to determine whether *mens rea*, that is to say a guilty mind or intention is an essential element of the offence charged, it is necessary to look at the object and terms of the law that creates the offence".[419]

This attitude, it is submitted, cannot be extracted from the provisions of the code. There is no basis for an automatic importation of the English law principles of strict liability coupled with its complex of juridical and analytical denominators into the Nigerian criminal law when in fact, the code is very clear on what should be done and that is to apply the code provisions by reference to its own definitions. A Nigerian scholar once expressed as thus: "it follows therefore that a criminal statute should never be interpreted as not requiring proof of some fault".[420] Such public welfare offence of strict responsibility under our law, that is, road traffic offences, food and drug offences, public nuisance cases and contempt of court cases are justifiable on the basis of negligent acts or omission which are recognized as exceptions under Section 24 of the Criminal Code, and to some extent by Section 48 of the Penal Code.

It is however arguable that where the statute expressly creates an offence of strict liability, the provision of Section 24 is therefore by implication of the interpretation Act, excluded. A subsequent Act of parliament necessarily amends an older one where they deal on the same subject matter.[421] The principles highlighted above are equally applicable to the Penal Code offences. However, it must be pointed out that strict liability offences in Nigeria are more in offences outside the two codes. Upon a strict legal construction of the codes in force in Nigeria i.e the Criminal Code and Penal Code, criminal law in Nigeria has no business with the English doctrine of *mens rea* as developed at common law considering that

[419] *Amofia v R* (1952) 14 W. A. C. A 238, Per Foster Sutton P.
[420] A Oyajobi , 'New Dimensions to Criminal Responsibility in Nigeria', (1991) 2 *Justice* 80, 82. See also C Howard, 'Protection of Principles under a Criminal Code', (1962) 25 *Modern Law Review* ,190.
[421] Interpretation Act (No. 1 of 1964).

the codes have extensive provisions dealing with the mental element of a crime.[422] This view has been expressed with some force as follows: "first and most important… there is really no need to import *mens rea* into Nigeria criminal law at all in view of the provisions in the criminal code itself".[423]

One view is that before the Middle Ages and the advent of classic Roman and Cannon law effects on the Common Law in England, offences were generally of strict liability. The concept of strict liability evolved from being the rule in English criminal law to becoming an exception to the doctrine of *mens rea* or of no liability without fault due to the combined influence of the Roman and Cannon Law principles on English legal scholars in the Middle Ages. In Nigeria, the determination of what constitutes strict liability offences will largely be inferred from the words of the statute. The use of such worlds and epithets as intentionally, knowingly, willfully, endeavour and the like have excluded the doctrine of *mens rea.*[424] It is doubtful however, whether the absence of such words *ipso facto* means strict liability[425]. The cases have not shown any consistency in this area. In the case of *Efana & Anor,*[426] in a trial under the Customs Ordinance in Calabar,[427] the Divisional Court under a case held that the accused persons ought to have been convicted without the need to prove a guilty mind by the prosecution. In this case the court found on the facts that the defendants acted innocently without any intention to defraud, as the original was that of the bank which delivered all the documents to the 2nd accused person. Webber J. cited with approval the decisions of the

[422] Chapter V of the Criminal Code; and Chapter 11 of the Penal Code both provides exclusively for criminal responsibility and the concept of blameworthiness crimes.
[423] Okonkwo & Naish, *Criminal Law in Nigeria* (2nd ed. Ibadan, Spectrum 1980) at p 67.
[424] F B Sayre, 'Mens Rea' (1987) 45 *Harvard Law Review*, 974-1026.
[425] *Ibid.*
[426] Okonkwo & Naish, *Ibid*, p. 75.
[427] See *Cundy v Lecocq* (1884) 5 QBD 207; *Sherras v De Fiter* (1985) IQ.B 918.

English courts in *Cundy v Lecocq,*[428] *R v Prince*[429] *and R. v Wheat & Stocks.*[430] The Learned Judge approached this issue of statutory construction thus:

There are sections of the Ordinance in which the prohibited acts are excused if an absence of *mens rea* is proved… But these are in Section 224 (Customs Ordinance) certain prohibited acts without any qualifying terms. They seem to me to be absolute prohibitions, and no proof of the absence of *mens rea*, or even positive good faith, can in my opinion avail.

In contrast in the decision in *Arabs Transport Ltd v Police,*[431]where the appellant company charged under Regulation 24 (1) (g) (iv) of the Road Traffic Regulations, 1948 with causing or permitting its lorries to carry passengers without hackney permits, was discharged on the ground that *mens rea* was required and it was not proved. Though on the facts, the charges were laid under the wrong provisions, Webber J. was of the firm view that the verbs "permitting" or "causing" were by themselves sufficient to imply *mens rea* which being unproved in the case rendered the appellants not liable.[432] It does seem that Section 24 of the Criminal Code was framed to obviate the confusion generated by the interpretation of the common law doctrine of *mens rea.*[433] Section 24[434] together with Section 25 of the Criminal Code, it does appear, performs the same function as the common law doctrine of *mens rea* without harboring its characteristic complexities. The draftsmen, as it were, wanted by these sections to free Nigerian criminal justice from the "bewitchment[435]" of the *mens rea* doctrine. In *Widget Shire Council v Bonney,*[436] Sir Samuel Griffith said of the Queensland Criminal

[428] *Supra.*
[429] (1927) 8 NLR 81.
[430] (1921) 2 K B 119.
[431] Per Webber J. at P. 86 (1952) 20 NLR, 55.
[432] *Supra.*
[433] K I Oraegbunam & J N Chukwukelu, 'Section 24 of the Criminal Code and its effect on Criminal Liability in Nigeria', *Journal of Law and Criminal Justice* (2015) vol 5. no 1, pp. 124-132.
[434] Cap C38, Laws of the Federation of Nigeria 2010.
[435] Bewitchment is a term used by the Austrian born English Philosopher Wittgenstein, to underscore the lack of clarity caused by the use of metaphysical language in philosophy.
[436] (1907) 4C.L R. 977, p. 981.

Code on which the Nigerian criminal code was patterned that: "… under the Criminal aw of Queensland as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which has been the subject of much discussion…". The test now to be applied is whether the prohibited acts was or were not done accidentally or independently of the will of the accused person". Supporting this claim, Cooper C.J and Lukin J. in *Thomas v Mc Eather,*[437] went even further to observe that it seems to us that the Queensland legislature have, by the express provisions of Section 23-25 laid down in clear terms what the law in future should be in regard to the very much debated, very much misunderstood, and very much confused doctrine of what is referred to as *mens rea* and directed that the courts should not in future be guided by the conflicting and irreconcilable decisions of various courts on this question, but should be guided in determining the criminal responsibility of a person charged by reference to the tests prescribed by the language of those sections. It is clear that Section 24 and 25 of the Criminal Code intend to do to *mens rea* what Section 4 of Evidence Act has done to the doctrine of *res gestae* namely consign it to the legal Museum.[438]

3.1.12 Independent Corrupt Practices and other Related Offences Act 2000 (ICPC ACT)

The Independent Corrupt Practices and other Related Offences Act 2002 ,[439] established the Independent Corrupt Practices Commission (ICPC),[440] which is one of the major anti-corruption agencies in Nigeria. The Act generally prohibits the various perceived acts of corrupt practices arising from interactions or transactions involving public/ government officers and the general public or private individuals. The basic thrust of the Act is

[437] (1920) St. R Qd. 166 p. 175.
[438] 1 K Oraegbunam & J N Chukwuele , *Ibid.*
[439] Cap C31, Laws of the Federation of Nigeria, 2010.
[440] Section 3 (1) ICPC Act 2010.

prohibition of corrupt practices and bribery the essential elements of which are: giving or receiving a thing of value to influence an official act. The Act defines corruption to include; bribery, fraud and other related offences,[441] while persons are defined to include natural persons, juristic persons or anybody of persons corporate or incorporate.[442] Although the Act seems to focus more on acts of corruption in public offices, institutions and parastatals, it equally sets to curb corrupt practices in private business transactions and interpersonal relationships among individuals and persons.

The Act created four categories of offences in the eighteen sections dealing with offences under the Act. The four categories of offences are:

a. Giving and receiving of bribes to influence public duty.
b. Fraudulent Acquisition and receipt of properties.
c. Failure to report bribery transactions
d. Concealment of information and frustration of investigation

a. Giving/Offering and Demand/Receipt of Gratification: The Act prohibits direct or indirect giving/offering and receipt of bribes or gratification for the purpose of influencing official acts related to official duties. The various instances under which bribes may be given or received are also treated under the Act. The Act prohibits corruptly giving or receiving gratification for or on behalf of public officers for the performance or non-performance of official duties,[443]giving and receiving of bribery through making agents,[444] bribery of a public officer with intent to influence decision making and other related official acts,[445] bribery with intent of industry a person to abstain from bidding on any action conducted by or on behalf of any public

[441] Section 2 , ICPC Act L.F.N 2010.
[442] *Ibid.*
[443] Section 12, 13 and 14 of the ICPC Act L.F.N 2010 .
[444] Section 20 *Ibid.*
[445] Section 21 *Ibid.*

body,[446]and bribery to influence contract award.[447] The gratification need not be in cash alone but also non-tangible effects such as dignity, employment and forbearance, office and employment among other things.

A person will be caught by any of the provisions, whether he is the giver or receiver of bribe for himself or on behalf of anther, if he or she corruptly and directly or indirectly, offers/receives, promises or gives/receives a financial or other advantage, from or to another person, intending that this induces someone to, or rewards someone for, performing a relevant act or duty improperly. The criminal intent or the *mens rea* in the section is "corruptly". The Act only defined corruption but not the word "corruptly". Both words though literally related are not synonymous. In the case of *Cooper v Slade,*[448]the leading case in England on the meaning of "corruptly", the House of the Lords took the view that "corruptly" meant "purposely doing an act which the law forbids as tending to corrupt". The Black's Law Dictionary,[449] however defines corruptly when used in a criminal law statute to means as indicating a wrongful desire for pecuniary gain or other advantages. It therefore means that to be guilty under these sections, the gratification must have been given or received with a wrongful desire for pecuniary gains another factor to be borne in mind with respect to the sections is that the acts or omissions for which the bribe is given may or may not be or related to an official act.[450] The Act defined officials to mean any director, functionary, officer, agent, servant, privy or employee serving in any capacity whatsoever in the public body, or in any private organization, corporate body, political party, institution or other employment whether under a contract of service or contract for service or otherwise and

[446] Section 24 *Ibid.*
[447] Section 25 *Ibid*
[448] (1857) H. L Cas. 746.
[449] A Garner , (9th edn. St. Paul Minni Minnesota: West Publishing (2009).
[450] Section 10 of ICPC Act, L.F.N 2010.

whether in an executive capacity or not.[451] A public officer on the other hand is defined in the Act to mean a person employed or engaged in any capacity in the public service of the federation, state or local government, public corporations or private company wholly or jointly floated by any government or its agency including the subsidiary of any such company whether located within or outside Nigeria.[452] The definition makes it clear that the Act is not concerned with acts of public officials alone but with acts of management and employees of private companies in which government is a shareholder or which is related to the governments.

b. Fraudulent Acquisition and Receipt of Property.

It is an offence for any person, who being employed in the public service, to knowingly acquire or hold, directly or indirectly, otherwise than a member of a joint stock company consisting of more than 20 persons, a private interest in any contract, agreement or investment emanating or, connected with the department or office in which he is employed or which is made on account of public service. The penalty for the offence is seven years imprisonment.[453]

C. Duty to Report Bribery Transaction

There is a duty on both public officers and private individuals to report bribery transactions.[454] While it imposes a duty on a public officer to whom bribe is offered to report the incidence to the ICPC[455] or the police, it also imposes a similar duty on private individuals from whom bribery is demanded.[456] Failure to report such an incidence without

[451] Section 2 ICPC Act L.F.N 2010 .
[452] *Ibid.*
[453] Section 12 ICPC Act L.F.N 2010.
[454] Section 23(1) & (2) ICPC Act L.F.N 2010.
[455] Section 26 (1) *Ibid.*
[456] Section 26 (3) *Ibid.*

reasonable excuse is an offence punishable with imprisonment for a term not exceeding two years and or fine not exceeding one hundred thousand naira.[457]

D. Concealment of Information and Frustration of Investigation.

Another major offence created by the Act is the concealment of information from the enforcement agencies and deliberate frustration of investigation into corruption related matters.[458] Offences under this heading includes; making false or misleading statement to the anti corruption agencies, deliberate frustration of investigation by the anti corruption agencies and concealment of gratification.[459] However to be guilty under this heading, there must be a proof of knowledge and the intention to conceal or frustrate investigations by the enforcement agencies.

3.1.13 Economic and Financial Crimes Commission (Establishment) Act.

Financial and economic crime is no new phenomenon and Nigeria like all other countries is well aware of the detrimental effects of financial crime on the individuals within the community and society as a whole. The Economic and Financial Crimes Commission Act 2002,[460] came into force on the 14th of December 2002. The Act establishes the Economic and Financial Crimes Commission (EFCC), as the overarching body designated with the primary responsibility of investigating and prosecuting economic crimes and bringing perpetrators of such crimes within the ambit of the law.[461] In the case of *Oluese v FRN & Anor.*,[462]the Court of Appeal stated that the EFCC is an agency in the prosecution of economic and financial crime offenders for both the Federal and State Government in Nigeria. Its function is unique, more so Section 6 (m) of the Act enables the body to

[457] Section 27 EFCC Act 2002.
[458] Section 27 *Ibid.*
[459] Section 28 *Ibid.*
[460] Laws of the Federation of Nigeria 2010.
[461] Section 1 EFCC Act 2002.
[462] (2013) LPELR ,22016.

prosecute all offences connected with or relating to economic and financial crimes.[463] The EFCC (Establishment) Act, which establishes the EFCC, has specifically in Sections 6 & 7 thereof vested it with investigatory and prosecutorial power.[464] Section 46[465] defines "Economic Crime" as a nonviolent criminal activity committed with the objectives of earning wealth illegally. *Section 5,*[466] sets out the various offences with which the Act is concerned and the list is not exhaustive.[467] The Act is a tool for holistic approach to combating economic crimes in Nigeria. This can be seen when a review is made of the membership of the commission and its powers under the Act. The membership of the commission is drawn from virtually all the government bodies saddled with economic issues while the commission has the powers of not only investigating and enforcement of the provisions of the Act but also the enforcement of other legislations dealing with various economic crimes. Thus *Section 7* [468] confers special powers on the commission to enforce the provisions of such other laws as:

a. The Money Laundering Act
b. The Advanced Fee Fraud and other Related Offences Act
c. The Failed Banks (Recovery of Debt and Financial Malpractices in Banks) Act.
d. The Banks and other Financial Institutions Act.
e. Miscellaneous Offences Act
f. Any other law or regulation relating to economic and financial crimes including the Criminal Code and Penal Code.

The provisions of the Act as it relates to the powers of the commission are:

[463] Per Pemu JCA.
[464] *Kalu v Fed. Rep. of Nig*. & Ors (2012) LPELR 9287.
[465] EFCC Act 2002.
[466] *Ibid.*
[467] See the case of *Mustapha v F.R.N* (20I7) All F.W.L.R Pt 902, 842.
[468] *Ibid.*

a. Coordination and enforcement at all economic and financial crime laws and enforcement function.
b. Adoption of measures to eradicate the commission of economic and financial crimes.
c. Adoption of measures for the privations of economic and financial crimes.
d. Facilitation and rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic financial crimes.
e. Examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals and corporate bodies involved.
f. Collaborating with government bodies within and outside Nigeria carrying on functions wholly or in part analogous with those of the commission.
g. Identification and determination of whereabouts and activities of persons suspected of being involved in economic and financial crimes.
h. Movement of proceeds or properties derived from the commission of economic and financial crimes.
i. Establishment and maintenance of a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved.
j. Taking charge of supervising, controlling coordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offences connected with or relating to economic and financial crimes in consultation with the attorney general of the federation.
k. The coordination of all existing and financial crime investigating units in Nigeria.
l. Carrying out such other activities as are necessary or expedient for the full, discharge of all or any of the functions conferred on it under the Act.

It is apparent that both individuals as well as corporate bodies in their day-to-day business might commit or be a victim of one or more of the various criminal activities proscribed by the Act. This might be deliberate or through inadvertence. It is therefore important that they are watchful of how their business operates, so as to ensure that they are not caught by the provision. It is worth mentioning that the list provided in Section 5 (1)[469], is not exhaustive, but is only intended to give an idea of the nature of offences, which the EFFCC will investigate. Part N of the Act provides for the specific offences, which are caught by the Act. However the offences that should be of concern to companies will be highlighted herein, these include the following.

a. Offences relating to Financial Malpractice

This provision should be of great importance to investors in the banking and other financial services related sector as it relates to personnel employed in banks or other financial institutions. Section 13[470] requires that personnel working in banks and other financial institutions must neither fail nor neglect to secure compliance with the provisions of the Act. It is important for personnel within the financial sector to know the offences which may be committed under the Act and ensure that they do not violate any of the provisions. It is therefore imperative to know the nature of crimes such as failure or neglect to comply with the provisions of the Act,[471] false information[472] and funding of terrorism.[473]

[469] EFCC Act, 2002.
[470] Section 4 of the EFCC Act, 2002.
[471] Section 15 of the EFCC Act, 2002.
[472] *Ibid.*
[473] EFCC Act, *op cit.*

b. Acquisition and Retention of Proceeds of a Criminal Conduct

These offences are provided for under the Act. Section 17(a),[474] applies to persons who knowingly retain control of the proceeds of a criminal conduct or an illegal act on behalf of another. This retention may be either concealment, removal, from jurisdiction or transfer to nominees. Finally, by virtue of Section 18 (d),[475] where a person attempts to conceal, disguise the true nature, source, location, disposition, movements, rights with respect to or ownership of property derived from commission of an offence, he would contravene the provisions of paragraph B above.

3.1.14 The Money Laundering (Prohibition) (Amendment) Act.

The Money Laundering (Prohibition) Act, 2004 makes various provisions prohibiting the laundering of the proceeds of a crime or of any criminal or illegal activity, and provides for appropriate penalties for money laundering infringements.[476] The provisions of the Money Laundering (Prohibition) Act remains one of the most effective measures to combating terrorism, narcotic related crimes, embezzlement of public funds, which latter offence is more commonly known in Nigeria as corruption.[477] There is no definitive statutory definition of what constitutes a money laundering offence. The Anti-Money Laundering/Combating the Financing of Terrorism Regulation in Bank and other Financial Institution 2013,[478]however defines it as the process whereby criminals attempt to conceal the origin and or ownership of property and other assets that are or were derived from criminal activity or activities. These regulations go further to acknowledge that money laundering and terrorism financing are now

[474] EFCC Act 2002.
[475] I*bid*
[476] Money Laundering (Prohibition) Act, 2011, Explanatory Memorandum .Available at http://www.nassnig.org accessed on 29 November, 2017.
[477] Money Laundering (Prohibition) Act, 2011. Available at http://www. Oseroghoassociates.com accessed on 29 Nov. 2017.
[478] This Regulation provides compliance guidelines for financial institutions.

a global phenomena and malaise which pose major threats to international peace and national development.

The Money Laundering (Prohibition) Act 2011 provides for the repeal at the 2004 Act and appropriate penalties and expands the scope of supervisory and regulatory authorities so as to address the challenges faced in the implementation of the anti-money laundering regime in Nigeria.[479] The provision of this law is mostly targeted to financial institution and designated non-financial institutions. Hence, they are expected to develop programmes to combat the laundering of the proceeds of a crime or other illegal act by doing the following; as the designation of compliance officers at management level at its headquarters at every branch and local office.

3.1.15 Advanced Fee Fraud and Related Offences Act.

The Advance Fee Fraud and other Related Offences Act[480] literally extended the felonious provisions of the Criminal Code Act, on false pretences, to now include any person who by false pretence, and with the intent to defraud obtains from any other person, whether in Nigeria or in any other country, or induces any other person in Nigeria or in any other country, to deliver to any person, any properly, whether or not the property or its delivery is induced through the medium of a contract, which can tract was itself induced by false pretence.[481] The gist of so-called advance fee frauds' is to trick prospective victims into parting with funds by persuading them that they will receive a substantial benefit in return for providing some modest payment in advance.[482]

[479] Money Laundering (Prohibition) Act, 2011.
[480] Cap A6 Laws of the Federation of Nigeria, 2010.
[481] Section, 1(a) and (b) of the Advance Fee Fraud Act, 2010.
[482] R Smith, M Holmes and P Kaufmann, 'Nigerian Advance Fee Fraud', International Society for the Reform of Criminal Law', <http://www.nigeriaandlawgoru.com> Accessed on 20 January, 2018.

The penalty on conviction for committing any of the above false pretences offences is imprisonment for a term of not more than seven (7) years without the option of a fine or imprisonment for a term of not more than twenty (20) years.[483] Other fraud related offences under this law includes:

a. Representing oneself as possessing the power of doubling or otherwise increasing any sum of money through any unorthodox method or methods like currency coloration.
b. Fraudulent invitation of a non-Nigerian to Nigeria under false pretences.
c. Possession of fraudulent documents to commit a false pretence offence.
d. Laundering of funds obtained through unlawful false pretences activity or activates.[484]

As part of the global efforts to enhance cyber security, the Advance Fee Fraud and other Fraud related Offences Act, provides in the Part II,[485] the statutory mandatory requirement for all telecommunication companies in Nigeria to obtain from all their subscribers or customers, especially their data services subscribers or customer, the full names, residential or corporate copies of utility bills, certificates of incorporation or registration, etc of these subscribers or customers.[486]

All telecommunications, internet and internet café service provides, are also required to, in addition to registering their business with the Economic and Financial Crime Commission, maintain a register of all telecommunication crimes in their networks. These service providers are further statutorily required to submit on demand to EFFCC, such data

[483] Section 1 (3) Advance Fee Fraud Act, 2004.
[484] Section 4 *Ibid.*
[485] Section 12 and 13 of the Advance Fee Fraud Act, 2004.
[486] Cyber Searching, Risks and Crimes. < http:/www.oseroghoassociates.com> Accessed on 20 January, 2018.

and information as are necessary or expedient for giving full effect to the performance of the functions of EFCC under the Advance Fee Fraud and other Fraud Related Offences Act.[487]

It is pertinent to note the provisions of Section 10 of the Advance Fee Fraud and other Fraud Related Offences Act, which provides that where an offence which has been committed by a body corporate is proved to have been committed on the instigation or with the connivance of or attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in such capacity, he as well as the body corporate, where practicable, shall be deemed to have committed that offence and shall be liable to be proceeded against and punished accordingly.[488] Where a body corporate is found guilty and convicted of an offence under this Act, the high court is permitted to order that the body corporate shall thereupon and without any further assurance, but for such order, be wound up and all its assets and properties forfeited to the federal government.[489]

Advance fee fraud has been described by Dr. Ibrahim Comassie, as a conspiracy between some dubious Nigerians and gullible foreigners to transfer illegally, abroad, non-existing funds.[490] Advance fee fraud involves some persuasion of the target (victim) by a trickster, to advance some money of relatively smaller value in the hope or promise of realizing a much larger gain.[491] Am.ong the variants of this type of scam is the so called Nigerian "419" frauds. The number "419" was derived from the Criminal Code Act which provides for the offence of "obtaining goods by false pretence' under Section 419. Other sections dealing with fraud and involving false pretence under the Criminal Code include:

[487] Section 13 Advance Fee Fraud Act, 2006.
[488] Section 10(1) Advance Fee Fraud Act 2006.
[489] Section 10 (2) *Ibid* .
[490] I Coomassie, NPM, Former Inspector General of Police, 'Advance Fee Fraud', Being a Paper Presented at the Interpol 63rd General Assembly in Rome, 2013, 28 September-4 October at p.1.
[491] F M Waziri, '*Advance Fee Fraud, National Security and the Law'*, (2005) (Ibadan: Nigeria, Book Builders Publisher). p 6.

Section 19A, 19B and 20. False pretence is defined under Section 418 of the Criminal Code Act. The advance fee fraud Act was intended to cover, as much as possible, in a single legislation. Highlighting the importance of the Act in *Ajudua v FRN,*[492] his Lordship, Ogebe JCA stated the aim of the Advance Fee Fraud Act as follows:- "…Advance fee fraud Act… is a special legislation designed to combat a variant of criminal manifestations that have made a dent on the psyche of the country as a component of the world community with the tendency to lower or undermine the self-esteem of the country.

Justice Mufutau Olokooba while delivering judgment on the matter of an Advance Fee Fraud Kingpin, Adedeji Alumile (a.k.a Ade Bendel) the Hon. Justice stated that not visiting the accused with the full weight of the law would be inappropriate. He sentenced the accused to six years imprisonment for defrauding an Egyptian General Abdel Azim Attia of over $500,000 (65 million in 2003. He also ordered the accused to refund US $500,000 that the obtained from the complainant.[493] The two essential ingredients of the offences under this Act are false pretence and "intention to defraud. It is observed that whilst "false pretence is defined under the Act,[494] the term "fraud" is not defined anywhere in the Act. This is a fundamental omission on the part of the craftsmen and the legislature.

> under this Act, "false pretence" is defined to mean "a representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or laws either past or present, which representation is false in fact or law, and which the person making it knows to be false or does not believe to be true.[495]

[492] (2006) 1 EFCLR 1 at 10, Para 25-30 C. A.

[493] Ade Bendel was arrested and arraigned by EFCC and charged along side one Chief Olafemi Ayeni in 2003, claiming to be the owner of worldwide company in charge of American currencies. The accused with one Olafemi Ayeni, upon going to the office of the complainant, told him he wanted to buy stone chemicals that would be used to clean security covers from the notes in boxes, for which the complainant parted with the sum. He later found out that the organization was fake and the so called chemical only existed in the imagination of the swindlers.

[494] Section 20 of the Advance Fee Fraud Act, 2006; see also Section 418 of the Criminal Code Act, Cap 38, LFN 2010.

[495] Section 20 of the Advance Fee Fraud Act 2006. See also *Onwudiwe v FRN* (2006) All FWLR (pt. 319) P. 775 at 812.

From the above definition, the offence of false pretence generally imputes knowledge which is founded on deceit and intent to defraud. The act of the accused must convey an element of deceit or to obtain some advantage for the accused or another person, or to cause loss to any other person.[496]The offence could be committed by oral communication or in wring or even by the conduct of the accused person to induce or make the victim part with a thing capable of being stolen or make the victim deliver a thing capable of being stolen. It is pertinent to note the provision of Section 7(3),[497] which provides that when as a result of negligence, or regulation in the internal control procedures a financial institution fails to exercise due diligence as specified in the Banks and other Financial Institutions Act, 1991 (as amended), in relation to the conduct of financial transactions which in fact involve the proceeds of unlawful activity. The financial institution commits an offence and is liable on conviction to refund the total amount involved in the financial transaction and not less than N100.000 sanction by the appropriate financial regulatory authority. Financial institution here is a body corporate in order to escape criminal liability the body corporate would have to exercise due diligence.

3.2. Corporate Criminal Liability for Occupational Safety in Nigeria

All companies are duty bound to ensure that employees and other persons who may be affected by the company's undertakings remains safe at all times. In Nigeria, the need to reinforce health and safety management issues is exemplified from the unsavory recruitment reports of plane crashes in the aviation industry, high rates of motor vehicle accidents, numerous cases of death due to poisoning in the solid mineral sector, frequent accounts of

[496] *FRN v Kalu* (2008) 7 EFCLR 110 at 133.
[497] Advance Fee Fraud Act 2006.

disasters in the petroleum sector arising from over spills, pipeline vandalism as well as accidents involving petroleum tankers.[498]

Health and Safety management is an area that is concerned with ensuring the safety, health and welfare of people engaged in work or employment. It goes further too to protect co-workers, family members, employers, customers, suppliers, nearby communities and other members of the public who are impacted by the workplace environment.[499] It is the responsibility of the management of a company to prevent accidents and eliminate health and safety hazards in order to minimize the possible deaths of employees and by so doing to minimize their own loss. In Nigeria, there are lots of industrial accidents in factories especially the ones owned by expatriates that are poorly equipped with abysmal safety standards that will not be tolerated anywhere else.[500] These accidents have led to deaths, amputation of limbs and permanent disabilities of the workers. In many cases, compensations are not paid and because of gross unemployment, the workers cannot protest as there are countless others waiting to take their place.

The elimination or at least minimization of health and safety hazard risks is the moral as well as the legal responsibility of employers.[501]An employee ought not to be saddled with the onerous responsibility of constantly being worried about the risk of injury or death in the workplace. This has great implications for the performance of the employee. It is logical to assume that an employee who is in constant fear for his safety will be unbalanced psychologically and may be unable to give his best to the job at hand. There are usually legal liabilities and sanctions associated with not maintaining high health and safety standards,

[498] E I Enaruna, & Oisamoje, M D, 'An Exploration of Health and Safety Management Issues in Nigeria's Effort to Industrialize', (2013) vol. 9, no. 12 , *Scientific Journal* <http://www.evjournal.org> Accessed on 29 November, 2017.
[499] G R, Ferris,& M R, Buckley, '*Human Resources Management: Perspectives, Context, Functions and Outcomes'*, (New Jersey: Prentice Hall, Englewood Cliff (2006) p. 10.
[500] Enoruna & Oisamoje, *op cit.*
[501] Armstrong M., '*A Handbook of Human Resources Management Practice*', (2003) 8th ed. London: The Bath Press Ltd, p 21.

which may be enforceable in civil or criminal law. This is usually a function of regulatory bodies put in place for such purposes. Thus, a corporate organization may eventually realize that the cost of non-compliance may be so immense as to encroach seriously on the organizations profit margin. Employers are legally under a duty to see to the safety of their employees. Thus the English Court in the case of *Wilsons & Clyde Coal & Co. Ltd v English,*[502]held that there are three main duties of an employer to the employee; provision of competent staff, adequate plant and safe system of work. The Occupational Health and Safety (OSH) is a global phenomenon towards ensuring the safety workers at their work places. The International Labour Conference at its 91st session in 2003 compiled its conclusion in a publication called Global Strategy on Occupational Health and Safety,[503] where it emphasized the need for nations to adopt comprehensive changes in occupational safety and health at the national and enterprise level.[504] This is necessary because of the result of the magnitude of the global impact of occupational accidents and diseases as well as major industrial disasters, human suffering and related economic cost. Recognizing the challenges created by the continuous exposure of workers to occupational risks and hazards the International Labour Organisation adopted Convection 161 in 2004.[505] This instrument provides guidelines for occupational health and safety services in line with transformation at workplace. Many countries of the world have progressively begun adopting different styles of occupational safety and health instruction for medium sized and large enterprises but the case is different in Nigeria because it seems Nigeria is yet to embrace this change. Williams (SAN), while commenting on the need for an Occupational Health and Safety Law opined thus; 'an urgent comprehensive review of the Nigerian Law for the purpose of meeting the

[502] (1937) 3 All ER 628.
[503] I. L. O Global Strategy on Occupational Safety and Health, Conclusions adopted by the International Labour Conference at its 91st session 2003.
[504] *Ibid.*
[505] ILO: Occupational Safety and Health, International Labour Conference 98th Session, 2009.

challenge that abounds in the coming millennium is the most important area of our national development'.[506]

On the 27th day of September 2012, the Nigerian legislative upper chamber, the senate passed a bill seeking to cater for the safety, health and welfare of Nigerian workers. The Bill was Titled, The Labour Safety, Health Welfare Bill 2012.[507] The Bill seeks to protect Nigerian workers from hazards associated with their jobs. The Bill contains III Clauses and Clause 83 deals with offences and penalties. The Bill also seeks to repeal and re-enact the Factories Act of 2004 to make comprehensive provisions for securing the safety, health and welfare of personnel at work in addition to establishing the National Council for Occupational Safety and Health. The Bill compels employers to pay a fine of 5 million or imprisonment of 3yrs to any person killed or who suffers severe injury resulting from a contravention by the employer.[508] The Bill as a protective provision and more encompassing than Factories Act, is a positive step in the right direction as regards the rights to the health safety and welfare of the employees both in private and public sectors of Nigeria.

3.2.1 The Factories Act

The Factories Act[509] hereby referred to as the Act commenced on the 11th of June 1987 and by its Section 86, repealed the Factories Act (Laws of Nigeria Cap 66). The Act is largely identical in its provisions to the English Factories Act 1961 and can be regarded as the most important safety legislation in Nigeria.[510] The first legislation on factories in Nigeria was the Factories Ordinance No.33 of 1955. This was based on the British Factories Act 1937, which

[506] I V, Oghoranduku , 'A Critique of Factories Act in Light of Changing Work Patterns, Occupational Safety and Health Practice', (2010) *Nigerian Journal of Labour Law and Industrial Relations*, vol. 4, no 2, p.11.
[507] Nigerian Labour Safety Health Welfare Bill, < http://www.nigerdeltaheartbeat.wix.com Nigera -delta-heat-beat/Nigeria-labor-safety-health-welfare-bill passed> Accessed on 16 December, 2017.
[508] J Oluwole, *Punch Newspaper Report* < http://www.punching.come/news/breach-labour safety.> Accessed on 16th December, 2017.
[509] Cap FI Laws of the Federation of Nigeria, 2010.
[510] O Oladosu , *The Nigerian Labour and Employment Law in Perspective*, (2nd edn Lagos Folio Publishers Limited Ikeja), p.120.

was an Act to consolidate the Factories and Workshop Act 1901 to 1929 and other related enactments. The Factories Act is divided into eleven parts and has 89 sections. Part I deals with the registration of factories and the appointment of factories appeal boards, part II of the Act contains Sections 7 to 13 and deals with Health (general provisions); part III contains Section 14 to 39 and deals with safety (general provisions); part IV contains Section 40 to 44 (Welfare provisions) whilst part V contains Sections 45 to 50 (Health, safety and welfare special provisions and regulations)

3.2.2 What is a Factory?

Section 87 (1) [511] gives the meaning of a factory as any premises in which or within the close or cartilage or precincts at which one person is, or more persons are, employed in any process for or incidental to any of the following purposes, namely:

a. The making of any articles,[512] or of part of any articles, or
b. The altering, repairing, ornamenting, finishing, cleaning or washing or the breaking up or demolition of any article or
c. The adopting for sale of any article, being premises in which or within the close or cartilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the person or persons employed therein has the right of access or control etc.

This section above makes a fundamental alteration to the definition of factory contained in Section 5 (1) of the Factories Act of 1956 in that a factory now means any premises for the making of any article in which one person is employed. Unlike the Factories Act 1956, ten or more persons must be employed to satisfy the definition of a factory.

[511] Factories Act, Cap F1 Laws of the Federation 2010.
[512] Section 88 of Factories Act 2004, defines an article to include any solid, liquid or gas or any combination of these.

However, the Act further provides that in addition to the definition provided above the word "factory" also includes the following, premises in which ten or more persons are employees.[513] Under the Act, an open space may be a factory if industrial activities are carried on therein.[514] The decision in *Powley v Siddeley Engines Ltd,*[515] buttresses this provision. In that case, the plaintiff was injured when he slipped on the icy steps of the approach to the air craft company's administrative block. The court held that as the activities carried on in the administrative block included processes incidental to the making of aircraft engines, the block and its approach were part of the factory.

To be a factory, however, the objective of the processes must be by way of trade or gain. If the object of the process is not for trade or gain, it will not be a factory even where the premises are used for making or adapting or repairing of articles.[516] In *National Union of Road Transport Workers v Nweke Ogbodo & Ors*[517], Niki Tobi, JCA (as he then was) said that trade among other things, also conveys the meaning of occupation or employment as a means of procuring livelihood. This decision therefore could be said to mean that the manufacturing of articles in a workshop solely for the use of the institution cannot be said to be a trade and any person that gets injured in the process can lay no claim under the Act. But the position is different under the common law in *Wood v London County Council*[518]**,** where the plaintiff was injured by an electrical machine used for the mincing of meat in the kitchen of a municipal hospital. The court held that the claim must fail because the process carried on in the kitchen was not for the purpose of trade or gain. The court took the view that a work place must be used for the making of product for gain or reward before it can come within the

[513] Section 87 (i) - (ix) and Section 87 (2) (7) Factories Act, 2004.
[514] Section 87 (6) *supra* .
[515] (1965) 3 All E.R. 612.
[516] E Akintude, *Nigeria Labour Law*, (2000: Ogbomoso Nigeria) p.186.
[517] (1998) 2 NWLR pt. (537) 189,p. 198.
[518] (1941) All E.R. 612.

definition of factory.[519]The employment in the factory as provided in the Act must be for wages. According to Atilola, there must be a relationship of employer and employee or employment for wages.[520] In *Pullen v Prison Commissioners,*[521] a prisoner was injured while working in a prison workshop. He claimed damages for breach of statutory duties under the English factories Act. The court held that there was no relationship of master and servant between the prisoner and the prison officials. Also in *Weston v London Country Council***,**[522]a technical institute was held not to be a factory in so far as those admitted there are admitted as scholars and not as employees.

The Factories Act was, apart from the common law applied to such a case in *Obere v Board of Management, Eku Hospital,*[523] in this case the plaintiff was employed as a boiler and steam operator. The boiler had a defective motor and it was reported to the hospital authorities on several occasions. The authorities took no action, an exposed fly wheel cut the plaintiff's thumb and he sued the authorities through cleaning damages for this injuries. The court held the hospital authorities liable and awarded a damage which was increased on appeal by the Supreme Court. From the above decision, the purposes of the premises could be seen to be extended beyond the ambit of the Act.

3.3. Criminal Liability of the Employer for Breach of Industrial Safety Laws

The liability of the employer can be categorized under two main headings, civil liability and criminal liability. However, this research work is limited to criminal liability. First, it is

[519] Factories Act 2004, Section 87 (1).
[520] B Atilola , *Annotated Nigerian Labour Legislation*, (2008) Lagos: Hybrid Consult) p.83.
[521] (1957) 3 All E. R. 470.
[522] (1941) K B 608.
[523] (1998) ANLR 155; (1978) 1 LNR 246.

pertinent to define who is an employer. The Black's Law Dictionary[524] defines an employer as a person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages. The courts have defined an employer as:

a. An employment agent, *Alderton v Burgon.*[525]
b. A commission agent, *Road Transport Industry Training Board v Ongaro.*[526]
c. An associated company of a person's last employer. *Lucas v Henry Johnson.*[527]
d. An organization of the self employed and small business *National Federation of the Self Employed and Small Business v Philipott.*[528]

But in contrast the term has been held not to include: The Secretary of State. See the case of *The Secretary of State for Employment v Mann.*[529] The Workmen Compensation Act[530] defines an employer thus: An employer includes:

a. The Government of the Federation of Nigeria and of any States
b. Anybody of persons corporate or unincorporated and legal representative of a decease/employer; and
c. Where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprentice, the later shall for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person; and

a) In relation to a person employed for the purposes of this Act, be deemed to be the employer.

[524] B A Garner, *Blacks Law Dictionary* (9th edn, St Paul Minni Minnesota: West Publishing, 2009) p. 604.
[525] (1974) R. T. R. 422 .
[526] (1974) I. C. R. 523.
[527] (1986) I. C. R. 384.
[528] (1997) IRLR 340 at 315.
[529] (1996) IRLR 4 at 220.
[530] Workmen Compensation Act, Cap W6 L.F.N. 2010.

The Employers' Compensation Act,[531]also defines an employer's thus; employer includes any individual, body corporate, federal, state or local government or any of the governmental agencies who has entered into a contract of employment to employ any other person as an employer or apprentice. From the above definitions an employer can either be a natural person human being and or an artificial person which can be a body corporate or an unincorporated body.

The general principle of criminal law as earlier stated is that a person cannot be guilty of an offence unless he has committed a positive act or an overt act prohibited by law, or has failed to do some act as provided by the law. The basic element for any criminal liability is embedded in the Latin maxim, '*actus non facit reumnisi mens sit rea'* meaning, "an act does not make a man guilty of a crime unless his mind is blameworthy".[532]In the same vein, an employee/ servant will not liable where he commits a crime unless, he can prove to have committed the crime in the execution of his official orders. Emiola is of the view that where the act or omission of the servant is manifestly unlawful the servant will not be entitled to indemnity.[533] On the other hand if the master expressly orders or in absence of express orders, the masters knows or ought reasonably to know that his servant is committing a crime in the course of his employment and he fails to restrain him, the master shall be guilty of that crime . Liability here arises because the employee/ servant enjoys a delegated power; the offence is essentially that of the employee, liability for its being ascribed to the employer or master the rationale of the liability relates to the failure of an employer to adequately perform a supervisory function.[534] There are however when employers/masters might not be human persons in this case they are artificial personalities who do not have the minds of their own to

[531] Employers Compensation Act 2010.
[532] J C Smith & B Hogan , Criminal Law, (7th edn,London: London and Co (Published) Ltd, 1992) , , in Corporate Criminal Liability in Nigeria (Lagos: Malthouse Press Limited) 1st edn 2008, p. 37.
[533] Emiola Akintude, *supra*, p. 279.
[534] *Griffiths v Studebakers Ltd* (1924) 1 KB 103, *Reynold v G.H Austin & Sons Ltd* (1951) 2 KB 135.

think or perform any act whether a wrong or a crime then their quit become difficult to prove. Thus at common law the position was that a master would not be held liable for the crime of his servant. In *Karaberis Ltd and Titton v Inspector General of Police***,**[535] where some vehicles were stolen by unknown persons and its was contended that Titton, as area manager of the first defendant company should be held criminally liable for the offence committed in relation to the vehicles. But the Supreme Court rejected this contention holding that the defendants could not be held responsible for the offence. In *Associated Tin Miners of Nig. Ltd v Chief Inspector of Mines*,[536] it was held that Section 101 of the Minerals Act 1946 makes the holder of a mining lease personally liable for an offence committed by his tributes. An employer (a corporation) can be vicariously liable for crimes of his employees not because the acts are ascribed to it alone, but also because it has either by his implied policy created enabling environment, which enhanced the commission of the offence, or by acquiescence, condoned and encouraged the commission of the offence. In *Lloyd v Grace, Simith and Co*[537], a solicitors managing clerk induced an old widow by fraud to part with her title deed and money and later appropriated them. The defence was that the servant committed the crime for his own benefit and that the employers were not answerable for such an act. But the House of Lords rejected the contention. Their Lordship held that a fraud committed in the course of business which the servant was authorized or held out as authorized to transact on behalf of his principal was an act done in the course of employment and the masters were liable for it.

There are difficulties in grounding vicarious liability for crimes on employers especially where they are corporations. As earlier stated, this is because of the problem in determining whose intent shall be ascribed as personal to the corporation. According to Ali,[538] the test of liability is that of delegation. Thus, the statutes may imposes duties on the master which he

[535] (1958) 3 F.S.C; (1958) WNCR 241.
[536] (1950) 19 N. L. R. 69.
[537] (1912) A. C. 716; (1911-13) All E. R. Rep 51.
[538] L Ali , *Corporate Criminal Liability in Nigeria***,** (2008, Surulere Lagos: Malthouse Press). p. 81.

cannot delegate the reasonability. Lord Atkin in the English case of *Mousell Brothers Ltd v London and North-Western Rly Co,*[539] buttressed this issue in the following terms.

> While *prima-facie* a principal is not to be criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such terms as to make the prohibition or the duty absolute; in which case the principle is liable if the act is in fact done by his servants. To ascertain whether a particular act of parliament has that effect or not, regard must be had to the object of the statute, the world used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom in ordinary circumstance it would be performed, and the person upon whom the penalty is imposed.

These duties as espoused by Lord Atkin above are non-delegable some examples of such duties are; the safety provisions of the Factories Act which impose duty personally on the master. Also the new law Employee's Compensation Act 2010 imposes duty on the employer and these duties are not delegable.

3.4 Corporate Criminal Liability for Homicide.

Since the nineteenth century, judges, legislators, prosecutors and academics have grappled with how best to accommodate within the criminal law, corporation whose conduct cause the death of others. The result of this debate was a gradual evolution towards acceptance of corporate criminal liability for homicide. On April 5, 2010 an explosion ripped through the Upper Big Branch Coal Mine in West Virginia, claiming the lives of twenty-nine miners.[540]A report commissioned by West Virginia's Governor determined that the explosion was caused by the ignition of methane and coal dust, which had built up in the mine due to insufficient ventilation and malfunctioning water spray systems.[541] In fourteen to the fifteen months leading up the explosion, the Upper Big Branch Mine received citations related to its handling of coal dust, a primary cause of the April 5th explosion. Despite these repeated

[539] (1917) 2 K B 896.
[540] J M Broder, Fatal Mine Blast was Preventable, Report Says, *N. Y. Times*, Jan. 20, 2011 at 17.
[541] Governor's Independent Investigation Panel, Upper Big Branch: The Aprils 15 2010 Explosion: A Failure of Basic Coal Mine Safety Practices 16, 23 (2011).

safety violations, Upper Big branch management did not implement an effective compliance program instead they adopted a 'catch me if you can' mentality toward regulation.[542]This illustrates a common flaw in the relationship between a corporation and its employees or the consumer of its products. The corporation failed to adhere to government regulation or to internal policies designed to prevent harm. This resulted in the death of individuals, suggesting the potential applicability of criminal homicide law.[543]

3.4.1 Modern Developments in Prosecuting Corporations for Homicide.

In the 1970s and 1980s, policy makers reconceptualised corporate criminal liability for homicide. Alongside the creation of regulatory bodies charged with ensuring employee and consumer safety,[544]the judiciary interpreted statutory amendments as removing ideological and doctrinal barriers to corporate homicide prosecutions. In practice, however, these developments did not remove all of the obstacles in the path of an optimal corporate homicide scheme.[545]

The legislature broadened corporate criminal liability for homicide by amending the definitional provisions in State Penal Codes. Early attempts to charge corporations with homicide had floundered because the homicide statutes required the victim to be a "person" and that the conduct be committed by 'another'.[546]To remedy this limitation, legislatures amended their penal codes to include corporations within the basic definition of a "person"

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[542] S Hannel, Federal Prosecutors are Conducting Criminal Probe in W. Va. Mine Explosion, *Wash. Post*, May 15, 2010 at A16.

[543] D A Fahrenthold and Kimberly Kindy, 'Safety Chief Details Mines History of Violations, *Wash. Post*, April 28, 2010 at A2.

[544] Occupational Safety and Health Act of 1970, Pub. L.No 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C SS 651-678 (2006) (Creating the Occupational Safety and Health Administration (OSHA).

[545] Commonwealth v III. Cent. R.R. (1913) 153 S. W. 459 ('Homicide in any of its degree is not an offence for which a corporation may be indicted…').

[546] K F Brickely, 'Death in the Workplace: Corporate Liability for Criminal Homicide, (2012) vol.2 *Notre Dame Journal of Law, Ethics and Public Policy* ,753.

and to delete the requirement that certain crimes be committed by a human being.[547]A caveat commonly accompanied these definitional amendments, however, stipulating that criminal liability should attach only "where appropriate".[548]

In the wake of these legislative and judicial developments, prosecutors around the country began filing homicide charges against corporate actors. This expanded use of corporate homicide charges was also the product of highly published examples of extreme corporate misconduct that had resulted in death at that time. For example, Ford motor company was prosecuted for reckless homicide after three young women died because their Ford Pinto burst into flames following a rear-end collision.[549] Similarly, the manslaughter prosecution of Film Recovery Systems after the death of an undocumented polish factory worker made national news.[550] Finally, the front page of the New York Times reported the manslaughter trial of the six flags corporation after eight New Jersey teenagers died in an amusement park fire.[551] One commentator describes these cases and the others brought against corporations as a "prosecutorial wave".[552] To date, at least fifteen states plus the federal government have prosecuted corporations for manslaughter or criminally negligent homicide in the U.K.[553]

Nonetheless, the current state of corporate homicide doctrine suggests that the wave has lost its momentum. In jurisdictions where corporate liability for homicide is accepted as a

[547] "Where appropriate" means a public or private corporation, an unincorporated association, a partnership, a government, or a governmental authority.

[548] M B Bixby, 'Workplace Homicide: Trends, Issues and Policy (1991) 70 *Or. L. Rev*. 333, 335-336 (Surveying several prosecutions that occurred between 1985 and 1991 in which employee deaths led to homicide charges against the corporate employer).

[549] *State v Ford Motor Co.,* (Ind. Super. Ct. 1979) 47 U.S. L. W, 2514, 2515.

[550] Steven Green house, 3 Executives convicted of murder for Unsafe Workplace Conditions, *N.Y. Times*, June 15, 1985,p. 1

[551] D J. Reilly, Comment, Murder, Inc. The Criminal Liability of Corporations for Homicide, 18 *Seton Hall Law Review* (1988) 378, 393-394.

[552] C L Bros, 'A Fresh Assault on the Hazardous Workplace: Corporate Homicide for Workplace Fatalities in Minnesota', (1989) 287 *Mitchell Law Review*,308.

[553] *State v Far W. Water and Sewer Inc.,* (Ariz. Ct. App. 2010) 228 P. 36 909, 916 (affirming the conviction of a corporation for criminally negligent homicide).

basic theoretical premise, its reach has, been constrained by judicial construction.[554] The reported cases of corporate homicide suggest that prosecutions are skewed toward small businesses.[555] Punishments for corporations, even large ones convicted of homicide at the state level tend to be disproportionately smaller than the harm the corporation caused. Lastly, the diminished and suboptimal state of corporate homicide doctrine is reflected in the willingness of prosecutors to undercharge a corporate entity even when its conduct is particularly egregious and results in a loss of life.[556]

3.4.2 The Corporate Manslaughter and Corporate Homicide Bill 2015

Nigeria criminal jurisprudence recognizes the offence of involuntary manslaughter which may result from an unlawful act (constructive) manslaughter, or manslaughter as a result of gross negligence which results from a breach of a duty of care. Criminal liability for the former involves an unlawful act in itself which results in death, while liability for the latter arises where the defendant's conduct though lawful, is carried out in such a way that it is regarded as gross negligence and therefore a crime. It is the second aspect of involuntary manslaughter that companies are often liable for, that raises concerns.[557] In circumstances where a company's conduct could be regarded as grossly negligent and therefore a crime, the present law in Nigeria requires the invocation of the provisions of the general criminal law so as to prove either the offence of manslaughter (under the Criminal Code[558] or homicide (under the Penal Code.[559] However, corporate criminal liability intersects both company law

[554] J W Harlow, *Ibid* p. 134

[555] W S Laufer,'Corporate Liability, Risk Shifting and the Paradox of Compliance', 42 *Vand. Law Rev*. (1999) 1343, 1344 (On average, small privately held business account for more than 95% of all corporate convictions each year).

[556] *United States v Atl. States Cast Iron Pipe Co.* 672 (D.N.J 2009) F. Supp. 2nd 180, 328-329. In 2006 ,the Atlantic Cast Iron pipe company and several individual managers were convicted of criminal conspiracy, obstruction of justice, and other offences related to the death of an employee who has driving an unsafe forklift. The evidence showed that for months prior to the accident, managers and supervisors knew that employers were being required to drive forklifts with inoperable brakes and other defects.

[557] J Gaadi, 'Dana Air: A Case for Corporate Criminality', (2012) Foundation Chambers E-News Issues 2 vol 1.

[558] Cap C38 LFN 2010.

[559] Cap P3 49 LFN 2010.

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

The law in some jurisdictions has since moved towards finding a solution to these challenges. The U.K parliament has enacted a stand-alone offence under the Corporate Manslaughter and Corporate Homicide Act (CMCHA), which is aimed at holding companies and businesses liable for gross negligence manslaughter.[560] Nigeria is yet to enact a law with respect to corporate manslaughter and corporate homicide Act, so as to check the excesses of corporate organizations in Nigeria. In 2013, Senator Pius Ewherido, initiated a bill tilted 'A Bill for an Act to Create the Offence of Corporate Manslaughter and Matters incidental therein which sought to create offences of corporate manslaughter to make corporate bodies, entities and agencies culpable for willful acts of negligence, dereliction of duty and or gross incompetence that result in death of a person or persons.[561] In his presentation, Senator Pius Ewherido had told the Senate that he carried out an indebt research and came out with the bill following the Dana Air crash of June 3rd 2012, at Iju, Ishaga, Lagos State where he noted that

[560] A Stuar t, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or The Health and Safety (Offences) Act 2008: Corporate Killing and the Law (2016). PhD Thesis University of Glasgow <http://www.these.gla.ac.uk/7376> Accessed on 20 December, 2017.

[561] J Erunke, 'Senate: Putting Eyes on Corporate Killing', 26 April, 2013 < http://www.vanguardngr.com> Accessed on `10 January, 2018.

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

The Bill proposed a fine of not less than N500, 000 and not more than 500 million for any organization found guilty of corporate manslaughter just as it provides that a person convicted under it would be liable to a minimum of three years and maximum of seven years prison terms with an option of fine from N100, 000 to N1 million respectively.[562] However, the Nigerian Bar Association which was represented by Paul Enakoro at a public hearing organized by the Senate Committee on Judiciary, Human right and Legal Matter called for a review of the punishment recommended in the Bill for persons and organizations found guilty of corporate manslaughter, saying severe punishment was necessary so as to hold companies accountable for deaths caused by negligence, dereliction of duty and incompetence. It is regrettable, that the Bill did not metamorphose into an Act before the tenure of the National Assembly members expired and the Bill was dumped. In a bid to close the gap, the 8th National Assembly in December 2015 proposed a law again, the Corporate Manslaughter Bill 2015, which was presented and read for the second time on the floor of the lower chamber of the National Assembly, the House of Representative, on 15th December, 2015 and thereafter referred to its Committee on Labour, Employment and Productivity for further consideration.[563]No mention of the bill has been made since the National Assembly re-convened. The implications for the proposed bill are both positive and negative. An organization can only be prosecuted and convicted of corporate manslaughter if its acts or

[562] *Ibid.*
[563] E. Ugbeta, 'An Assessment of Nigeria's Corporate Manslaughter Bill 2015', available at http://www.thelawyerschronicle.com accessed on 10 January 2018.

omissions result in death. An organization would thus not be convicted of an attempt to commit corporate manslaughter no matter how dangerous its activities are managed or organized. Therefore, the Bill appears to insulate corporate entities from unwarranted prosecution by government officials who driven by avarice could tag any activity of a corporate body as capable of causing death.[564]The negative aspect will be the liability of a corporate body irrespective of the consent and unlawfulness of the act of the person affected may expose corporate entities to criminal liability for death of persons who die due to contributory negligence.[565] Also, the trial of an organization already convicted of corporate manslaughter for other offences defined under any other health and safety legislation on the same set of facts or related facts may amount to double jeopardy and its contrary to the twin principles of '*autrefoisacquit*' and '*autrefois convic*t' provided for in Section 36 (9) and (10) of the Constitution of the Federal Republic of Nigeria.[566] These subjections of the constitution prohibit the second trial of any person (corporate or individual) who has been convicted or acquitted of an offence, for the same offence or another offence having the same ingredients. The Bill is silent on the criminal liability and trial of an organization that has adequately compensated the family members of the victim for its breach of relevant duty of care.[567]

Conclusively, the Corporate Manslaughter Bill, 2015 is a step in the right direction, as death of employees and persons; resulting from corporate negligence is a recurrent concern in Nigeria. The researcher is optimistic that the Bill would receive the consideration it deserves and passed during the lifetime of the 8th National Assembly.

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[564] *Ibid*
[565] *Ibid*
[566] 1999 (As Amended).
[567] Corporate Manslaughter Bill: Implications for Corporate Entities,<https://www.internationallawoffice.com> Accessed on 10th January, 2018.

3.5 Corporate Crime Regulation and Control

Nigeria is among the developing countries of the world. Nigeria is presently experiencing a prevalence, of rising crime waves, criminal intentions and varying degree of delinquencies. Nigeria has been on the global crime map since 1980s. The nature of these crimes includes murder, fraud, bribery and corruption, food and drug adulteration, money laundering, advanced fee fraud and other illegal activates. Crime prevention is a pattern of attitudes and behaviours directed at both reducing the threat of crime and enhancing the sense of safety and security to positively influence the quality of life and to develop environments where crime cannot flourish. Crime prevention and control are, however, closely related and their elements overlap. Crime prevention involves the community, government as well as individuals; crime control involves the whole of the criminal justice system that is the police, court and prisons.

Corporate crimes cost the society financial and physically. Financially, the "duplicity and cunning" of corporate criminals result, in a loss of billions of naira in profits and revenues, to the government and businesses. Corporate crime can also cause enormous physical harm. Thousands of people have been killed or injured by the criminal acts of corporations. Many workers have died from occupational diseases and individual accidents as well as from the willful violation of health and safety standards by corporations. The general public is also affected by corporate criminality. Unsafe and detective products have killed and injured thousands of consumers. Because corporate crime is such a major social problem, it needs to be dealt with in a more effective manner. Generally, it is difficult to successfully detect, prosecute, convict and punish a corporation for its illegal activity. Thus, many proposals have been made to reform the criminal justice system in order to allow the system to do a better job of controlling corporate crime. Most of the proposed reforms merely scratch the surface in their effort to deal with corporate criminality. Reform of the criminal justice

system is a cumbersome but vital task in the fight to control corporate criminality. Effective reforms must therefore take into consideration the other factors involved ideologically, structurally, and legally before they can be viable solutions to the problem. What is needed to combat corporate criminality is a more comprehensive program which attempts to solve the problem from more than just one perspective.[568]

Corporate crime can also cause enormous physical harm. Thousands of people have been killed or injured by the criminal acts of corporations. Many workers have died from occupational diseases and industrial accidents as well as from the willful violation of health and safety standards by corporations. The unsafe and defective products have killed and injured thousands of consumers. The general public is also harmed by the pollution the corporations produce. These crimes are often looked at as less serious by the general public, and they are also dealt with less seriously by the criminal justice system. Generally, it is very difficult to successfully detect, prosecute, convict, and punish a corporation for its illegal activity.[569]

3.5.1 The Politics of Social Control

Social control within any society is a product of political processes. Political processes are centrally involved in the creation of laws and regulations and in determining the level and manner of execution of these laws and regulations.[570] This is the case in all areas of crime, whether we are talking about areas of conventional crime; i.e drug offence, rape or white collar or economic crime.[571] In regard to most areas of economic crime, the creation and

[568] J Braithwaite, & G Geis, 'On Theory and Action for Corporate Crime Control', <http://www.anu.edu.au> Accessed on 10 Jan. 2018.
[569] M A Vogt, 'Controlling Corporate Crime through Reform of the Criminal Justice System', <htpps://www.scholarworks.wmich.edu> Accessed on 15 Jan., 2018.
[570] A Adebayo, 'Social Factors Affecting Effective Crime Prevention and Control in Nigeria', (2013) *International Journal of Applied Sociology* 3(4), 71-75.
[571] P Iadicola,' Economic Crime: The Challenges of Regulation and Control, Economic Forum', (2014) 531 (10) 158-163 <http://opus.ipfw.edu> Accessed on 21 Nov, 2017.

enforcement of laws are relatively recent in the history of crime control. Most of the statutes are regulatory in nature, not criminal. In general, the roles of regulatory agencies are only secondarily to apprehend and persecute offenders. Their principle role is primarily educational. Thus built into the system of social control for economic crime is a hesitancy to criminally prosecute.

Controlling corporate crime has always been highly political because of the political power of the offenders and those who may benefit by their actions. This is especially the case for corporate crime. The level of enforcement and prosecution in Nigeria always shifts as there are swings from political party in government.[572] This is the case with federal prosecution, but even more so at the state government level of regulation and prosecution. In general state agencies are even more affected by political ideology and in general are less likely to prosecute corporate crime in particular because of the fear of economic consequences as the regulatory environment becomes destined as burdensome by business owners and managers.

Aside from the ideological orientation of the executive branch of government who oversee the regulatory and criminal justice agencies, there is also the influence of corporate actors in determining the nature of the regulatory and criminal justice environment as it pertains to violation that they are more likely to commit. This is unique in enforcement of laws. For most conventional crime those who are likely offenders have generally no significant influence in the creation and enforcement of laws which they are likely to commit. The influence of corporations over the nature of the regulatory environment significantly limits the enforcement of laws controlling economic crime. The influence of money in elections, the legislative process, and the execution of laws and regulations by the executive

[572] A Adebayo, *op cit.*

branch of government clearly restrains the mechanism of social control as it pertains to the crimes in which corporations and the wealthy most benefit.

3.5.2 Revolving Door between Regulators and the Corporations.

Another fact of the influence of corporation in the enforcement of the regulations is the 'revolving door' of personnel between the regulatory agencies and the corporations that they are regulating. 'Revolving Door' refers to the movement of legislators and regulators between the regulatory bodies and companies and organizations they are regulating.[573] Under the revolving door phenomenon, future job opportunities make SEC lawyers increase their enforcement effort to showcase their expertise, and then it can also promote more enthusiastic regulatory effort. In contrast, SEC lawyers can relax enforcement efforts in order to seek favour with prospective employers in the private sector.[574] Thus regulatory enforcement powers are influenced by the future job prospects of SEC lawyers. It is commonly recognized that there exist revolving doors connecting government regulatory agencies with the firms they regulate. These revolving doors lead to both the SEC hiring officials from firms that they regulate, as well as SEC officials leaving to work for firms that are regulated.[575] Personnel from all levels within the various regulatory agencies that oversee business activity can easily find employment in the very corporations that they were regulating and usually at much higher salaries. On the other hand, lawyers and former corporate officials appear to be prime candidates to run the agencies that they were regulated by when they were working in the private sector.

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[573] Legal Corruption, The Massive Revolving Door Problem between Regulators and Wall Street, <https://www.steemit.com> Accessed on 20 Jan., 2018.

[574] D S Hilzenrath, 'SEC Staff's Revolving Door' Prompts Concerns about Agency's Independence', <htpps://www.washingtonpost.com> Accessed on 22 Jan., 2018.

[575] *Ibid.*

3.5.3 The Cost of Prosecution

Not only is there a great deal of political influence in the creation and execution of the laws, there is also the challenges to prosecute corporate crime cases. The regulations and laws that regulate and control most areas of white collar crime is more complex than statues for conventional crime. One of the central challenges is establishing intent to do harm or '*mens rea'*. The complexity of the organisations and the insulation of the leadership from decisions made by lower level functionaries create challenges to prosecution. Most crimes are identified as accidents or oversights and only where there are patterns of repeated violations and 'smoking guns' in the forms of memos authorising the actions are there clear paths to prosecution. In the vast majority of cases, the violations, it identified, are punished with fines that in the case of cooperate crime, are far less than the benefits they accrue from violation of the laws.

This is also the problem of defining the violator as the organisation and not particular individuals who authorized the decisions and carried out the activity. Criminologists recognize that although the corporate organisation plays an important role in defining the context for the criminal behaviour. The behaviour is the decision of individuals. Despite the legal status of the corporation as a person, the organisation itself does not commit crime; it is the individual officers within the corporation that commit the crime. This is important in the search for causes but also in the context of creating a system of social control that would be most effective.

In most cases, aside from a cease and desist order, the levying of fines will have a limited impact. The reason for this is not only are the fines small relative to the size of the profits that the corporation achieve in any given year, but also in many cases the fines can be deducted as a cost of rehabilitation. Historically, corporations have often found it less costly

to contend with civil servants that to unit profits by fully complying with the law or correcting the hazards they created. More severe sanctioning such as suspension or revocation of corporate charters, the so called corporate death penalty in the business area or the volition are politically extremely difficult to achieve and also are seen as punishing not only the corporation, but the workers and communities that the corporation operates and the shareholders who have invested. Prosecutors also assess the difficulty of prosecution based on the amount of resources that the accused can bring to their defense. In the case of corporate crimes in general, prosecutors will most often assess that the resources that would have to be expanded on the part of the government to achieve a successful prosecution for exceeds the benefit of a prosecution.

3.5.4 The Criminogenic Culture of Capitalism

In addition to all the other challenges of crime control mentioned, there is the role of a criminogenic culture that defines the context in which a corporate crime occurs. There is a drive for accumulation of wealth, through competition in the marketplace. There are key factors in creating a criminogenic culture for economic crime. Accordingly, where the markets drive for accumulation of wealth through competition in the marketplace what develops in response to the competition is a "win at any cost' morality that encourages even the scrupulous entrepreneur or executive to bend the rules or to engage in outright fraud and deception in order to stay ahead of the competition. These pressures may be found in any society that produces a surplus, but it is felt most acutely in advanced capitalist societies like U.S. society[576] where upward mobility is regarded as a right".

[576] R Apel, & R Paternoster, 'Understanding "Criminogenic" Corporate Culture: What White Collar Crime Researchers' Can Learn', Studies of the Adolescent Employment-Crime Relationship, <http://www.springer.com> Accessed on 15 Jan. 2018.

Some organisations have distinct cultures which are more or less tolerant of law violation for the benefit of the firm. This is seen when corporations turn a blind eye to ethical and legal infractions if it benefits the firm, thereby creating a culture of rule breaking. There is a culture within certain businesses or firms that not only merely tolerates but supports the violation of regulatory and criminal laws

3.5.5 Lack of Diligent Prosecution

This has led to the loss of many high profile cases. The perpetrators of massive fraud and looting and acquitted on legal technicalities. An example of flagrant disregard for diligent prosecution is the case of the former government of Delta State, Nigeria Chief James Ibori who was not found guilty of corruption in Nigeria but was failed in the United Kingdom for money laundering crime[577]. Recently, a federal high court in Abuja frowned on the EFCC over an alleged sloppy handling of the trial of former minister of interior Abba Moro on charges of recruitment fraud which took place at the Nigeria Immigration service in 2014[578]. The court expressed reservation about the unpreparedness of the prosecution to diligently prosecute the case. In addition to the above, the conviction of six persons out of a total 49 high profile cases instituted by the EFCC between 2008 and 2012 for a combined financial crimes to the tune of N296 billion has brought the commission under serious public scrutiny. In another case, Mr. Erastus Akingbola was also to exploit the identified legal pitfalls and was acquitted of all criminal charges preferred against him by the EFCC. Meanwhile, a United kingdom court which tried him on the same charges of money laundering and fraud, on Tuesday July 31, 2012, ordered him to pay a total sum of €654 million pounds to Access

[577] EFCC's Lack of Diligent Prosecution Sustains Corruption in Nigeria, August 5, 2012 <http://www.fronteirnews.com> Accessed on 10 January, 2018.
[578] K Kanayo,' Moro'sTrial: Court Berates EFCC for Lack of Diligent Prosecution, June 29, 2017 <http://www.signalng.com> Accessed on 10 January, 2018.

bank, the new owners of the defunct intercontinental Bank that the ran aground[579]. The conviction made by the UK courts is an indictment of the commission for its inability to successfully prosecute same charges and offences, prompting the question on how the effect initiates investigations prepare its case files and the procedure for filling suits against accused persons.[580] Presently, there are over fifty high profile cases being prosecuted by the commission with the majority of them stalled at various trial courts due to all kinds of Interlocutory appeals and objections.

3.5.6 Lack of Independence of Anti-Corruption Agencies.

The most obvious problem of the EFCC and the ICPC, judged by their acts of omission and commission, is that they appear to lack complete independence.[581] The ICPC is shown to act and cannot in the strict sense of things prosecute; while the EFCC seems to be the politicization of the EFCC. Due to the close proximity of both commissions to the presidency, there is a tendency for their powers to be used as tools of victimization, persecution and prosecution of perceived enemies of whichever administration is in power.[582] The then Chief Justice of Nigeria, Justice Mahmed Mohammed, has recently stated that the reasons behind the failure of the EFCC to successfully prosecute high profile corruption cases stems in part from the numerous amount of charges tied to each individuals case. The CJN stated further that for the prosecution to be successful, the commission must call more than one witness to testify on each count in the charge.[583] An example is the Jame Ibori corruption

[579] B Ibidolapu, Nigeria: The Anti-Corruption Legal Framework and its Effect on Nigeria's Development <http://www.nwndag.com> Accessed on 10 January 2018.
[580] *Ibid*
[581] B Ibidolapo, 'Nigeria: The Anti-Corruption Legal Framework and its Effect on Nigeria's Development, 2016 < http://www.nwndag.com> Accessed on 10 January 2018.
[582] *Ibid.*
[583] K Olapugjo, 'Why EFCC Fail to Prosecute Corrupt Individuals', < http://www.ynaija.com> Accessed on 25th February 2016.

case, in which the EFCC charge him with 170 counts of corruption and he was acquitted of all, while in the United Kingdom he was arraigned on 23 counts of money laundering and corruption and was convicted of 10. He also explained that the 'courts cannot carry out investigation and our security agencies must be encouraged. To carryout investigation led arrest and not arrest-led investigation.[584]

3.5.7 Bribery and Corruption

Bribery and corruption are twin cankerworms that have eaten deep unto the fabrics of the Nigerian society today. Funds released to that law enforcement agencies and parastatals to embark on enforcement of the provisions of the law, have been diverted into private pockets corporation involved in criminal activities usually bribe their way through and escape the long arms of justice,[585]this had led to the increase in criminal activities by corporations since the corporation known that they can go scotch free. The few corporations that are held criminally liable albeit vicariously pay the necessary fines imposed on them and are back on the streets again the next day perpetrating crime. Also the Nigeria police, which is an enforcement arm of the government is known for its rottenness, as many of the police officers are known to be corrupt.[586] This has greatly affected the effectiveness of the police in corporate crime prevention and control in Nigeria. Corruption has been described as a cancer militating against Nigeria's development. Olusegun Obasanjo opined that, "No society can achieve anything near its full potential if it allows corruption to become the full blown cancer it has become in Nigeria.[587]Corruption in Nigeria has a long and salacious history. The existence of two anti-graft agencies i.e ICPC and EFCC since 1991 appear to have done little to eradicate or stem the tide of corruption practices in Nigeria. EFCC has

[584] K Olapugjo, *op cit*.
[585] W Robert , 'Situating Crime Prevention: Models, Methods and Political Perspectives, "Crime Prevention Strategies (2013) vol. 15,p 23.
[586] A B Dambazau, *Criminology and Criminal Justice* (2007) (2nd edn, Ibadan: University Press) p 45.
[587] 'Values' in Oyobraire (ed) Governance and Politics in Nigeria, the IBB and OBJ Years (2008, Ibadan; Spectrum Books Limited) p 10.

derailed completely as it becomes a tool of the government to silence and witch hunt perceived political opponents.[588]

3.5.8 Lack of Information

The public have a role to play in supplying information to the governmental agencies set up fight corporate crime. The ICPC, EFCC and police needs information to work. The act of hiding information from these enforcement agencies is not help helpful.[589] In some situation the public hide criminal activities of corporations as they do not report cases to the appropriate authorities to fake the necessary action. It is the people working in an organization that will give the enforcement agencies a tip off so as to embark on investigation which will consequently lead to prosecution where necessary. However, it has been revealed that people are afraid of giving out information because in most cases the information is revealed as the case progress. The informant becomes a target to the suspect.

3.5.9 Lack of New laws

The Lack of new laws so specifically to corporate criminal acts is anti-effective in controlling corporate crime. The reason that the creation of new laws is required is because the existing laws are not effective or are not utilized for dealing with corporate crime cases. Most of the extant laws on criminality were drafted with the mindset that the culprits or proposed offenders would be human beings. Thus corporations were not envisaged by the legislators as possible would be offenders. This has created untold hardship in application of our extant laws to address the issues of corporate criminality; which can be likened as putting a square peg in a round hole. The basic premise behind the measure is that new laws are necessary if we are serious about using the legal system to control corporate crime. New

[588] C J Nwanegbo & J Odigbo, 'Policy Direction on Economic and Financial Crimes and Plea Bargaining in the Nigeria Legal System, in Law, Security and National Development Proceedings of the 50th Golden Jubilee Conference of the Nigerian Association of Law Teacher held 11-16 June, 2017 at Nnamdi Azikiwe University Awka, Anambra State.

[589] S N Ikenyei, 'Police and Challenges of Crime Control in Uvie Community,Warri, Delta State, Nigeria', (2007) *International Journal of Health and Social Inquiry*, vol 3, no. p 12.

laws help to suppress crime within corporations. This approach attempts to deal with the most foundational stage of the criminal justice system, the creation of laws.[590] If controlling the crime of corporations is the desired outcome, and if the law does not consider a corporation in the desired outcome, and if the law does not consider a corporation in the same way it considers a person who commits traditional street crime, criminal prosecution which will be at a standstill. It also seems logical that with the ability to prosecute corporations for criminal wrong doing goes the change to demonstrate general deterrence. By successfully, prosecuting and convicting a corporation, hopefully other companies will see the example that has been set.

Overseas, the biggest development in 2011 was the coming into force of the U.K Bribery Act on July 1. The Act which covers official and commercial bribery is most noteworthy for establishing a strict liability corporate offence. This significantly emphasized the U.K authority's willingness to deal with corporate criminality.[591]

3.5.10 Lack of Inter Agency Collaboration

The governmental agencies charged with the duties of prosecuting and punishing criminal offenders whether natural or juristic persons' in Nigeria, do not join forces with other sister agencies in bringing corporations to account for their wrong doing. Rather, each of the agencies is on their own trying to achieve what would have been possible with synergy with other sister agencies.

[590] P C Yeager, 'Practical Challenges of Responding to Corporate Crime', <http://www.oxfordhandbooks.com>Aaccessed on 30 Nov, 2017.

[591] W Carlin, & W Lipton, 'White Collar and Regulatory Enforcement, Harvard Law School Forum on Corporate Governance and Financial Regulation', Feb 3, 2012 < http://www.corpgov.law.harvard.edu > Accessed on Dec 5, 2017.

CHAPTER FOUR

AN OVERVIEW OF CORPORATE CRIMINAL LIABILITY IN OTHER JURISDICTIONS

4.1. Preamble

This chapter will look at the concept of corporate criminal liability with regards to what is obtainable in other jurisdictions. Some countries have come to embrace the concept of corporate criminal liability, while some other countries have long embraced the concept. Some jurisdictions were selected and looked at in the course of this research work. The selected counties discussed hereunder were picked from some of the major continents in the world. The choice of jurisdictions discussed was also influenced by legal systems that in years past have influenced Nigeria legal system and from which Nigeria have had to borrow a leaf from in the past.

Corporate criminal liability currently exist in many legal systems including the United States, England, Australia, Canada, Finland, Denmark and France. But these systems use models of corporate criminal liability that differ in three important respects: the choice of which organisations are criminally liable; the typology of the offences attributed to corporate entities and the criteria for attributing responsibility to corporations.[592]

However, corporate criminal liability is not a universal feature of modern legal systems. Some countries including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognise any form of corporate criminal liability.[593] Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability,

[592] C de Maglie, 'Models of Corporate Criminal Liability in Comparative Law (2005) *Washington University Global Studies Law Review*, Vol 4, 47.

[593] A A Robinson, 'Corporate Culture' as a Basis for the Criminal Liability, Report for the Use of the United Nations Special Representative of the Secretary General for Business and Human Rights, February 2008 < https://www.allens.com accessed on 25 November, 2017

nevertheless have in place regimes whereby administrative penalties may be imposed on corporations for the criminal acts of certain employees. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability. Of course, many countries draw on combinations of the various models[594]. This chapter will discuss the approaches followed by different countries across the world in holding corporations criminally liable for their acts.

4.2 United Kingdom

The United Kingdom has, since the 1940s, dealt with corporate criminal liability on the basis of the doctrine of "identification". The doctrine had its origins in a civil case of *Lennard's Carrying Co. Ltd*[595] *v Asiatic Petroleum Co. Ltd.*[596] In the 1940s' a series of cases under statutory offence provisions moved away from the then-current model of vicarious liability to find that corporations were directly liable for offences committed by employees. In 1971, the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattress (Tesco),*[597] clarified that corporations would be directly liable for wrongdoing committed by persons sufficiently senior to constitute the corporation's directing mind and will, on the basis that the actions and culpable mindset of such individuals were the actions and mindset of the company itself.[598]Since *Tesco*'s case, there has been some shift in the scope of the class of persons considered sufficiently senior to constitute a corporation's directing mind and will. In *Meridian Global Funds Management Asia Ltd v Security Commission,*[599] the Privy Council held that, in the case of statutory offences, the language of the provisions, their content and policy, served to indicate the persons whose state of mind would constitute the state of mind of the corporation. Accordingly, in order to identify these persons, it is necessary to engage in

[594] A A Robinson, *op cit.*
[595] *Ibid.*
[596] (1915) A.C. 705.
[597] (1995)2 A.C. 500.
[598] A A Robinson ,*op cit.*
[599] (1995) 2 AC 500.

a rather circular inquiry into whether they have the 'status or authority in law to make their acts the acts of the company'. Although the identification document remains the cornerstone of corporate criminal liability in the U.K, the recently passed Corporate Manslaughter and Corporate Homicide Act 2007 provides for a form of organisational liability in relation to the offence of manslaughter.

4.2.1 Corporate Manslaughter and Corporate Homicide Act 2007.

In 1994 the Law Commission published proposals for reforming the law on involuntary manslaughter, and in 1996 issued a report that recommended, *inter alia*, abolition of the existing offence of unlawful manslaughter, its replacement by new offences of reckless killing and killing by gross carelessness,' and the institution of a new offence of 'corporate killing'[600]. The government did not introduce any legislation on the strength of the Law Commission's recommendations. Following a ruling in 1999 that the company whose negligence had led to the Southall train disaster, on which seven people had died, could not be convicted on manslaughter by gross negligence unless an individual who constituted a 'directing mind and will' of the company had the requisite *mens rea*, the Attorney General referred to the Court of Appeal a question as to whether a non- human defendant could be convicted of manslaughter by gross negligence in the absence of evidence establishing the guilt of a known individual. The Court of Appeal held that the 'identification model' in *Tesco v Nattrass* still served as the basis for corporate criminal liability.[601]

In May 2000, the government issued a consultation paper based on the Law Commission's recommendations (2000 consultation paper). The 2000 consultation paper accepted the thrust of law commission recommendations that liability should be based on

[600] England and Wales Low Commission, Legislating the Criminal Code: Involuntary Manslaughter (1995-96) < http://www. lawcom.gov.uk accessed on 28 September, 2017

[601] Attorney-General's Reference (No. 2 of 1999) [2000]3 All E R 182.

failures in the management or organisation of a corporation's activities. As draft Corporate Manslaughter Bill was published by the government on 23 March 2005. It accepted the notion of failure in the management or organisation of activities as a basis for liability, but inserted a requirement that these failures be referable to senior management.

The Home Affairs and Work and Pensions Committee conducted an examination of the draft bill. The committees made comments on a range of issues, but most relevantly they:

- took issue with removal of a clause clarifying the common law position on causation by providing that management failure could still be cause of death regardless of whether the immediate cause was the act or omission of individual,[602]
- advocated the removal of limitations to circumstances in which an organisation would owe a duty of care in negligence and also limitations to certain specific duties owed,[603]
- noted that although, some witnesses advocated the Canadian or Australian 'Corporate Culture' approach, it was too late to start to consider an entirely new model and recommended including 'corporate culture' as a separate factor that Juries might consider when assessing whether there had been a gross breach of relevant duty of care.[604]

The Committee recommended that, a test should be devised that captures the essence of corporate culpability. In doing this, we believe that the offence should not be based on the culpability of any individual at whatever level in the organization, but should be based on the

[602] Home and Affairs and Work and Pensions Committee, House of Commons, Parliament of the United Kingdom.. Draft Corporate Manslaughter Bill: First Joint Report of Session 2005-2006, vol 1, 25-26 (House of Common Committee Report) available at http://www.publications.parliamet.uk. accessed on 1 November, 2017.
[603] *Ibid*, 29-30.
[604] *Ibid*, 31-32.

concept of a 'management failure' related to either an absence of correct process or an unacceptable low level of monitoring or application of a management process.[605]

In its response to the House of Commons Committee Report, the government said that:

a. It was confident that the state of case law was such that courts would be able to hold that a management failure was a cause of death, even if the death was more directly caused by another phenomenon, including the acts or omissions of a particular individual.[606]

b. 'corporate culture' was potentially a useful factor to which a jury should be directed in determining whether there had been a gross breach of a relevant duty of care; and

c. the Draft Bill moved away from the identification doctrine, in that it focused on the way in which a corporation managed or organised its activities, and the 'senior management' limb was necessary to ensure that the Draft Bill did not have the effect of holding organisations liable in circumstances where failings had only occurred at a low level.[607]

The Corporate Manslaughter Act came into force on 6 April, 2008. The Corporate Manslaughter and Corporate Homicide Act was supported and criticised when it was introduced.[608] Intended as a response to inadequacies identified in the legal approach to corporate killing, its origins can be traced back to the Law Commission Consultation Paper on Involuntary Manslaughter published in 1994, although the campaign for a change in the

[605] *Ibid*, 44.
[606] Secretary of State for the Home department, Draft Corporate Manslaughter Bill: Government Reply to the First Joint Report from the Home Affairs and Work and Pensions Committees Session 2005-2006, 8 available at htpp://www.official-documents.co.uk accessed on 1 November, 2017.
[607] *Ibid*, p 11.
[608] For some typical responses, see F B Wright, 'Criminal liability of Directors and Senior Managers for Deaths at Work' (2007) *Criminal Law Review* 949, D Ormerod and R Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' (2008) *Criminal Law Review* 589,

law dealing with corporate killing started to gather momentum in the late nineteen eighties following a series of accidents that resulted in major loss of life.[609] Whilst the Consultation Paper dealt with most aspects of involuntary manslaughter, one section was devoted to corporate manslaughter and the problems of holding organisations accountable for deaths arising from their activities.[610] When the Consultation Document was published, the Law Commission was basing its views on one failed corporate manslaughter prosecution taken against P&O Ferries Ltd following the capsize of the Herald of Free Enterprise in 1987 with the loss of one-hundred and eighty-four lives.[611] The Herald of Free Enterprise was not the first accident with a major loss of life attributed, at least in part, to the behaviour of an organisation and it was certainly not the last in the years leading towards the end of the twentieth and the start of the twenty-first century. The King's Cross Fire in 1987, Piper Alpha and the Clapham Rail Crash in 1988, the Southall Rail Crash in 1997, the Larkhall gas explosion in 1998 and the Hatfield Rail Crash in 2000 are just a few of the accidents that occurred during this period, each with a significant loss of life and attributed to the activities of large national and international organisations. There were few prosecutions for manslaughter following these accidents which were mainly unsuccessful resulting in some commentators suggesting that corporations were getting away with murder.[612] The few successful corporate manslaughter prosecutions were in respect of the very smallest companies where the actions of the senior management and the actions of the company were deemed to be one and the same. Discussing the crime of manslaughter, former Home Secretary Jack Straw commented on the ineffectiveness of the then existing approach to

[609] The Law Commission, Law Commission Consultation Paper No 135, Involuntary Manslaughter (LCCP 135) (HMSO 1994); R Craig, 'Thou Shall do no Murder: A Discussion Paper on the Corporate Manslaughter and Corporate Homicide Act 2007' (2008) 30 Company Lawyer 17.
[610] The Law Commission, Law Commission Consultation Paper No 135, Involuntary Manslaughter (LCCP 135) *op cit.* n.4, p.17.
[611] *R v P & O European Ferries (Dover) Ltd*. (1990) 93 Cr App R 72 (Central Criminal Court).
[612] M Punch, 'Suite Violence: Why Managers Murder and Corporations Kill' (2000) 33 *Crime, Law and Social Change Journal*, 243.

dealing with deaths arising from corporate activities, where the criminal law was unable to secure a conviction against either corporations or individuals "whose acts or failures have contributed to the deaths".[613] The Act simplified the path to successful prosecution of a company and was intended to increase corporate manslaughter convictions, something rarely occurring under the common law. The Act was brought in to change the 'directing mind' requirement, focusing instead on how an activity is managed and the adequacy of those arrangements across the organizations.[614] A company commits corporate manslaughter if the way in which its activities are managed or organised:

a. Causes a person's death
b. Amounts to a gross breach of the company's duty of care to that person (gross negligence) and
c. A substantial element of the gross negligence derives from the way the company's senior management had managed or organised the company's activities.[615]

Prior to the new offence, organisations could only be convicted of manslaughter (or culpable homicide in Scotland) if a 'directing mind' at the top of the company (such as a director) was also personally liable. The reality of decision making in large organisation's does not reflect this and the law therefore failed to provide proper accountability and justice for victims. The new offence allows an organization's liability to be assessed on a wider basis, providing a more effective means of accountability for serious management falling across the organisation.

[613] The Home Office, Reforming the Law on Involuntary Manslaughter: The Government's Proposals (HMSO 2000) p. 3
[614] Corporate Manslaughter: An Update, 21 August, 2014 available at http://www.lexology.com, accessed on 1 November, 2017.
[615] A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007, Ministry of Justice, <http//www.gkstill.com accessed on 1 November, 2017.

It is worthy to note that since the inception of the Corporate Manslaughter and Homicide Act 2008, the number of charges brought under the Act between 2008-2016, is a total of Nineteen (19) charges. These charges were brought against individuals and organizations for health and safety or common law (gross negligence) manslaughter, which were successful and sentence resulted in heavy fines.[616]Relevantly, the effect of the Corporate Manslaughter Act is as follows:

An organisation is guilty of the offence of 'Corporate manslaughter' in Scotland where;

a. the way in which its activities are managed or organised
b. Causes the death of a person and
c. Amounts to a gross breach of a relevant duty of care owed to the deceased and
d. The way in which the organization's activities are managed or organised by its 'senior management' is a 'substantial element' of the gross breach of the relevant duty of care[617].

A relevant duty of care is defined in Section 2(1)[618] as any one of circumscribed list of duties owned under the law of negligence, or any common law rules that prevent a duty of care to persons engaged in joint unlawful conduct or who have accepted a risk of harm. These duties include:

(a) A duty owned to... employees or to other persons working for the organisation or performing services for it;
(b) A duty owned as occupier of premises
(c) A duty owed in connection with
    (i) The supply by the organisation of goods or services (whether for consideration or not).

[616] Corporate Manslaughter Statistics: The Crown Prosecution Service < http://www.cps.gov.uk, accessed on 1 November, 2017.
[617] A A Robinson, *op cit*.
[618] Corporate Manslaughter and Homicide Act, 2008.

(ii) The carrying on by the organisation of any construction or maintenance operations.[619]

(iii) The carrying on by the organisation of any other activity on a commercial basis or

(iv) The use or keeping by the organisation of any plant, vehicle or other thing.

A 'gross breach' of a duty of care arises if the conduct alleged 'falls far below what can reasonably be expected of the organisation in the circumstances'. Section 8[620] provides that, where it is established that an organisation owed a relevant duty of care to a person, and it falls on the jury to decide whether the evidence established that there was a failure to comply with any Occupational Health and Safety legislation that are related to the alleged breach and if so, how serious the failure to comply was, and how much of a risk of death it posed. The jury may also consider among any other matters it considers relevant, any health and safety guidance that relates to the alleged breach and 'corporate culture' factors.

Senior management is defined as: the persons who play signification roles in:

i. the making of decisions about how the whole or a substantial post of its activities are to be managed or organised; or

ii. the actual managing or organising of the whole or a substantial part of those activities

There are exceptions to the regime under the Corporate Manslaughter Act that apply to certain acts or decisions of public authorities, or in the exercise of exclusively public functions[621], they include military activities,[622] policing and law enforcement,[623] emergencies,[624] and child protection and probation functions.[625]

[619] Further defined in Section 2(7) of Corporate Manslaughter and Homicide Act, 2008.
[620] *Ibid.*
[621] Section 3 Corporate Manslaughter and Homicide Act, 2008.
[622] Section 4 *Ibid.*

4.2.2 Anti-Bribery Act 2010 of United Kingdom

The Bribery Act 2010 is an act of the parliament of the United Kingdom that covers the criminal law relating to bribery. It was introduced to parliament in the Queen's speech in 2009 after several decades of reports and draft bill, the Act received the Royal Assent on 8 April 2010 following cross-party support.[626] Initially scheduled to enter into force in April 2010, this was later changed to 1 July 2011. The Act was enacted to replace the old and fragmented legal structure where the offense of bribery was criminalized under the Common Law and the Prevention of Corruption Acts 1889-1916.[627] The objective of the Act is to provide a modern legislation that effectively deals with the increasingly sophisticated, cross-border use of bribery, and make the prosecution of bribery,[628] by individual and organisations both within the U.K and overseas easier.[629]

The first steps to reform the law on bribery dates back to 1995 and the Nolan Committee's Report on Standards in Public Life (CM 2850) set up in response to concerns about unethical conduct by persons in public office, when it was suggested that the statutory criminal law of bribery should be consolidated. The reason for consolidation has been succinctly addressed by the right Honorable Jack Straw, then Lord Chancellor and Secretary State of Justice in the Bribery Draft Legislation (CM 7570) of 2009;

> There are inconsistencies of language and concepts between the various provisions and a small number of

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[623] Section 5 *Ibid.*
[624] Section 6 *Ibid.*
[625] Section 7 *Ibid.*
[626] Bribery Act 2010, C.23 < http://www.legislative.gov.uk accessed on 1 November, 2017.
[627] Public Bodies Corrupt Practices Act 1889, 52 & 53 C. 69 <http://www.legislation.gov.uk;Prevention of Corruption Act 1906, 6 Ed.7,C.34, http:/www.legislation.gov.uk and the Prevention of Corruption Act 1916, 687 Geo.5, C. 64 http://www.legislation.gov.uk accessed on 14 November, 2017.
[628] Ministry of Justice, 'Impact Assessment of Bill on Reform of the Law of Bribery', <http://www.justice.gove.uk accessed on 25 February, 2011.
[629] C R Yukins, 'Comparative Efforts in Fighting Corruption in Procurement: Corporate Compliance-A Case Study in Convergence', Paper Delivered at the International Public Procurement Forum II, Beijing, China, Oct. 15, 2010, in American Bar Association, Section of International Law <http://www.abanet.org accessed on 1 November, 2017.

> potentially significant gaps in the law. Furthermore, the exact scope of the common law offense is unclear. The result is a bribery law which is difficult to understand for the public and difficult to apply for prosecutors and the courts.[630]

A draft corruption Bill was produced in 2003[631] but failed for lack of broad support. Among other things, there was disagreement on whether to preserve the agent/principle relationship in the old law as the basis of the offense.[632] The need for legislative reform was accentuated by a report of the Organisation for Economic Co-operation and Development (OECD) where the U.K came under criticism for failing to adequately implement the OECD convention on Combating Bribery of Foreign Officials in International Business Transactions.[633] The OECD working group recommended that the U.K. should undertake to enact comprehensive legislation on bribery that clearly included bribery of a foreign public official[634]. It specifically recognized that:

> The absence of specific case law on the bribery of foreign officials in a common law country, makes it difficult to evaluate how effectively the current system works (with regards for instance to the scope of application ,relevance and clarity of the terms used, efficiency of sanctions, etc.[635]

At the end it was the Law Commission's Bribery Bill, Reforming Bribery (No. 313) November 2018 that became the model for U.K's new anti-corruption statute. Jack Straw concluded by saying that; the Act will provide the basis for a modern, clear and consolidated

[630] Ministry of Justice, 'Bribery Draft Legislation', 2009. Cm.7570, < http://www.official-doucments. gov.uk accessed on 1 November,2017.
[631] Home Office, Corruption: Draft legislation, 2003, Cm.5777,< http://www.legislation.gov.uk accessed on 1 November, 2017.
[632] Bribery Act 2010, C.23, Explanatory Notes-Background, < http://www.legislation.gov.uk accessed on 1 November, 2017.
[633] OECD Convention on Combating Bribery of Foreign Officials.
[634] OECD, Directorate for Financial and Enterprise Affairs, United Kingdom: Phase 2-Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions paragraph 248 (March 17, 2005) available at http://www.oecd.org.accessed on 1 Nov.,2017.
[635] *Ibid* , para. 15.

law that complements and support the UK's international efforts and equips the UK courts and prosecutors to deal effectively with bribery of all kinds, wherever it occurs.[636]

Section 7 of the Act[637] introduced a new offense that applies to commercial organisations that fail to prevent bribery. Specifically, it creates a strict liability offense for commercial organisations that fails to prevent a bribery being paid for or on their behalf by an associated person. It applies to UK corporations and partnerships as well as foreign corporations and partnerships performing any part of their business in the U.K. The new corporate offense introduced a novel concept under English Law.[638] It is a paradigm shift from the old law where the Serious Fraud Office had to prove that the controlling mind of a company was involved in the corruption. Under the new statutory offense, the fault element is negligence in preventing bribery which means that the Act imposes vicarious liability on the company for acts of any employee, agent, or subsidiary. It makes it considerably easier for the Serious Fraud Office to persecute the company.[639]

There is, however, a defense in the Act if the commercial organisation can show it has in place adequate internal compliance programmes to prevent bribery. The Secretary of State is required by the Act to produce guidance as to what will be recognised as "adequate procedures", while the guidance is set to provide companies with information on how to go about establishing a "true anti-corruption culture", it is not intended to be a checklist on how to avoid criminal liability of bribery.[640] Part of Serious Fraud Office's strategy of dealing with corporate corruption is also the system of self-reporting. Companies are encouraged to come forward and make full disclosure of events in which corruption maybe suspected. In

[636] Ministry of Justice, supra note 6, at 4.
[637] Anti-Bribery Act 2010.
[638] R Amaee, SFO, Speech to World Bribery & Corruption Compliance Forum (Sept. 14, 2010), http:// www.sfo.gov.uk/about -us/our-views.accessed on 1 Nov.2017.
[639] V Robinson, General Counsel, SFO, Speech at Breakfast Seminar with Grant Thornton (Nov. 10, 2009) < http://www.sfo.gov.uk/about-us/our-view accessed on 1 Nov. 2017.
[640] R Alderman, Director SFO, Speech at the Corporate Investigations Group Seminar (12 Feb.,2010) <http://www.sfo.gov.uk accessed on 10 November, 2017.

cases of self-reporting, the company will not receive blanket immunity from prosecution, but it may be considered for a civil, as opposed to a criminal resolution.[641]

4.2.3 Deferred and Non- Prosecution Agreements in United Kingdom

Prosecutors have several alternatives to criminal trial. They may accept a corporation's offer to plead guilty. They may defer prosecution of the corporation under a deferred prosecution agreement. They may accept a corporation's offer to sign a non-prosecution agreement, frequently with the intent to prosecute corporate officials or employees. They may elect to forgo prosecution in favour of civil sanctions.[642]Finally, since corporate misconduct often occurs in a regulatory context, civil or regulatory sanctions may be available. Whether prosecutors consider them appealing alternatives may depend in part on the severity of the misconduct and the severity of the sanctions. The factors the United States Sentencing Guidelines identify include "the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action, and the probable sanction if the regulatory authority's enforcement action is upheld".[643]

In February 2014, the Deferred Prosecution agreements became available in the UK. The basic principle is that through a process of negotiation, a prosecutor and a potential corporate criminal suspect can enter into an agreement whereby the prosecutor agrees not to prosecute the company in return for certain conditions being met, typically the payment of a large financial penalty and the agreement to take certain steps to ensure there is no repeat of the offending behavior. Advantages of Deferred Prosecution Agreements are presented as,

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[641] Amaee, *op cit*, note 20.

[642] C Doyle, 'Corporate Criminal Liability; An Overview of Federal Law (2013) Washington, D.C. Congressional Research Service<http://www.digitalcommions.ilr.cornell.edu/key_workplace> accessed on 3 No, 2017.

[643] United State Attorney's Manual (USAM) Section 9-27, 1100 (B) Prosecutors will sometime agree to a combination of criminal and civil sanctions e.g Johnson & Johnson agrees to pay 24.1 million criminal penalty to remedy Foreign Corrupt Practices Act and Oil for food investments, Department of Justice Press Release (April 8,2011).

among others: certainty of outcome; the avoidance of a corporate conviction which might well lead to exclusion from certain pubic contracts); and the savings of cost and time. The altercation of such a system may therefore appear obvious in circumstances where a company finds itself clearly exposed to the risk of a corporate prosecution. The Serious Fraud Office (SFO) is the agency most likely to use the Deferred Prosecution Agreement process.[644]

The common perception is that the announcement of indictment sounds a large corporation's death knell[645]. Consequently, a large corporation, threatened with the prospect of indictment may be inclined to accept a deferred prosecution agreement or a non-prosecution agreement at terms particularly favorable to the government.[646] Although they are very similar, a deferred prosecution agreement is typically predicated upon the filling of a formal charging document by the government, and the agreement is filed with the appropriate court'.[647] On the other hand a non-prosecution garment does not involve filing of formal charges and "the agreement is maintained by the parties rather than being filed with a court". In either case, an agreement gives both parties resolution without the expensive ordeal and uncertain outcome of a criminal trail and its attendant appeals. As, part of, or in conjunction with an agreement, "corporation may be induced to shed executives,[648] assist in their prosecution, underwrite extensive[649] remedial action,[650]pay substantial fines,[651] acquiesce in

[644] L Hodges & J Grimes, 'Trends in Corporate Criminal Liability in the UK', September 2014 <http:www.whoswhogal.com> Accessed on 1 November, 2017.

[645] Markoff, A Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty First Century, 15 *University of Pennsylvania Journal of Business Law* (2013) 797,800.

[646] C Warren , 2013 Mid-year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, Harvard Law School Forum on Corporate Governance and Financial Regulation <http://blogs.law.harvard.edu> Accessed on 3 Nov; 2017.

[647] Criminal Resource Manual (CRM) Section 163 n.2 (Mar. 7, 2018). The distinction is not insignificant, because the courts serve as an additional guarantor for of the public interest when they are involved.

[648] *United States v Stain* (2nd ar. 2008) 541.F.3d180, 57 .

[649] Sec. e.g UBS Ag Non-Prosecution Agreement ("UBS shall...(b) fruitfully and completely disclose non-privilege information with respect to the activities of UBS, its officers and employees, and other concerning all matters about which the fraud section requires of it… (c) bring to the Fraud…

[650] *United States v BP America Inc.* (Deferred Prosecution Agreement) (no. 07-Cr-683) (N.D. III. Oct 27, 2007 <http://www.justice.gov.accessed on 3 Nov. 2017.

[651] *United States v The Royal Bank of Scotland Plc* (3:13-CR-74-MPS) *United States v RBS Securities Japan Limited* (3:13-CR-73-MPS), Department of Fustia Press |Release (Feb. 13, 2013) canonizing an agreement

the confiscation of property of considerable value[652], establish a robust compliance process,[653] and accept and oversight monitor of assurance of its continued good behavour.[654] The guideline address deferred prosecution and non-prosecution agreements primarily in their plea bargain instructions. As in the case of individuals, the guidelines remind prosecutors to include at least a basic statement of facts.[655] In the case of government contractors, the guidelines prohibit prosecutors from "negotiating away an agency's right to debar or delist the corporate defendant".[656] They also discourage agreements that shield individual corporate officers, employees, or agents from liability.[657] Internal memoranda guide negotiation of agreements that feature the appointment of outside experts to serve as monitors of a corporation's continued good behavior.[658]

4.3 United States of America

In the United States, corporate criminal liability developed in response to the industrial revolution and the rise in the scope and importance of corporate activities. English courts permitted the prosecution of corporate non-feasance as early as the mid-nineteenth century, and by twentieth century the English courts developed a doctrine of identification under

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under which Royal Bank of Scotland and RBS Securities Japan agreed to pay 612 million in Criminal Penalties).

[652] *Untied States v Credit Suisse AG* (Deferred Prosecution Agreement) D.D. C. Dec. 16, 2009) agreeing to a forfeiture settlement of $268 million)< http://www.justice.gov accessed on 3 Nov, 2017.

[653] HSBC Deferred Prosecution Agreement, Attachment B, Corporate Compliance Monitor, available at http://www.justice.gov.accessed on Nov. 3, 2017.

[654] USAM Section 9-28.1300.

[655] USAM Section 9-28.1300(B).

[656] *Ibid* .

[657] *Ibid.*

[658] CRM Section 163 (Morford Memorandum), 66 ("Grandle Memorandum"). The recommendations cover selection of a monitor, the monitor's independence, his or her responsibility to oversee compliance with the agreement.

which corporations could be prosecuted for crimes of intent.[659] In the United States, although some earlier state cases recognised corporate criminal liability, the seminal case in the development of federal criminal law was *New York Central & Hudson River Railroad Co. v United State*,[660] in this case the defendant corporation New Year Central and Hudson River Railroad Co, together with a managing agent within the corporation, were convicted for violating a federal law prohibiting the payment of rebates.[661]Specifically, the corporation was prosecuted for the payment of rebates to the American Sugar Refining Company arising out of shipments of sugar from New York to Detroit. The defendant was prosecuted under Section 32 of the Elkins Act.**[662]** The issue for determination was whether a corporation was criminally responsible for the unlawful acts of its agent acting within the scope of authority conferred upon them by the corporation? The Supreme Court unanimously rejected New York Central's claim that the imposition of criminal liability was unconstitutional because it punished innocent shareholders without due process, and its opinion endorsed corporate criminal liability and provided a standard for the imposition of such liability. Acknowledging an early statement by Blackstone that a corporation cannot commit a crime, the court commented that "modern authority" accepted corporate criminal liability, and it quoted with approval the following passage from an American Criminal Law Treaties;

Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act

[659] P H Bucy, 'Corporate Criminal Responsibility' in Joshua Dressler *et al*. (ed), 2nd edn 1 *Encyclopedia of Crime and Justice (*2002). p. 259.
[660] (1909) 212 U S 481.
[661] The Elkins Act 1887.
[662] *Ibid.*

therein as well viciously as virtuously.[663]The Supreme Court noted that without the rebate the sugar might have been sent by boat, and the lower price helped the shipper respond to "severe competition with other shipper and dealers".[664] The court stated that the imposition of corporate criminal liability was critical to the success of the regulation of rates, and it rejected the idea that there was any impediment to this important legislation. The opinion noted that the Elkins Act was adopted after the ICC published multiple reports stating that "statutes against rebates could not be effectually enforced as long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments".[665] In reading this result, the court focused on the public policy benefit inherent in securing equal rights to interstate transportation with one generally accessible legal rate. The court also made it plain that it was not illegal and was good public policy to hold a corporation that had profited from a transaction responsible for the acts of the agents to whom it had entrusted the authority to act in connection with the setting of rates.[666] Since the great majority of business transactions and almost all interstate commerce were in the hand of corporations, giving the corporation immunity from criminal punishment because of what the court characterized as "the old and exploded doctrine that a corporation cannot commit a crime" would effectively "take away the only means of effectually controlling the subject matter and correcting the abuses aimed at".[667]Since congress's power to regulate interstate commerce to prevent favoritism was well established, it would be a distinct step backwards to accept the railroads arguments.

The opinion also established the federal standard for corporate criminal liability, extending the tort concept of respondeat superior. As in tort law, the corporation may be held

[663] S A Seigel, 'Bishop Joel Prentiss' in R K Newman (ed), *The Yale Biographical Dictionary of American Law* 47 (2009) p.1.
[664] *New York Central & Hudson River R. R.V United States* (1909) 212) U.S 481.
[665] *Ibid* at 495.
[666] *Ibid* at 496.
[667] *Ibid* at 496

responsible for acts of the agent in the course of his employment when the act is done in whole or part for the benefit of the principal, here the corporation. Rather than construing an agent's powers strictly, the court stated that a corporation is held responsible for acts an agent has "assumed to perform for the corporation when employing the corporate powers actually authorized".[668] Under this standard, making and fixing rates was within the scope of authority of the general freight manager and the assistant freight managers and New York Central was properly held liable for their acts. The court stated it was going "only a step further" than the tort cases in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.[669]

It is pertinent to note that like Australia, the US has criminal law at both the state and federal level.[670] The majority of prosecutions are brought under state criminal laws. The liability of corporations under federal criminal law is based on the doctrine of respondeat superior or vicarious liability. The position in relation to state criminal laws is more complex. Some states have adopted more sophisticated statutory provisions concerning corporate liability, based in some cases on the Model Penal Code.[671] Despite the relatively simple approach to corporate criminal liability at the Federal level, the US has advanced much further than Australia, the UK or Canada in developing sentencing regimes that are adapted to corporate defendants.

However, the Department of Justice is increasingly relying on 'deferred and non-prosecution agreements' which allow corporate defendants to avoid indictment at all by

[668] *Ibid* p. 493-94.
[669] *Ibid* p. 494.
[670] S S Beale, The Development and Evolution of the U.S Law of Corporate Criminal Liability, (2014) 1 *Duke Law Scholarship*, < http://scholarship.duke.edu> Accessed on 16 Nov. 2017
[671] American Law Institute, Model Penal Code (1981) Revision Section 2.07 (1) (c).

taking a range of steps which usually include payment of a monetary penalty, and more importantly for present purposes, making changes to their corporate governance.[672] Under the federal law, corporations may be criminally liable for the illegal acts of officers, employees or agents, provided that it can be established that;

a. The individual's actions were within the scope of their duties; and
b. The individual's actions were intended, at least in part, to benefit the corporation.

As regards the first requirement, obviously it is not the individual's illegal actions which need to be within the scope of their duties in order for corporate liability to be attracted. Instead, it is sufficient that the individual commits an offence in the course of pursuing objectives or undertaking tasks which are authorized or required by virtue of their position. Even the fact that a superior officer has given express instructions that the individual should not engage in the conduct constituting an offence does not prevent that conduct from being within the scope of the individual's duties. The test was discussed in the case of *U S v Potter*[673] in which a general manager had paid a bribe to the speaker of the Rhodes Island House of Representatives, despite the president of the company having considered the proposed course of action and ordered him not to proceed. The Court of Appeal observed that the principal is held liable for acts done on his account by a general agent which are incidental to or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is an established fact that the act was forbidden by the principal.

As regards the requirement that the individual's actions be intended to benefit the corporation, all that this requires is that benefit to the company be one motivation of the individual's conduct. The test appears to be relatively undemanding. In *U S v Sun-Diamond*

[672] P J Henning,' The Organisational Guidelines: R.I.P?, (2007) 116 *Yale Law Journal*, 312.
[673] (2006) 1st Cir.463 F 3 d 9.

Growers of California,[674] the vice-president for corporate affairs, responsible for lobbying for the company's interest, also happened to be friends with the Secretary of Agriculture. The Secretary of Agriculture requested the individual to assist in retiring the secretary's brother's debts accrued in the running for the senate. The vice-president for corporate affairs arraigned to transfer $5000 of the company's money towards this debt, disguising it as a payment to a third party communications agency. The Court of Appeal held that, although the acts could be interpreted as acts of friendship for the secretary, they could also have been intended to benefit the company by consolidating its relationship with the Secretary of Agriculture, despite the fact that the illegal acts effectively defrauded the company.

4.3.1 The Historical and Utilitarian Roots of Corporate Criminal Liability

The New York Central case reflects a utilitarian and pragmatic employment of criminal law by both Congress and the Supreme Court during a period of major social and economic change.[675] The unprecedented concentration of economic power in corporations and combinations of business concerns (trusts) that developed after the civil war produced a demand for new laws, including criminal laws, to respond effectively to increasing powerful corporate entities. As one scholar noted, given the absence of widespread public civil enforcement prior to the early 1990s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability'.[676] The 1887 Interstate Commerce Commission Act and the Elkins Act were enacted during the same period as the Sherman Act, the first Federal Statute to limit

[674] (1998) 3rd Cir. 138F 3d 961.

[675] S S Beale , 'The Development and Evolution of the U.S Law of Corporate Criminal Liability', <http://scholarship.duke.edu>Accessed on 16 November, 2017.

[676] V S Khanna, 'Corporate Criminal liability: What Purpose Does it Serve? (1996) *Harvard Law Review* ,1477, 1486. See also W A Hogen, 'Criminal Law Sanctions', (2003) 38 *Harvard Criminal Law Review*,353.

cartels and monopolies. Like the Elkins Act, the Sherman Act[677] applied to both natural and corporate persons.[678]

New York Central was consistent with other Supreme Court decisions giving full effect to their critical aspects of the Federal antitrust legislation adopted during this period. Historians have noted that both public opinion and federal policy seem to have reached a turning point in the year immediately preceding the *New York Central* decision President Roosevelt took great interest in the enforcement of the antitrust laws, and Congress appropriated special funds for enforcement and provided expedited appeal of antitrust cases to the Supreme Court.[679] Although the Supreme Court's first decision gave the *Sherman Act* a narrow reading that threatens its effectiveness, the court then issued a series of decisions between 1897 and 1911 upholding lower court decisions preventing mergers and breaking up the Standard Oil and American Tobacco trusts.[680] The opinion in *New York Central* endorsed another critical aspect of a new legislative framework;

> Given the prominence of corporations in interstate commerce, their immense potential to do wrong, and the absence of other regulatory criminal liability to agents… The simple- minded public policy that emerged in [*New York Central*] seemed ideal in its shared allocation or risks to both principal and agent. Corporate liability deters crimes, it moves the risk of loss away from risk averse officers and directors toward the firm; it efficiently distributes liability risk between the firm and employees. Without significant entity liability or even shared liability, some argued, incentives would be seen as too weak to ensure an organisational commitment to law abidance.[681]

The Supreme Court's extended discussion of public policy and its critical reference to the "old and exploded doctrine that a corporation cannot commit a crime "are also consistent with a view of law that reject legal formalism and allows criminal as well as civil law to

[677] 1890, Ch. 647, Stat. 209.
[678] *Ibid*, Section 8 (Defines 'person', to include U. S. Corporations and Associations.
[679] B H Thorelli, The Federal Antitrust Policy: Origination of an American Tradition (1954) at 560-516.
[680] *Ibid*, p 563.
[681] W Laufer, Corporate Liability, Risk Shifting and the Paradox of Compliance, (1999), 52 *Vand. Law. Rev.* 1343.

develop to meet the needs of time. Although he did not write the opinion in *New York Central, Oliver Wendell Holmes Jr,* was a member of Massachusetts Supreme Judicial Court when it decided the principal state case cited in *New York Central*. Holmes is, of course, famous for the following statement;

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their follow-men, have had good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a national's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of book of mathematics.[682]

Holmes did not limit his analysis to civil law. To the contrary, he argued that 'the general principles of criminal and civil liability are the same'.[683] He also stated that "prevention… would seem to be the chief and only universal purpose of punishment," and he urged that criminal law should abandon its traditional focus on metal culpability.[684] The court's opinion in *New York Central* seems to follow these recommendations, basing corporate criminal liability on the same standard as civil tort liability, without any separate analysis of *mens rea*.

4.3.2 Interstate Commerce Commission Act 1887 of United States of America

After the civil war, congress significantly expanded the scope of Federal criminal law.[685] Although other factors also played a role, the most significant impetus for the expansion of federal authority was the dramatic postwar economic expansion and the growth in interstate commerce fueled by the development of a national rail system. The growth in interstate

[682] O W Holmes, 'The Common Law'. I (1881).
[683] W A Alschuler, Law without Values (2000), 76 (Quoting the Common Law at 38).
[684] *Ibid* p. 107 (Quoting the Common Law at 46,49-50).
[685] S S Beale, 'Federal Criminal Jurisdiction' in Joshua Dressler et al. (eds) 2nd ed., 2 *Encyclopedia of Crime and Justice* (2002) p. 696.

transportation and commerce created new problems that were beyond the reach of individual states. Employing its authority under the commerce clause, Congress responded. The earliest federal statutes were quite narrow. For example Congress made it a federal crime to transport explosives and cattle with contagious diseases in interstate commerce. At the end of the Nineteenth century, however, congress employed its authority to enact sweeping legislation aimed at monopolistic activity that interfered with interstate commerce. Hence, the Interstate Commerce Commission Act of 1887[686] was enacted. The first federal law to regulate private industry regulates the railroad industry and required that railroad rates be "reasonable and just[687]." It prohibited price discrimination against smaller markets, such as farmers, and it created the Interstate Commerce Commission (ICC). The later was to hear evidence and render decisions on individual case. This was the first federal independent regulatory Commission and it served as a model for others that followed. However, it is pertinent to note that the ICC marketed a significant turning point in federal policy. Before 1887, Congress had applied the commerce clause only on a limited basis, usually to remove barriers that the states tried to impose on interstate trade. The Interstate Commerce Act showed that congress could apply the commerce clause more expensively to national issues if they involved commerce across state lines. After 1887[688], the national economy grew much more integrated and turned the commerce clause into a powerful legislative tool for addressing national problems.[689]

Evolving technology eventually made the purpose of the ICC obsolete; here the ICC was abolished in 1995 by virtue of the Interstate Commerce Commission Termination Act

[686] Interstate Commerce Act of 1887, Ch. 104,24 Stat.379.
[687] *Ibid*, Section 1.
[688] U.S. Senate: The Interstate Commerce Act is Passed,< http://www.senate.gov/history accessed on 2 November,2017.
[689] S Best *et al*, 'Terminating the Oldest Living Regulator: The Death of the Interstate Commerce Commission'. (1997), *International Journal of Public Administration* 2096.

(ICCTA) effective 31 December, 1995.[690] The ICCTA created the Surface Transportation Board (STD) as part of the U.S department of transportation to replace the ICC and take care of the loose ends of rail and motor-carrier regulations. Surface transportation regulated by the ICC eventually included rail/roads, trucking, buses, freight forwards, water carriers, transportation brokers and those pipelines that were not regulated by the Federal Energy Regulatory Commission. The ICCTA granted the STB authority to approve or reject proposed mergers in the railroad industry.

4.3.3 Elkins Act 1903 of United States of America

The Elkins Act is a 1903 United States federal law that amended the Interstate Commerce Act of 1887. The Act authorised the Interstate Commerce Commission (ICC) to impose heavy fines on rail-roads that offered rebates, and upon the shippers that accepted these rebates. The railroad companies were not permitted to offer rebates. Railroad corporations, their officers, and their employees, were all made liable for discriminatory practices.[691] Prior to the Elkins Act, the livestock and petroleum industries paid standard rail shipping rates, but then would demand that the railroad company give them rebates. The railroad companies resented being extorted by the railroad trusts and therefore welcomed passage of the Elkins Act. Without restrictive legislation, large firms' could demand rebates or prices below the collusive prince from railroad companies as condition for their business. As a result it was common practice for railroads to offer competitive lower rates for transport between the large cities with high density of firms than the monopolistic rates between less industrial cities, irrespective of length of travel.[692] Trusts constituted such a substantial portion of a carrier's

[690] Interstate Commerce Act- United States American History, < http://www.U-S-history.com> Accessed on 2 Nov. 2017.
[691] L Sharfman, The Elkins Act', Railway Regulation (1915) Chicago, Lassalle Extension University. p. 201-202.
[692] H Hovenkamp , 'Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem,' (1998) *Yale Law Journal* vol 97, no 6 , 1027.

revenue that the trusts could demand rebates as a condition for business and the carrier would be forced to cooperate.

The Interstate Commerce Commission had been unable to protect competition and fair pricing. Section 2, prohibits a carrier from offering preferential prices or rebates; however, enforcement of this section was ineffective. Powerful trusts would pay the standard shipping price, but demand a rebate from the carrier. Court cases brought before the Commission generally did not result in punitive action, as the ICC was composed primarily of railroad interests.[693] Carriers found guilty of price discrimination, moreover, could appeal the ICC decision to federal courts, delaying punishment for years.[694] The Elkins Act was a response to the ICC's claim that the absence of corporate criminal sanctions was a fatal flow in critical regulatory legislation. The Act made it a misdemeanor for a carrier to impose preferential rebates, and implicated both the carrier and the recipient of the low price. The Act also abolished imprisonment as a punishment for breaching the law, so a violator could only be fined.[695] By reducing the severity of punishment, legislators hoped to encourage firms to testify against each other and promote stricter enforcement of the law.[696] The elimination of rebates led the railroads to seek other methods to compete for business.[697]The Elkins Act, thus, was more effective in stabilizing prices and entrenching price collusion than demonstrably lowering prices. The Elkins Act was criticised on the grounds that it was drafted by Congress on behalf of railroads and that while some railroads curtailed rebates for some customer's, for others the practice continued unabated. The Elkins Act was named after its sponsor senator Stephen B. Elkins of West Virginia who introduced the bill at the behest

[693] M Scribner, 'Slow Train Coming? Misguided Economic Regulation of U.S. Railroads, Then and Now', Competitive Enterprise Institute (2013). p. I.
[694] J Eliot, *Principles of Railway Transportation* (New York: Macmillan, 1924) p. 234.
[695] Elkins Act, 'An Act to Further Regulate Commerce with Foreign Nations and Among the States' 57th Congress, Session 2, Ch. 708, 32 Stat. 847.
[696] E P Chicago, 'The Elkins Act', *The Washington Post* (1877-1922). p. 30
[697] F Parsons, 'The Elkins Act and Its Effects', The Heart of the Railroad Problem (1906) Boston: Little Brown. p. 110-119.

of the Pennsylvania Railroad.[698] Following the short comings of the Elkins Act, the Hepburn Act replaced the Elkins Act. The Hepburn Act set maximum freight rates for railroads, representing the greater interests of Americans.[699]The Act also strained railroads, which saw new competition from the rise of trucks and automobiles.

4.3.4 The Sherman Antitrust Act

The Sherman Antitrust Act is the first legislation enacted by the United State Congress (1890) to curb concentrations of power that interfere with trade and reduce economic competition.[700]It was name after U.S Senator John Sherman of Ohio, who was an expert on the regulation of commerce.[701] One of the Act's man provision outlaws all combinations that restrain trade between states or with foreign nations. This prohibition applies not only to formal cartels but also to any agreement to fix prices, unit industrial output, share markets or exclude competition. The Sherman Act authorised the federal government to institute proceedings against trusts in order to dissolve them. Any combination "in the form of trust or otherwise that was in restraint of trade or commerce among the several states or with foreign nations was declared illegal". Persons forming such combinations were subject to fines of $5,000 and a year in jail.[702] Individuals and companies suffering losses because of trusts were permitted to sue in federal court for triple damages. The Sherman Act was designed to restore competition but was loosely worded and failed to define such critical terms as "trust", "combination", "conspiracy" and "monopoly".

[698] Elkins Act, TR Encyclopedia Dickinson ND: Theodore Roosevelt Center, Dickson State University, < http://www.theodorerooseveltcenter.org> accessed on 18 April, 2014.
[699] Hepburn Act of 1906 Facts, Information pictures available at https//www.encyclopedia.com accessed on 2 November. 2017.
[700] Sherman Antitrust Act, United States (1890) < http://www.britainnica.com accessed on 2 Nov, 2017.
[701] Sherman Antitrust Act (1890) < http://www.ourdocuments.gov accessed on 2 Nov. 2017.
[702] Section 1 now provides for punishment by a fine not exceeding 100 million for a corporation, and imprisonment for up to three years and a fine not exceeding $350,000 for an individual.

A second key provision makes illegal all attempts to monopolise any part of trade or commerce in the United States. For more than a decade after its passage, the Sherman Act was invoked only rarely against industrial monopolies and then not successfully, chiefly because of the narrow judicial interpretations of what contributes trade or commerce among states. Its only effective use was against trade unions which were held by the courts to be illegal combinations.[703] In 1914 Congress passed two legislative measures that provided support for the Sherman Act. One of these was the Clayton Antitrust Act,[704] which elaborated on the general provisions of the Sherman Act and specified many illegal practices that either contributed to or resulted from monopolisation. The other measure created the Federal Trade Commission providing the government with an agency that had the power to investigate possible violations of antitrust legislation and issue orders forbidding unfair competition practices. The Sherman Act was also criticised as stifling innovation and harmed the society.[705]

4.3.5 The Current Scope of Corporate Liability under Federal Law

In general, federal criminal laws are applicable to corporations. Some, like the Elkins Act, refer explicitly to corporations. But other criminal statutes that make no reference to entity liability are governed by the definitional provisions of the United States code, which state "unless the context indicates otherwise… the words' "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies and joint stock companies as well as individual".[706] Although the only question presented in *New York Central* case was whether the imposition of corporate criminal liability under the Elkins Act would violate due process, the Supreme Court's opinion was written far more broadly. It has

[703] *Ibid.*
[704] 1914.
[705] H Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice (2011) 4th edn, 58-61.
[706] C Doyle, 'Corporate Criminal Liability: An Overview of Federal Law' < https://www.fas.org> Accessed on 29 November, 2017.

been understood to be a strong endorsement of corporate criminal liability and the respondeat superior test, which is now applied to other federal offenses in all federal courts. Despite scholarly criticism, the federal courts have declined to narrow the standard of liability by requiring the government to prove that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees.[707] Additionally, collective knowledge and action is sometimes invoked to impose corporate liability even when no individual has committed an offense.[708] Under this theory, the knowledge and conduct of multiple employees is imputed in the aggregate to the corporate actor. For example a corporation[709] may be found to have knowledge of a particular fact when "one part of the corporation has half the information making the item, and another part of the entity has the other half.[710]This doctrine allows the imposition of corporate criminal liability even when no individual employee or agent had the necessary *mens rea*. The leading decision involved a bank's failure to file U.S treasury reports on multiple transactions over $10,000.[711] The customer in question made more than 30 withdrawals of amounts in excess of $10,000 in cash by simultaneous presenting a single teller with multiple cheques that totaled more than $10,000. The bank argued that no one employee had the necessary willful intent to violate the reporting requirements, because the tellers who conducted the transactions were unaware that the law required the reports to be filed, and the employees who know of the reporting requirements did not know of the transactions. Noting that corporations frequently compartmentalize information in smaller units, the court concluded that the aggregate of those components should be treated as the corporations knowledge of a particular operations, regardless whether employees administering the component of an operation know the specific

[707] S S Beale,'Is Corporate Criminal Liability Unique? < http://scholarship.law.duke.edu> Accessed on 15 November, 2017.
[708] *Ibid.*
[709] *Ibid.*
[710] *United States v Bank of New England* (1987), 821 F. 2d 844.
[711] C Doyle, *op cit*.

activities of employees administering another aspect of the operation. The court refused to allow the bank to escape liability by pleading ignorance when its organisational structure prevented any one employee from comprehending the full import of the transactions. In *New York Central's* case, the Supreme Court did not state in dicta that there are 'some crimes which is in their nature, cannot be committed by corporations', but there have been no federal decisions identifying such offences. To the contrary, corporate liability has been imposed for a very wide variety of federal offenses, including offenses like the currency reporting prosecution noted above, that requires specific intent.

4.3.6 The Model Penal Code Alternative

Although it has not been adopted by congress, several states have implemented a more limited form of corporate criminal liability based on the American Law Institute's Model Penal Code (MPC).[712] With limited exceptions, the American Law Institute rejected the respondent superior theory but preserved a more limited role for corporate criminal liability.[713]The MPC permits imposition of corporate criminal liability when "the commission of the offense was authorized, requested, commanded, proffered or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment'.[714] These actors' role in the entity' makes it reasonable to assume their acts are in some substantial sense reflective of the policy of the corporate body,[715]and shareholders are likely to be in a position to bring pressure to bear to avoid liability. The MPC also provides for a defense that the high managerial agent having

[712] Model Penal Code Section 2. 07 cint. 2 (a) 6 & 7 lists state laws that adopt various factors of the proposed code or are similar to the proposed code.
[713] The code permits the imposition of liability on the basis of respondent supervisor if the offense is one outside the model code and "a legislative purpose to impose liability on corporations plainly appears". MPC Section 2.07 (1) (c).
[714] MPC Section 2.07 (1) (c).
[715] *Ibid* Section 2.07 ant. 2 (c) at 339.

supervisory authority "employed due diligence to prevent its commission".[716] Since the purpose of the corporate fine is to encourage diligent supervision, where that diligence can be shown the entity should be exculpated in the absence of a contrary legislative purpose.[717] The Model Penal Code remedied some of the problems of the respondeat superior standard because it more narrowly imposed corporate criminal liability. The code imposes corporate criminal liability only for the acts of some corporate agents.[718] While praised as an improvement over respondeat superior's breath, the code standard has been criticised on several grounds. The first of such criticism is that it is unrealistic, given the size of many modern corporations. Because illegal activities rarely are conducted openly, it would be difficult if not impossible to obtain the required proof that a high managerial agent conducted or even recklessly tolerated illegal activity.[719] Secondly, the Code standard has been criticised because it encourages high managerial agencies to avoid learning of wrongdoing within a corporation.[720] Since the Code imposes corporate liability only if higher-level corporate officials are involved in or tolerate wrongdoing, a lack of knowledge of wrong doing avoids liability under the Code. Lastly, the Code standard has been criticised as inappropriately narrow, since even if a clear corporate policy encouraged a lower echelon employee to commit an offense, the corporation is -unless there is evidence of participation or knowledge by a specific corporate director or high managerial agent.[721]

4.4 Australia

Australia is a federal system in which the commonwealth, under the constitution, only has legislative power in respect of certain specified matters. These matters do not include general

[716] *Ibid* Section 2.07 (5) .
[717] *Ibid,* Section 2.07 CMT. 6.
[718] MPC Section 2.01.
[719] Corporate Criminal Responsibility: American Standards of Corporate Criminal Liability< http://www.law.jrank.org/pages/744/corporate-crimnal-responsibility accessed on 2 Nov, 2017.
[720] *Ibid.*
[721] *Ibid*.

criminal law. Accordingly, most criminal law in Australia is state law, and federal criminal offences are confined to those enacted in relation to maters in respect of which the commonwealth does have legislative power. State criminal law varies across the jurisdiction; some Australian states have comprehensive criminal codes and others rely upon a combination statute and the common law.[722] In Australia, courts initially relied on principles of vicarious liability but, have largely followed the identification approach since it was developed in the UK in 1940s.[723] The most significant aspect of Australia's corporate criminal liability regime is the statutory provisions providing for organisational liability in relation to federal offences, including on the basis of 'corporate culture'. These provisions are arguably the most sophisticated model of corporate criminal liability in the world.[724] They are also various provisions in individual states setting out models of corporate liability applying to particular offences.[725]

Unlike the U.S. and despite having a nuanced model of organisational liability, Australia has not developed corresponding systematic principles of sentencing to deal with organisational liability.[726] In 2006, the Australian Law Reform Commission (ALRC)

[722] A A Robinson, Corporate Culture as a Basis for the Criminal Liability of Corporations <http://www.accessed on 5 Nov, 2017.

[723] *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 (relying on the UK decision in Tesco Supermarket Ltd v Nattrass (1972) Ac 151; Entwalls Pty Ltd v National and General Insurance Co. Ltd (1990-1991) 5 ACSR 424.

[724] J Clough and C Mulhern, The Prosecution of Corporation (2002) p. 138.

[725] 126 Section 84 of the Trade Practices Act1974, (1) where, in a proceeding under this part in respect of conduct engaged in by a body corporate, being conduct in relation to section 46 or 46 A or part NB, V, VB or VC applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the person's actual corporate, being a director, servant or agent by whom the corporate being a director, servant or agent by whim the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind

2) Any conduct engaged in on behalf of a body corporate:

a. by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority, or

b. by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent; shall be deemed for the purposes of this Act, to have been enjoyed in all by the body corporate.

[726] Although, such provisions do exist in particular statues. For example Section 86C (2) (b) of the Trade Practices Act which allows for the making of probation orders, pursuant to which corporations can be

recommended that the government expand the range of possible penalties for corporations to include orders for corrective action, community service and publicisation of the offence committed. The ALRC also recommended that Section 16A (2),[727] which set out factors to be taken into account in sentencing, be amended to include:

The type, size, financial circumstance and internal culture of the corporation and the existence or absence of an effective compliance programme designed to prevent or detect criminal conduct.[728]

The ALRC recommendations have not yet been implemented.[729] In July 1990, a review of Commonwealth Criminal Law recommended that the statutory framework of commonwealth offences be completely overhauled. A Model Criminal Code Officer Committee (MCCOC) was established under the Standing Committee of Attorneys-General to undertake broad consultation and draft a model law that came to be the basis of the Criminal Code Act 1995 (CCA).

From the beginning of the drafting processing, it was envisaged that the model law would include provisions on corporate criminal liability. As it happened, the provisions remained very similar throughout the drafting process and the provisions currently contained in the CCA mirror closely the provisions contained in the final draft of the Model Criminal Code[730]. In its final report, the MCCOC concluded that the identification approach was no longer appropriate as a basis for corporate criminal liability, given the "flatter structures" and

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required to establish a compliance program, or an education and training program for employees or other persons, involved in the persons' business.

[727] Criminal Act 1914.

[728] Australian Law Reform Commission, Same Crime, Same Time; The Sentencing of Federal Offenders Sep. 2006), Recommendation 30, available at http://www.austlii.edu.au accessed on 10 Nov, 2017.

[729] *Environment Protection Authority v Middle Harbour Constructions Pty Ltd* (2002) 11.9 LEERA 440 at 57-58. Many civil regulatory regimes contained provisions stipulating that factors such as the deliberateness of the breach, the seniority of those involved, and the corporations approach to compliance are relevant to the determination of an appropriate penalty; even where such provisions are not expressly applied; courts tend to take these factors into account.

[730] Criminal Law Officer's Committee of the Standing Committee of Attorneys General, Final Report General Principles of Criminal Responsibility (Dec. 1992) 104-108.

greater delegation to relatively junior officers in modern corporations[731]. Among the options that the MCCOC considered was a general reversal of the onus of proof such that, where a director, servant or agent engaged in conduct, both the conduct and state of mind of the relevant individual would be deemed to be the conduct of the body corporate, and the body corporate would only have a defense if it could prove, on the balance of probabilities, that it exercised due diligence to avoid the conduct.[732] The MCCOC ultimately rejected this approach. The MCCOC stated that its objective was to develop a scheme of corporate criminal responsibility which as nearly as possible adapted personal criminal responsibility to fit the modern corporation. The Committee believed that the concept of 'corporate culture'… supplies the key analogy. Although the term 'corporate culture' will strike some as too diffuse. It is both fair and practical to hold companies liable for policies and practices adopted as their method of operation… Furthermore, the concept of 'corporate culture' casts a much more realistic net of responsibility over corporations, than the unrealistically narrow *Tesco* test.[733]

The final report of the MCCOC outlined the justification for the corporate culture provisions, noting that; the rationale for holding corporations liable on (a corporate culture) basis is that… the polices, standing orders, regulations and institutionalised practices of corporations are evidence of corporate of corporate aims, intentions and knowledge of individuals within the corporation…[734]

Chief Justice Gleeson of the Supreme Court of New South Wales (as he then was) commented that it seemed anomalous to hold corporations criminally liable for 'permitting',

[731] Final Report, *Ibid* p. 105
[732] *Ibid*, p.107.
[733] *Ibid*
[734] B Fisse, "Corporate Criminal Responsibility' (1991) 15 *Criminal Law Journal* 173, P H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095.

conduct,[735] which he understood to involve no more than failing to prevent such conduct when the criminal law would not generally hold individuals liable for this.[736] His Honour's submission also expressed concern at the vagueness of 'corporate culture' as a foundation for criminal liability. In response, the Attorney-General's Department noted that the "corporate culture" concept has already been used successfully in the US, in relation to sentencing. The New south Wales Attorney-General emphasised that the 'corporate culture' concept allows corporate criminal responsibility to mirror, as closely as possible, the fault element of personal criminal responsibility.

Despite concerns about the drafting of corporate criminal responsibility provisions, among others, the Senate Committee concluded that the Criminal Code Bill 'provided a thorough, workable, logical and balanced compromised', and recommended that it be passed.[737]Under Section 12,[738] where an employee, agent or officer of body corporate acting within the actual or apparent authority, commits the physical element of an offence, the physical element of the offence must be attributed also to the body corporate.[739] If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to the body corporate if that body corporate 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'. Authorisation or permission for the commission of an offence may be established on, *inter alia*, the four bases set out in Section 12 (3) 2.[740]They are

[735] Criminal Code Act Section 12 (2*). Ibid.*
[736] Evidence of Hon. Chief Justice Gleeson, excerpted in Senate Legal and Constitutional Committee, Criminal Code Bill 1994 and Crimes Amendment Bill 1994 (Dec, 1994) 31 (Senate Committee Report).
[737] *Ibid*, 31-32.
[738] *Ibid*, 38 .
[739] J Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique' (2003) *Journal of Business Law* 1, Sweet & Maxwell <http://www.ssrn.com/abstract=429220> Accessed on 5 November, 2017.
[740] Criminal Code Act ,*Ibid.*

a. The body corporate board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly, or impliedly authorized or permitted the commission of the offence[741].

b. A high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly or tacitly or impliedly authorized or permitted the commission of the offence.

c. A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance, or the

d. The body corporate failed to create and maintain a corporate culture that required compliance.

This provision has been criticised for blurring the fault element of offences. Under the provisions, a corporation will be liable if it merely 'authorized or permitted' the offence. Authorizing or permitting, an offence is different to the fault element of the offence itself as it would apply to an individual (for example, intention or recklessness). This is particularly problematic because Section 12[742] deals uniformly with different fault elements (intention, knowledge and recklessness) reducing them all to the same authorised or permitted threshold for corporations. However, this is an almost inevitable corollary of the fact that corporations do not have the mental capacities of natural persons, and the 'corporate' state of mind is not amenable to the same distractions. Many aspects of how the provisions will operate in practice remain unclear. Areas of uncertainly include how corporate culture is to be ascertained, and the scale on which corporate culture will be assessed, particularly in circumstances in which the 'corporate culture' of particular corporate group or entity was acceptable, but the culture in particular business divisions or office sites was deficient. It may be difficult to obtain evidence of a corporation's 'culture', and particularly to pinpoint the

[741] Section 12 (3) Criminal Code Act, *Ibid* .
[742] J Clough and C Mulhern, 'The Prosecution of Corporation (2002) p. 139.

corporation's culture at a particular moment in time.[743] It is worthy to sate that the first statute enacting industrial manslaughter legislation in Australia was passed by the Australian Capital Territory Legislative Assembly on 27 November 2003. The Crimes (Industrial Manslaughter) Amendment Act 2002 took effect from 1 March 2004.[744]

4.5 India

All the penal liabilities are generally regulated under the Indian Penal Code 1860. It is this statute which needs to be pondered upon in case of criminal liability of corporation[745]. Corporations play a significant role not only in creating and managing business but also in common lives of most people. That is why most modern criminal law systems foresee the possibility to hold the corporation criminally liable for the perpetration of a criminal offence. The doctrine of corporate criminal liability turned from its infancy to almost a prevailing rule.[746] Until recently, Indian courts were of the opinion that corporations could not be criminally prosecuted for offences requiring *mens rea*. Adopting a generalised rationale; Indian courts held that corporations could not be prosecuted for offences requiring a mandatory punishment of imprisonment, as they could not be imprisoned.

In *A. K. Khosla v. S. Venkatesan,*[747] two corporations were charged with having committed fraud under the Indian Penal Code. The magistrate issued process against the corporations. The court in this case pointed out that there were two pre-requisites for the prosecution of corporate bodies, the first being that of *mens rea* and the other being the ability to impose the mandatory sentence of imprisonment as it has no physical body. In

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[743] *Ibid.*

[744] Calver Richard, Developments in Industrial Manslaughter Legislation <http://www.austlii.edu.au> Accessed on 5 Nov. 2017.

[745] Indian Penal Code, 45 of 1860, Section 11: the world "person" include any Company or Association or body of persons, whether incorporated or not.

[746] Thiyagarajan, T. Sivanathan, "Corporate Criminal Concept", < http;//www.manupatra.com/articles> Accessed on 7 Nov, 2012.

[747] (1992) Cr. L. J. 1448

*Kalpanah Rai v State (*Through CBI),[748] a company accused and arraigned under the Terrorists and Disruptive Activities Prevention (TADA)Act was alleged to have harbored terrorist. The trial court convicted the company of the offense punishable under 3 (4) of the TADA Act. On appeal, the Indian Supreme Court referred to the definition of the word "harbor" as provided in Section 52A of the IPC and pointed out that there was nothing in TADA either express or implied, to indicate that the *mens rea* element had been excluded from the offense under Section 3 (4) of TADA Act. The Indian Supreme Court referred to its earlier decisions in *State of Maharashtra v Mayer Hans George[749] and Nathulal v State of M.P*[750] and observed that there was a plethora of decisions by Indian courts which had settled the legal proposition that unless the statute clearly excludes *mens rea* in the commission of an offence, the same must be treated as an essential ingredient of the Act in order for the act to be punishable with imprisonment and/or fine.[751] There is uncertainty over whether a company can be convicted for an offence where the punishment prescribed by the statute is imprisonment and fine. This controversy was first addressed in *MV Javali v Mahajan Borewell & Co. and Ors,*[752] where the Supreme Court held that mandatory sentence of imprisonment and fine is to be imposed where it can be imposed, but where it cannot be imposed, namely on a company then fine will be the only punishment.

In *Zee Tele Films Ltd v Sahara India Co. Corp. Ltd,*[753]the court dismissed a complaint filed against Zee under section 500 of the IPC. The complaint alleged that Zee had tele-casted a program based on falsehood and thereby defamed Sahara India. The court held that *mens rea* was one of the essential elements of the offence of criminal defamation and that a company could not have the requisite *mens rea*. It is clear from the above stated cases that

[748] (1997) 8 SCC 732.
[749] (1965) A I R S C 722.
[750] (1996 A I R S C 43.
[751] *Ibid.*
[752] (1997) A I R Sc 3964 .
[753] (2001) 3 Rec3nt Criminal Report 292, see also *Motorolla Inc v. Union of India* (2004) Cri L.TJ. 1576.

Indian court never felt about inclusion of company on certain criminal liability. But what if a corporation is accused of violating a statute that mandates imprisonment for its violation? In *The Assistant Commissioner, Assessment- II, Bangalore & Ors v Velliappa Textiles,*[754] a private company was prosecuted for violation of certain sections under the Income Tax Act (ITA). Sections 276-C and 277 of the ITA provided for sentence of imprisonment and a fine in the event of a violation. The Indian Supreme Court held that the respondent company could not be prosecuted for offenses under certain sections of the Income Tax Act because each of these sections required the imposition of a mandatory term of imprisonment coupled with a fine. Indulging in a strict and literal analysis, the court held that a corporation did not have a physical body to imprison and therefore could not be sentenced to imprisonment. In *Standard Chartered Bank and Ors v Directorate of Enforcement*,[755] the apex court overruled the all other laid down principles. In this case, Standard Chartered Bank was being prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act, 1973. Ultimately, the Supreme Court held that the corporation could be prosecuted and punished, with fines, regardless of the mandatory punishment required under the respective statute. The court did not go by the literal and strict interpretation rule required to be done for the penal statutes and went on to provide complete justice thereby imposing fine on the corporate. The court looked into the interpretation rule that all panel statutes are to be strictly constructed in the sense that the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the worlds or any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of,[756] The court initially pointed out that, under the view expressed in *Velliappa Textiles,* the Bank could be prosecuted and punished for an

[754] (2004) 1 Comp. L.J. 21.
[755] (2005) 4 SCC 530.
[756] *Tolaram Relumal and Anr. v The State of Bombay*, MANU/SC/0057 /1954 and |*Girdhari Lal Gupta v D.H. Mehta and Aror.* MANU/SC/0487/1971 (Unreported).

offence involving rupees one lakh or less as the court had an option to impose a sentence of imprisonment or fine. However, in the case of an offence involving an amount exceeding ruppes one lakh, where the court is not given discretion to impose imprisonment or fine that is, imprisonment is mandatory, the bank could not be prosecuted. The Supreme Court in *Standard Chartered Bank* observed that the view of different high courts in India was very inconsistent this issue. For example, in *State of Maharashtra v Syndicate Transport,*[757] the Bombay High Court had held that the company could not be prosecuted for offences which necessarily entailed corporal punishment or imprisonment; prosecuting a company for such offences would only result in a trial with a verdict of guilty and no effective order by way of a sentence. Justice Paranjape had stated:[758]

> "The question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend on the nature of the offence disclosed by the allegations in the complaint or in the charge-sheet, the relative position of the officer or agent, *vis-à-vis*, the corporate body and the other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act…

On the other hand, in *Oswal Vanaspati & Allied Industries v State of Utter Pradesh,*[759] the appellant company had sought to quash a criminal complaint, arguing that the company could not be prosecuted for the particular criminal offence in question, as the sentence of imprisonment provided under that section was mandatory. The full Bench of the Allahabad High Court had disagreed; a company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. It is settled law that sentence or punishment must follow conviction, and if only corporal punishment is prescribed, a company which is a juristic person cannot be prosecuted as it cannot be punished. If however, both sentence of imprisonment and fine is prescribed for natural persons and juristic person's

[757] (1963) Bom. L R 197.
[758] *Ibid* .
[759] (1993) I Camp L J 172.

jointly, then, though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it.[760]

The Supreme Court in *Standard Chartered Bank* also referred to an old decision of the United States Supreme Court, *United State v Union Supply,*[761] In that case, a corporation was indicted for willfully violating a status that required the wholesale dealers in oleomargarine to keep certain books and make certain returns. Any person who willfully violated this provision was liable to be punished with a fine not less than fifthly dollars and not exceeding five hundred dollars and imprisonment for not less than 30days and not more than six months. It was interesting to note that for the offense under Section 5 of the statute in issue, the court had discretionary power to punish by either fine or imprisonment, whereas under Section 6 of the statute (the section that was actually violated in Union Supply's case), both types of punishment were to be imposed in all cases. The corporation moved to quash the indictment and the District Court quashed it on the grounds that Section 6 was not applicable to the corporations. The United State Supreme Court reversed the District Court's judgment. The Supreme Court held that it was not the intention of the legislature to give complete immunity from prosecution to corporate bodies for grave offenses. The offenses mentioned under Section 56(1) of the FERA Act, 1973, for which the minimum sentence of six months' imprisonment is prescribed, are serious offenses and if committed would have serious financial consequences affecting the economy of the country.[762] The Supreme Court also pointed out that, as to criminal liability, the FERA Act does not make any distinction between a natural person and corporations. Furthermore, the Indian Criminal Procedure Code, dealing with trial of offenses, contains no provision for exemption of corporations from prosecution. When it is difficult to sentence them according to a statute, the court did

[760] *Ibid.*
[761] (1909) 215 U. S. 50.
[762] A Singhri, 'Corporate Crime and Sentence in India Required Amendments in Law', (2006) *International Journal of Criminal Justice Science*, vol. I, Issue 2, 98.

not develop its reasoning far enough so as to specifically hold that a corporation is capable of forming *mens rea* and acting pursuant to it. Many of the offences, punishable by fines, however do have *mens rea* as a necessary element of the offense.

In *Tridium India Telecom Ltd v Motorola Incorporated and Ors,*[763] the Indian apex court held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring *mens rea.* The notion that a corporation cannot be held liable for the commission of a crime had been rejected by adopting the doctrine of attribution and imputation.[764] In another judgment in July 2011 in the case of *CBI v M/S Blue-Sky Tie-up Ltd and Ors,*[765] the apex court reiterated the position of the law and held that companies are liable to be prosecuted for criminal offences and fines may be imposed on the companies.

It is pertinent to note that Indian law imposes vicarious criminal liability at two levels[766]. First, companies are made criminally liable for the offences committed by its employees within the scope of their employment. Secondly, certain key employees of the company are also made criminally liable for the offence of the company. Section 2 (60)[767] of the Companies Act specified the persons who would be considered as officers who are in default. The first category encompasses what the Companies Act terms as key managerial personnel (KMP) which includes the managing director, whole time directors, chief executive officers, chief financial officers and company secretaries. The second category are those while reporting to the KMP, are responsible for maintaining filing or distributing accounts and records and actively participate in knowingly permit or knowingly tail to rake active steps to prevent any default. The third category covers anyone who is responsible for

[763] (2011) Air, S.C. 20.
[764] *Ibid.*
[765] (2004) Court of Appeal No (5) 950 (Unreported).
[766] N Nuggehalh, 'Vicarious Criminal Liability for Corporate Officers in India: Problems and Prospects', <http://www.azimpremjiuniversity.edu> Accessed on 1 Nov. 2017.
[767] Companies Act of 2013.

maintaining accounts and records. It certainly looks like the compliance officers of banks would be covered.

4.6 South Africa

South Africa has adopted a statutory model of corporate criminal liability based on vicarious liability.[768]Historically, corporate criminal liability in South Africa was determined through common law and established principles of vicarious liability. Presently, such liability is predominantly governed by Section 332[769] (1) of the Criminal Procedure Act.[770]It provides,

For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-

a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body, and
b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his power or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) on the part of that corporate body.

[768] C N Nana, 'Corporate Criminal Liability in South Africa: The Need to look beyond Vicarious Liability <http://www.cambridge.org> Accessed on 5 Nov., 2017.
[769] Criminal Procedure Act No. 51 of 1977.
[770] No. 51 of 1977.

It should be noted that the meaning of 'for any offence' is contested. On the one hand, it has been read as meaning exactly what is says. On the other, it has been treated as meaning only those offences for which a corporation can *prima facie* be liable.[771]

Section 332(2),[772] provides that a director or servant of the corporate body shall be cited as a representative of the corporate body in any prosecution, and will be dealt with as if he or she were the person accused of the offence (although if the corporation is convicted, the liability will be imposed on the corporation, rather than the individual representative). The principles applicable to Section 332[773] seem to be similar to those used in relation to vicarious liability in the U.S. For example in both jurisdictions, there is no apparent restriction on the level of the employee whose conduct can be attributed to the corporation. Equally, in both jurisdictions, an intention to benefit the corporation will be sufficient to bring an *ultra vires* act within the scope of the doctrine. It appears, however, that, Section 322 may be wider than the US test for vicarious liability as the US test for vicarious liability as the US test appears to require a party to be acting in the course of their duties and for the benefit of the corporation. Whereas, Section 332[774] phrases these consideration in the alternative. It has been suggested that Section 332[775] violates South African's Constitution. Oosten states; Legal commentators, on the other hand, unanimously repudiate the doctrine of vicarious responsibility as representing a departure from the fault requisite for criminal liability, and it will in all likelihood be declared unconstitutional by the constitutional court for the same reason, if and when the matter comes up for decision.[776]

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[771] E.g. not bigamy or rape. See also Ferdinand van Oosten, Theoretical Basis for the Liability of Legal Persona in South Africa in de Doelder and Tiedemann (eds), The Liability of Legal and Collective Entities (1999) 195, 196,198.
[772] Criminal Procedure Act No 51 of 1977.
[773] *Ibid.*
[774] *Ibid.*
[775] *Ibid.*
[776] Oosten van Ferdinand, *Ibid*

In addition, South Africa recently signed the OECD Bribery Convention and it will be interesting to see whether a pure vicarious liability system is sufficient to meet the requirements of the Convention. From the wordings of Section 332(1),[777] it is clear that a corporation will be held liable for any act or omission that is regarded as a crime, irrespective of whether it is regarded as such by legislation or by common law. The specific mention of the phrase "under any law or at common law, serves to eliminate confusion regarding the laws that can be contravened by corporations. It is submitted that the legislature has avoided prescribing a list of specific offences that can be committed by a corporation, as doing so would require the constant revision of the provision to keep up with ever-changing and increasing corporate activities.[778] It does so by referring to acts and omissions that take place "with or without a particular intent". The criminal liability of a corporation therefore caters for intentional and negligent acts. Since intention and negligence are human attributes, the corporation is held criminally liable by imputing the *mens rea* of its director or servants to the corporation. Holding a corporation criminally liable by imputing the fault of its directors or servants to the corporation has led to a situation where a corporation may also be convicted of crimes that could only be committed by natural parsons.[779] Although it has been said that Section 332(1)[780] appears as though it refers to intentional acts or omissions only, case law has shown that it is possible for a corporation to be convicted for culpable homicide.[781] In *R v Bennett*, a person who was working for the accused corporation had negligently operated machinery and thereby caused the death of another employee. Both the company and the negligent worker were charged with and convicted of culpable homicide. In *S v Joseph*

[777] Criminal Procedure Act 1977.
[778] M D Farisani, 'Corporate Criminal Liability for Deaths, Impunity and Illnesses: Is South Africa's Mining Sector Ready for Change?< http://www.ufh.ac.2a> Accessed on 3 Nov. 2017.
[779] *Ibid.*
[780] Criminal Procedure Act 1977.
[781] B Jorgensen & V Derhinde, 'Corporate Criminal Liability in South Africa: Time for Change', (part 1)" (2011) T.S.A.R ,452.

Mtshumayeli,[782] the driver of a bus owned by the accused company allowed one of the passengers in the bus to drive the bus. The passenger lost control of the bus which in turn overturned, causing the death of another passenger. The negligence of the employee was imputed to the corporation and the corporation was found guilty of culpable homicide. Both decisions are in the line with Section 332[783](1) that regards the act and the culpability of the corporation's directors and servants as the act and culpability of the corporation.

In *S. v. Suid Afrikaanse Uitsaaikorporasie,*[784] the court interpreted Section 332 (1)[785] as excluding crimes committed negligently. This judgment was, however subsequently overruled by the Appellate Division in Ex parte Minister Van Justisie: In *Re S v Suid Afrikaanse Uitsaaikorporasie,*[786] in which the judgment in *R v Bennet* was approved.

[782] (1941) T. P. D. 194, 200.
[783] (1971 I.S.A 33.
[784] (1991) 2 S. A 698.
[785] Criminal Procedure Act 1977.
[786] *Supra.*

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Findings

This study came up with the following findings:

5.1.1. That corporations in Nigeria cannot be held liable for murder and/or manslaughter as there is no provision for that in our extant laws.

5.1.2. That corporations are now being held liable for corporate manslaughter or corporate homicide in other jurisdictions.

5.1.3. That there is no clearly defined legal framework for holding corporations criminally liable for their activities as well as sanctioning them.

5.1.4. That most jurisdictions have evolved from holding corporations by way of attribution to holding corporations directly liable for their criminal activities.

5.1.5. That the international community and some countries, both those with the same legal jurisdiction and those with different legal jurisdiction with Nigeria, have made moves towards holding corporations directly liable for their crimes including crimes of intent.

5.1.6. That it is not the case that the state of mind of a corporation can only be discerned from the directors which is the principal perception in other jurisdictions, the state of mind can be discovered from the company's policies and procedures.

5.2 Conclusion

It is evident that the concept of corporate criminal liability has become part of most legal systems in the world. As can be gleaned from the foregoing research, corporations are now being held liable directly for their criminal actions. This research work in chapter one introduced the concept of corporate criminal liability and the rationale behind it. The second chapter dealt with review of existing literature on the concept of corporate criminal liability. The various theories used by jurisdictions in the determination of criminal liability of corporations as well as the sanctions for criminal corporations, was dealt with extensively in chapter two. Under chapter three, the provisions of extant laws in Nigeria pertaining to the criminal liability of corporations was examined. In chapter four, an extensive research was made with respect to corporate criminal liability in other jurisdictions, particularly the Corporate Manslaughter and Homicide Act in some jurisdictions. Chapter five, deals with the conclusion and recommendations proffered.

Large scale corporations are the main defining force on the globe. They are everywhere, in almost every aspect of our lives. Parallel to this subtle and sometimes not so subtle dominance, corporations have become dangerous criminals as well.[787] However, because they are a special kind of entity, non-human entities, their criminal behavior is also out of the ordinary. Corporate criminality "challenges our sense of reality".[788] It is this characteristic that makes corporate crime a problematic issue. Contemporary western law, especially criminal law, has its roots in individualistic principles, in both civil law and common law jurisdictions. The criminal law as an institution in most legal systems has excluded full consideration of collectives. The question thus arises: How should we put a stop

[787] J Vining , 'Corporate Crime and the Religious Sensibility', (2003) 3 *Punishment and Society Journal*, 315.
[788] *Ibid.*

to corporate criminality, and more particularly, how could we use such individualistic legal system to put a stop to them?

Different legal systems have reacted to the problem of corporate crime in their own way. While common law countries have tried to deal with corporate crime over the past century, in some countries affiliated to civil law, especially in Nigeria, the maxim that corporations do not commit crime has prevailed. The endorsement of criminal liability of corporations has largely been a twentieth century judicial development, influenced by the "sweeping expansion"[789] of common law principles. Civil law countries were, and to some extent still are, reticent to embrace the idea of corporate criminal liability. The common law experience with corporate criminal liability can and should influence the introduction of the concept of corporate criminal liability in the Nigerian legal system. European civil law countries like Denmark and France have adopted the common law model of identification doctrine as a ground theory for the ascription of criminal liability to corporations. The success of the introduction of a completely new concept in the Nigerian legal scenario is conditioned to the existence of a solid theoretical and legal background. It is in the hands of Nigerian legal scholars to develop theoretical constructions that will support the attribution of criminal liability to corporations directly and trigger structural and legislative changes in the legal system.

The control of corporate crime on the other hand involves a delicate balancing act, straddling between the objectives of a robust and adequate regulation and enforcement on one hand, and the fostering of business enterprise and innovation. In the effort to raise corporate

[789] L P Harvey, & K Groskaufmanis, 'Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct', (1990) 78 *Georgetown Law Journal* 1560.

governance standards and promoting good regulating practices, we must be mindful that this will not result in unnecessarily onerous and costly burden on businesses.[790]

While Nigeria has achieved significant success in our efforts at controlling corporate activities and combating corporate crime thus far, we recognize that we cannot rest on our laurels. We will need to constantly fine tune our system by learning from the experiences of other Jurisdictions and ensuring that we keep abreast of the latest developments. We must remain nimble and agile in our ability to deal with emerging trends in corporate criminal liability and corporate crime as we continue to safeguard and preserve our reputation and integrity as a trusted international financial and business hub with tenacity and resolve.

5.3 RECOMMENDATIONS

The following recommendations are proffered in the light of the foregoing research on criminal liability of corporations in Nigeria. These recommendations if considered and implemented would help to deter the criminal activities of corporations in Nigeria.

5.3.1 Enactment of Corporate Manslaughter and Corporate Homicide Act in Nigeria

It has therefore become imperative that Nigeria enact a statute comparable to the Corporate Manslaughter and Corporate Homicide Act 2007 of the United Kingdom to properly spell out potential liability of corporate bodies whose operations may result in the deaths of either their workers or third parties.

[790] E Lederman, 'Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle', (1985) 76 *Journal of Criminal Law and Criminology* 294.

5.3.2. Enactment of Bribery Act in Nigeria

It is humbly suggested that Bribery Act should be enacted in Nigeria. In addition to enacting the Bribery Act in Nigeria, just as is obtainable in the United Kingdom, it would be desirable if the "failing to prevent" bribe offence found in Section 7 of the United Kingdom's Bribery Act of 2010 could be applied/ introduced to other offences for example a company that failed to prevent other crimes of fraud or dishonesty by its employees or agents would be guilty of an offence. As with the Bribery Act, a statutory adequate procedure defence should be provided for.[791]

5.3.3. Enactment of Sentencing Act of Nigeria

The Nigerian Legislature should also enact a Sentencing Act and also establish a Sentencing Commission. The Sentencing Commission is needed for the following reasons:

a. It will be responsible for promulgating guidelines to assist a judge in sentencing criminal corporations and selecting the most appropriate sentence given the circumstances of each case
b. In addition, these guidelines will assist courts in fashioning appropriate conditions of probation in sentencing criminal corporations.
c. In respect of the quantum of punishments, the need for constant review to ensure that it meets the ends of justice and disparity is reduced in similar situations.
d. Also the need for institutional machinery involving correctional experts for fixing proper punishment.

[791] The Act should create a strict liability corporate offence of failing to prevent foreign bribery. A Company can be convicted under this provision even if the relevant associate has not been successfully convicted of a foreign bribery offence.

e. The need for criminal law to offer more alternatives in the matter of punishments instead of limiting the option merely to fines and imprisonment.[792]

5.3.4 Review of Inadequate Penalties in our Extant Laws.

The penalties prescribed by various legislations on violation of the provisions of the laws with respect to corporations and persons are a slap on the wrist when compared to the harm caused. Some fines are so ridiculous that some corporations see it as a cost of doing business. Prevailing penalties in the Penal Code, Criminal Code, and CAMA are inadequate.

It is recommended that heavy monetary fines or compensation should be given to corporations when sanctioning their criminal activities. Before a fine or compensation is considered heavy, a look should be taken at the income base and the profit base of the corporation. Thus, if a corporation is given a fine or asked to pay compensation that threatens its existence or struggled to pay, it will go a long way to deter corporations. Some innovative sanctions suitable for corporation have also emerged. They include community service orders, permit/license revocations loss of government contracts, publicity order e.t.c are other means of penalizing a corporation that should be explored.

5.3.5. Prevention of Corporate Crimes

Prevention they say is better than cure. Corporate and economic crime carries with it drastic consequences and impact which frequently cannot be adequately remedied. In many instances, victims if alive are unable to recover their losses even if the culprits have been apprehended and dealt with under the law. Companies and corporations have also been brought irrecoverably to their knees as a result of fraud committed by their directors and

[792] The Law Library of Congress, Global Research Center, "Sentencing Guidelines" <https://www.loc.gov> Accessed on 10 January, 2018.

employees. Prevention is thus a key pillar for any strategy to combat corporate crime effectively. Nigeria's focus in this aspect should be on the efficient regulation and supervision of our financial and business sector.

5.3.6 Promoting Corporate Governance

Nigeria has long recognised that in our development into a regional and global financial hub, the integrity of our government and institutions has been a major factor in our ability to draw investments and talent. We need to maintain a competitive edge in the midst of intense competition brought about by globalization and an increasingly borderless capital market. Nigeria has built up an international reputation for good corporate governance by enacting the laws and codes; however, there is still considerable improvement to be made. The corporate governance framework in Nigeria can be found in our Companies and Allied Matters Act and Code of Corporate Governance.

5.3.7 Cooperation with the Private Sector

To fight corporate criminality, partnership with the corporate and financial community is essential. One of the best defenses against such crimes is for market players and stakeholders to be aware of and be sensitised of the risk of corporate crime. This is especially crucial given the complexities involved in such crimes. There is also much to be gained by leveraging on industry expertise and resources to complement the government's efforts. There are bodies to liaise with;

(a) The Stock Exchange

(b) Professional bodies like Nigerian Bar Association, Institute of Chartered Secretaries and Administrators of Nigeria, Institute of Chartered Bankers of Nigeria, and Institute of Chartered Taxation of Nigeria.

5.3.8 Diligent Prosecution by Law Enforcement Agencies.

The prosecuting agencies like EFCC, Attorney General's office should be more diligent and charge under appropriate laws. The enforcement agencies need to improve on their prosecutorial capabilities and strategies. It is expected that they borrow a lead from the United Kingdom courts for speedy disposal of the legion of corruption cases in the nation's courts. The enforcement agencies need to be more diligent in the investigation of financial crimes and the prosecution of offenders.

5.3.9. Routine Training and Retraining of Enforcement Agencies Staff.

Due to the phenomenal rate at which corporate criminality evolves, and because corporations are formed rapidly, law enforcement agents must receive continuous training in the investigation and prosecution of corporate crimes. There is the need for constant training, workshop, symposiums and conferences for members of staff of the enforcement agencies like the Police, EFCC, ICPC and others. They should also participate in coordinated training with other countries, so that transnational cases can be pursed quickly and seamlessly. This will improve the quality of work done by them in terms of investigation, surveillance and prosecution of alleged corporate crimes. Other jurisdictions such as the United Kingdom, who have managed to successfully reduce incidences of corruption, need to be emulated here in Nigeria in terms of the quality of charges framed by prosecutors and in the apportionment of appropriate sentencing. In addition, the anti-corruption agencies like the EFCC and the ICPC needs to be emboldened, granted autonomy, support and possibly have its powers expanded. Law enforcement agents must be properly equipped with the latest hardware and software.

5.3.10 The Judiciary needs to be Proactive

It is recommended that our judges should be more inclined to holding corporations criminally liable directly. The judiciary needs to have a stronger resolve to sentence convicted corporate entities to maximum terms allowed under the law. Sentencing needs to be seen as a serious deterrent to would-be corrupt individuals and not as a slap on the wrist on the offenders.

5.3.11 Interagency Cooperation

There should be a high level of inter agency cooperation among the enforcement and prosecuting agencies in Nigeria. This will lead to a great yield of results attainable by them. They should synergize and harness their strength and potentials in combating corporate crime. Rather than struggle for superiority amongst themselves, they should see themselves as sisters in the fight against corporate criminality.

5.3.12 Public Enlightenment/Awareness Campaign

The public should be sensitized about their rights with respect to the environment, consumption of goods and services, shareholders in a company, employees in a company and so on. When the public is well versed in knowledge about their rights, then it becomes easy for them to identify when that right has been infringed upon and then take necessary steps by reporting to the appropriate authorities or seeking redress in the courts of law. Public enlightenment programs should be organized regularly by non-governmental agencies, government agencies and bodies to create adequate awareness needed by citizens.

5.3.13 Separation of Investigative and Prosecutorial Powers

The investigative and prosecutorial powers of the EFCC and ICPC should be separated. It has been seen from different cases handled by these bodies that the powers of investigation and prosecution do not always go together. Where an investigator is also expected to prosecute,

there is a danger that he may not be objective in his investigation and that his eventual decision to prosecute may not be a product of a well-thought out process. This is a major problem bedeviling Nigeria's EFCC and ICPC from carrying out their duties efficiently and effectively.

5.3.14. Effective Compliance Programs

Effective compliance programs qualify for a reduction in corporations' culpability score. It is humbly submitted that corporations must have compliance programmes which must be reasonably capable of reducing the prospect of criminal conduct of corporation .High-level personnel should also be assigned overall responsibility to oversee it. Compliance programs must be consistently enforced through appropriate dispensary mechanisms.

5.3.15 Increase Corporate Crime Education

The government with the participation of all departments and agencies should support for key education programmes and research and development to ensure the Nation's ability to practice and imbibe world's best practices with respect to corporate conduct.

5.3.16 Development of Stronger Business Ethics.

It is recommended a way to instill the proper moral attitudes in the people who are entering the corporation. When companies have certain principles and their employees also share in these ideas, they financially out-perform those who do not have those principles. Thus, there is need for more effective general corporate business codes in Nigeria.

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APPENDIX

Template of a Proposed Corporate Homicide Statute.

It is proposed that there should be a comprehensive statutory framework on corporate criminal liability for homicide in Nigeria. Thus, there should be enacted a Corporate Homicide Statute. To address this concern, the following statutory language is proposed: Model Corporate Homicide Statute.

1. An organisation is guilty of corporate homicide when knowingly, recklessly, or negligently causes the death of a human being.
2. First-degree corporate homicide occurs when:
   (a) Through the actions or omissions of an owner, management official or other similarly situated individual;
   (b) An organization knowingly or recklessly creates or tolerates a condition under circumstances manifesting extreme disregard for human life; and
   (c) That condition causes the death of a human being.
3. Second-degree corporate homicide occurs when:
   (a) Through the actions or omissions of an owner, management official, supervisor, or other similarly situated individual;
   (b) An organisation recklessly or negligently creates or tolerates a condition; and
   (c) That condition causes the death of a human being.
4. As provided in Section 2 and 3:
   a) An organisation's culpability may be established by the knowledge and actions, whether individually or collectively, at owners, officers, management officials, supervisors, or other similarly situated individuals with a duty or responsibility to communicate their knowledge to someone else within the organisation;

b) In determining liability of the organization, the following may be considered as evidence:

(i) Prior health or safety regulatory violations pertaining to the condition causing death, except when the organisation did not have notice of the violation;

(ii) Organisational policies, practices and culture

Any organisation found guilty under Section 2 or 3 of this

a) Shall be fined up to a maximum of ten million naira per victim; and

b) May be subject to a period of probation not to exceed five years, with the court to consider as conditions of probation:

i) The remedying of the condition(s) that led to the loss of life;

ii) The adoption and implementation of an effective corporate compliance program;

iii) The reassignment of those owners' management officials, supervisors, or other similarly situated individuals whose conduct was causally liked to the loss of life;

iv) The efforts by the organization to refine or restructure its operations or organization to guard against the recurrence of the conditions that led to the loss of life.

5. For the purposes of this Act,

a) "Organisation means any entity registered or licensed to do business within the jurisdiction and any entity, whether charitable or not engaged in the manufacture, distribution, transportation, sale or provision of goods or services within the jurisdiction;

b) "Owner" means any national person or legal entity with an ownership stake in the organisation;

Proposal for the Enactment of a Corporate Criminal Liability Statute.

1. Section One: Establishment of the Offence.

   This first section of the proposed statute creases a new offence of corporate homicide. It resolves any uncertainty courts might have about the legislature's intent to hold corporations criminally liable for homicide. The proposed bill will apply to any person, whose death was caused by corporate action or inaction.

2. Section Two: First Degree Corporate Homicide.

   The second section of the proposed statute sets forth the elements of the most serious level of homicide. For the statutes to apply, corporation must have acted knowingly or recklessly, evidencing an extreme disregard for human life by creating or tolerating a condition that resulted in death. The *mens rea* element may also be satisfied when corporate officials deliberately avoid attaining knowledge of the condition.

3. Section Three: Second-Degree Corporate Homicide.

   The proposed statute's third section sets forth the less severe level of corporate homicide. The corporations must have acted recklessly or negligently in creating or tolerating a condition that caused death. Second degree corporate homicide adopts an approach akin to respondent superior. It simultaneously expands the number of corporate employees whose conduct may be the basis for liability by including supervisors and lowers the minimum *mens rea* to negligence.

4. Section Four: Collective Knowledge.

   The fourth section of the proposed statute presents both a single actor, the conventional means of finding corporate liability and a collective knowledge approach to corporate liability. Under the single actor model, a corporation may be liable only when one of its employees or agents possesses the requisite *mens rea* for each element of the offence. Collective knowledge, on the other hand, works by aggregating the individual

knowledge of several corporate employees so as to create a collective state of mind for the corporation.

5. Section Four: Evidence of Corporate Practice, Culture and Prior Regulatory Violations**.**

   The proposed Act allows prosecutors to introduce evidence of organizational culture and policies to prove that a corporation created or tolerated a deadly condition. Corporate culture is an important underlying cause of corporate misconduct. Indeed, corporate policies are often the results of more than a simple aggregation of individual choices.

6. Section Five: Punishment.

   Punishment for corporate homicide is bipartite, melding economic and structural sentencing policies to achieve the foremost goal of rehabilitation. The first part of Section 5 consists of a fine of up to 10 million per victim. But a criminal fine alone has limited deterrent and rehabilitative powers. If a corporation tails to undertake internal restructuring to prevent a recurrence of the criminal conduct and instead simple pays a fine, society is merely pricing, not sanctioning, offenders, behavior. To ensure that the sentencing scheme accommodates societal and rehabilitative interests, the proposed statute expressly provides for the correction for fundamental deficiencies in corporate structure and management through probation. Through corporate probation, a sentencing court may be able to draw upon the exposes of regulators to assist in monitoring corporate compliance and oversee the implementation of internal reforms.