

# The Organic Theory of Corporate Management and Its Applicability under the Nigerian Company Law

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DOI:10.21276/sb.2019.5.7.10

| Received: 01.07.2019 | Accepted: 09.07.2019 | Published: 30.07.2019

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## Abstract

One cannot hold a company directly liable for any criminal act until one identifies the very ego and center of the personality of the company. This paper is, therefore, concerned with the examination of the provisions made under our laws and the laws of other jurisdictions together with case laws for easy identification of those organs of the company which control the affairs of the company. The author adopted historical, expository, analytical and comparative methods in conducting this research. Part of the findings of this paper is that the *de facto* control of the management of the affairs of a company resides with the board of directors while *de jure* control is with the general meeting. The paper, recommends that Sections 246 and 255 of CAMA be amended to accommodate the right caliber of men on the board.

**Keywords:** Trial Courts, Organic Theory, Management Organs, Corporate Punishment, Directors, and Meetings.

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## INTRODUCTION

Under the Nigerian legal system, there are three main common forms of business organizations in which a prospective investor may choose to invest in Nigeria. The oldest and most common among the business set ups in Nigeria today is the individual or Sole Proprietor business. The next to the sole proprietorship is the partnership which is an association of more than one person but not more than twenty [<sup>1</sup>] who finance and manage the business for their joint benefits. Each of them represents the other and one is an agent of the other. The modern forms and the one which this paper addresses, is an incorporated company that is where two or more persons [<sup>2</sup>] come together and agree to form a “business entity or association .... for the purpose of carrying out defined and common objective or objectives, usually for gains [<sup>3</sup>]”, and prepare or cause to be prepared some prescribed documents such as: Memorandum and Articles of Association and submit them to the Corporate Affairs

Commission (CAC) for registration [<sup>4</sup>] and once the certificate (Certificate of Incorporation) is issued, the entity or association becomes an incorporated company, a “juristic person” which is to say, in the words of Okere, “a personification of a sum total of legal rules applicable to a plurality of persons [<sup>5</sup>]”. These registered companies created by registration under CAMA or by Act of Parliament although technically legal persons are practically artificial entities and so must act through human organs, agents and officers, whose actions are binding on the company. However, inspite of the above-established concept of the organic theory which in turn is the basis of determining both civil and criminal liabilities to the company, some scholars and jurists have not agreed on the proper theory of corporate criminal liability which is the concern of this paper.

## Historical Development of Organic Theory

The division and exercise of powers between the corporate organs, and the liability of the company, otherwise known as the organic theory principle or identification doctrine [<sup>6</sup>] of the company as applicable

<sup>1</sup> Section 19 Companies and Allied Matters Act, Cap. C. 20 Vol. III, Laws of the Federation of Nigeria (LFC) 2004.

<sup>2</sup> *Ibid*, Section 20 (1) – (4)

<sup>3</sup> Kachikwu E. I. & Osekhon M. A., *Nigerian Company and Partnership Law and Practice* (Lagos: Mikzek Law Publication Ltd., 1988) p.8.

<sup>4</sup> Section 18 - 36

<sup>5</sup> Okere B. O. “*Legal Personality*” in Prof. Okonkwo *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) p. 303.

<sup>6</sup> Mayson, French and Ryan: *On Company Law*, Blackstone Press Ltd., (1987) 4<sup>th</sup> ed. P. 653

in the Nigerian company law today, has its origin in the early company law practice in England. This is so because most English law and traditions found their way into the Nigerian legal system by virtue of the fact that Nigeria was a British colony. An incident of this colonial nexus brought about the introduction and adoption of the organic theory of the company into the Nigerian legal system. What this means is that the common law of England and the doctrines of equity, in so far as they applied to company law were made applicable in Nigeria has received English Laws [7]. For example, the decision in the locus classicus case of *Salomon v. Salomon & Co* [8] which forms a landmark in area of company law; a case which has established beyond all doubt that once a company has gone through the rituals of incorporation as stipulated, it becomes an entity distinct from the incorporators or what we may here choose to call the shareholders [9] was so received and has since become part of our law. So also, the doctrine of organic theory as was enunciated in the very important case of *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd* [10] which form the basis of attributing the directing mind and will of officers, organs and agents of the company as that of the company itself, which is the main focus of this paper and the doctrine of ultra vires as declared in *Ashbury Railway Carriage & Iron Co. v. Riche* [11] which has only recently been codified [12] to mention just a few. The Act which governed the operations of companies in England by 1<sup>st</sup> January 1900 was the Companies Act of 1862. The Act, was a statute of general application, as it applied to all classes of registered companies in England [13].

The English Companies Act 1986 with subsequent amendments was passed as the Companies (Consolidated) Act 1908, and therefore with regard to statutory law, this Act continued in force and formed the basis of the first Nigerian Companies Statute in 1912, namely: The Companies Ordinances of 1912. It applied to the colony of Lagos. It is, however, worthy to mention that in spite of the introduction of English law into the colony of Lagos in 1863 and subsequently into the whole country in 1900, there was no company legislation in this country until 1912. The reason for this is that before the First World War, there was practically no industry of importance in Nigeria. The country then was simply undeveloped. All the then trading companies in Nigeria have registered abroad and only came here in search of raw materials for their

factories in the developed countries particularly the United Kingdom.

As earlier stated, 1912 saw the first company's ordinance, which provided for the formation of companies by registration in Nigeria [14], but this ordinance applied only to the colony of Lagos, and in 1917, it was amended and extended to apply to the whole country [15]. However, it is to be noted that the first company to be registered in Nigeria under the ordinance was the Bank of West Africa. This was a subsidiary of the Standard Bank of England which is today known as First Bank of Nigeria PLC. With the amalgamation of the Northern and Southern protectorates of Nigeria with the Colony of Lagos in 1914 by the then Governor, Sir Fredrick Lugard, the law was extended to the whole country [15] in 1917 by the companies (Amendment and Extension Ordinances [15] 1917).

In 1922, both ordinances of 1912 and 1917 were repealed and replaced by the Companies' Ordinances of 1922. These ordinances were based mainly on the United Kingdom Companies Act of 1908 and 1917[15]. It was also amended in 1929 to fall in line with the United Kingdom Companies Act of 1929. In 1968, a new Company Decree [16] was passed to replace the Companies Ordinances of 1922 which had been in force for over 40years, save for minor amendments made to it [17]. The 1986 act was based mainly on the United Kingdom Company Act of 1948 and part of the recommendations of the Jenkins Committee (United Kingdom). The Act was a Federal Law and therefore applied throughout the whole country and was listed on the Exclusive Legislative List under the 1979 Constitution with the Federal High Court being given original jurisdiction on Companies matters [18]. The 1986 Companies Act was a marked improvement on the previous laws. For instance, it made mandatory provisions for accounts and encouraged greater accountability of directors and more effective participation of the shareholders in the affairs of the company. The Act attempted to ensure that as much information as is reasonably required shall be made available to the shareholders, the creditors and to the general public. Under the said Act, it was compulsory for the companies to publish details balance sheet, profit, and loss account of the company for the consumption of the general public, shareholders and the creditors[19].

<sup>7</sup> Orojo, *Op cit.* at p. 17

<sup>8</sup> Supra

<sup>9</sup> Supra

<sup>10</sup> (1915) AC 705

<sup>11</sup> (1975) H. L. 653

<sup>12</sup> Section 39, Companies and Allied Matters Act.

<sup>13</sup> *Attorney General v. John Holt & Co.* (1910)2 NLR 1 at 21, see also *Young v. Abina* (1910)6 WACA 180 at p. 183 – 184.

<sup>14</sup> Orojo, *Op cit.* at p. 18

<sup>15</sup> Sofowora, *Op cit.* at p. 11

<sup>16</sup> Decrees, because it was promulgated by the ten Military government. But it was later re-designated as Act by Virtue of the adoption of Laws (Re-designation Decrees etc.) order 1980

<sup>17</sup> *Ibid* at p. 11

<sup>18</sup> *Ibid*

<sup>19</sup> Orojo, *Op cit.* at p. 19

Another outstanding change introduced by the Act was the introduction of part X, which required foreign companies intending to carry on business in Nigeria to be incorporated locally [20]. Article 80 of TABLE a first schedule to the Act which is in *parimaterial* with Article 80 of the English Companies Act 1948 made provisions for the division and exercise of power among the corporate organs of a company thus:

The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company, as are not by the Decree or by these regulations required to be exercised by the company in general meeting, subject, nevertheless to any of these regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

It is to be observed that in spite of these improvements in the 1968 Companies Act, it was easily clear that those changes did not go far enough, and the law was severally criticized by academic writers, the general public and corporate lawyers as being inadequate to deal with rapid, industrial, economic and commercial development of Nigeria that was brought about by Petroleum oil boom of 1970 – 1979[20]. The defect of the Act as of the previous ones and, indeed, as of most colonial companies' statutes, is the failure to state the relevant law in a systematic and comprehensive form. As Prof. Gower, pointed out, these Acts “merely superimpose a number of statutory rules upon an existing body of common law and equity [20]”. It was obvious from all these defects, together with the various public concerns about the law, that the Nigerian government was compelled to direct the Nigerian Law Reform Commission, in 1987 to

undertake a review and reform of Nigerian Company Law<sup>[21]</sup>.

A National Workshop on company law was held from February 10<sup>th</sup> – 12<sup>th</sup> 1988<sup>22</sup> with the main objective of discussing and fashioning out company legislation that would take care of Nigerian further needs. This workshop deliberated on the “the draft papers of Companies Act, the draft Business Names Act and the draft Incorporated Trustee Act”. These were fully and exhaustively considered by a representative of interested organizations, institutions, and member of the public. Their findings and recommendations were enacted into law hereinafter referred to as “Companies and Allied Matters Act, 2004 now Cap. C20 Vol. III, Laws of the Federation of Nigeria 2004. The Act has incorporated a number of relevant common law principles and the doctrines of equity with necessary modifications to suit our local circumstances.

The Act also made provisions for the various organs of the company, to wit: the members in general meeting, the board of directors, managing directors and secretary [23]. Besides, the Act further contains provisions in respect of corporate liability <sup>[23]</sup>. It is clear however that, in all these statutes the organic theory principle was maintained. The English Courts on their own part have firmly established this principle and it formed part of the common law and doctrine of equity, as far as they applied to company laws which were received into Nigerian law; the development of the principle by the courts forms the subject for consideration in this paper.

### The Pre-Organic Theory Position

The position of the law prior to the change brought about by the concept of organic theory as stated in the case of *Lennard's Carrying Company v. Asiatic Petroleum Co. Ltd*<sup>[24]</sup> was that once a company had gone through the rituals as provided by the law, it became an entity distinct and separate from its members<sup>[25]</sup>. Dr. Akanki A. has written that corporate personality is a “cornerstone of the company”, and that in “*Salomon v. Salomon & Co Ltd*.”<sup>[26]</sup> the House of Lords seized an opportunity to link the old concept of corporate personality to joint-stock companies<sup>[26]</sup>.

The Joint-Stock Companies Act of 1856 provided for the limited liability of the members of a company on complete registration if: (a) the company had at least 25 members who held £10 shares paid up to

<sup>21</sup> Akanki, *Ibid*

<sup>22</sup> *Ibid*

<sup>23</sup> *Ibid*

<sup>24</sup> (1915) A. C. 705

<sup>25</sup> Gower, *Op cit.* at p. 77

<sup>26</sup> Kiser, D. B. *Cases and materials on Nigerian company law*, Obafemi Awolowo University Press Ltd., Ile-Ife, Nigeria (1992) p. 61

<sup>20</sup> Akanki, *Op cit.* at p. 2, see also Report on Ghana Company Law, p.4 para.116

the extent of 20per cent, (b) not less than three – fourths of the nominal capital was subscribed, (c) “limited” was added to the company’s name, and (d) the Board of Trade approved the auditors.

The directors were to be personally liable if they paid a dividend knowing the company to be insolvent or made loans to the members, and the company had to wind up if three-fourths of the capital were lost [27]. However, the above statutorily enactment was not greatly appreciated until the celebrated case of *Salomon v. Salomon*<sup>[27]</sup> where the House of Lords in England affirmed that the benefit of corporate personality extended to all registered companies, regardless of the fact that is controlled solely by one individual.

From the foregoing, it is clear, that the corporate personality principle was founded on the law of agency [28]. This is so because a company being a juristic personality can only act through human agencies. At common law, the general rule is that where an agent acting with the scope of his authority [29]. Makes a contract with a third party on behalf of his principal, the agent drops out completely and only the principal can sue and be sued by the third party on the contract [30]. Ordinarily, it makes no difference that the agent acted fraudulently and entirely in his own interest and contrary to those of his principal [30]. The legal implication of the doctrine is that any contract made by the agent on behalf of his principal will operate to pass the rights and liabilities under the contract to the principal. This common law rule was explained by Wright J. in the case of *Montgomery v. U. K. Steamship Association* [30]; here His Lordship stated as follows:

The contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue is the principal [30]. It follows that it is the principal alone who acquires rights and liabilities under the contract and he alone can sue and be sued on the contract.

However, there are exceptions to this common rule; that is to say that an agent or a director may incur personal liability on contracts made by him on behalf of the company if he goes beyond his powers [31]. It must be noted that these principles, were watered down, in favour of the company, by two important attributes, to

wit: the ultra vires doctrine and the doctrine of constructive notice. It was the law that once an act was ultra vires the company, it was void, invalid or unlawful and could not be validated by assent or ratification, even if all members of the company attempted to do so by, ratification at the general meeting [32]. The strict application of the doctrine occasioned a lot of hardship to both the company and the third parties. The effect is that the third party dealing with the company may lose out and or the director may be personally liable if he goes beyond the powers [32]. On the other hand, the constructive notice was that since the memorandum and articles are public documents and open to public inspection, anyone, whether shareholder or outsider, who had dealings with the company, has to be taken to have notice of the contents of those documents, whether he had read them or not<sup>[32]</sup>. It is contended that these documents will prescribe the objects and powers of the company and indicate which powers are to be exercised by the members in general meeting, those to be performed by the board of directors and the extent the board’s powers may be delegated to other officers.

The above provision has been specifically abolished [33]. The effect is that no person shall be deemed to have knowledge of the contents of the memorandum and articles of Association merely because such a document is registered by the commission. Thus, the company is now held liable for the acts of its officers. The issue of who has authority to bind a company contractually has been settled by both the common law and the Act. It is now specifically provided [33] that the act of members in the general meeting, the board of directors or managing directors, 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 civilly and criminally liable therefore to the same extent as if it were a natural person. For act of an officer or agent of the company, other than aforementioned, to bind the company, it must be shown that the company acting through its members in the general meeting, board of directors or managing directors, has expressly or impliedly authorised such officer or agent to act in the matter or that the company as aforesaid, has represented the officer or agent as having authority to act and the third party has entered into the transaction in reliance on such representation.

A company may also be vicariously liable for torts committed by its organs, agents or officer in the course of their duties or employment [34] A company’s liability may also arise in torts by attribute. This occurs if the act complained of is by somebody for whom the company is liable because his action is the very action

<sup>27</sup> Supra

<sup>28</sup> Gower, *Op cit.* at p. 78

<sup>29</sup> Okany, M. C. *Nigerian Commercial Law: Africana-Fep. Publishers Limited*, 1<sup>st</sup> ed. (1992) p. 376

<sup>30</sup> Supra, at p. 371

<sup>31</sup> *Firbank’s Exors. V. Humphreys* (1886) 18 Q. B. D. 54

<sup>32</sup> Section 68 Companies and Allied Matters Act

<sup>33</sup> *Palmer’s Company Law*, 23<sup>rd</sup> ed. Vol. 1, 1982 para. 27 – 29, p. 333

<sup>34</sup> See Street, H. *The Law of Torts, Butterworths*, (1976) 6<sup>th</sup> ed. P. 427 and 464



of the company itself. Thus, when a company director acts tortuously in the course of his duties, the company is liable, not by way of vicarious liability, but because the tortious act is that of the company itself [35]. The company's liability for torts committed by its agent or servant is governed by the relevant common law rules and doctrines of equity [36]. For example, Section 66(3) expressly preserves vicarious liability in tort by providing that nothing in Section 66 (which deals with the acts of officers and agents) "shall derogate from the vicarious liability of a company for the acts of its servants while acting within the scope of their employment".

Care must, however, be exercised in applying previous decision on the liability of companies in tort in the light of the provisions of Section 65 to 67 of the Act. In *Ayodele James v. Midmotors Nig. Ltd.*[37] the Supreme Court said that the general law has been stated that a corporation is liable to be sued for any tort provided that:

1. It is a tort in respect of which action will be brought against a private individual;
2. The person by whom the tort is actually committed is acting within the scope of his authority and in the course of his employment as an agent of the corporation; and
3. The act complained of is not one which the corporation would not, in any circumstances, be authorized by its constitution to commit unless perhaps the corporation has expressly authorized the act.

Another limitation that was associated with the legal concept of separate personality is to be found in the area of corporate criminal liability. At first, English law, from which the Nigerian legal system originated and developed, refused to impute to companies those characteristics of natural persons which pertained to their human and social nature, and which might form the basis of a vast range of individual's rights and duties [37]. It was thought that a corporation was not indicted and could not commit a crime [38]. A lot of reasons were offered for this lukewarm attitude towards holding a corporation liable for the acts of its agents. The rule was that a corporation, as a distinct legal entity, was an abstraction and had no mind and could not form criminal intent. Commenting on the limitation of companies in this respect, Buckley J. in his most

illuminating pronouncement in the case of *Continental Tyre and Rubber Co. (CB) Ltd. v. Daimler Co.*[39] said:

The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body parts nor passions. It cannot wear weapons nor serve in wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy.

Apart from its corporator, it can have neither thoughts, wishes nor intentions, for it has no mind other than the minds of the corporator.

However, the evolution in England, of holding corporations criminally liable for the offences requiring *mens rea* could be traced to the civil case of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[40]. There, a company sought to take advantage of the limitation of liability under Section 502 of the Merchant Shipping Act 1894. By the provisions of the statute, the limitation was available only where the injury caused was within the owner's actual fault or privity. In holding the company liable for the default of its managing director, Lord Haldane in a memorable judgment stated thus:

Did what happened take place without the actual fault or privity of the owners of the ship....? My Lords, a corporation is an abstraction, it has no mind of its own any more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and center of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself.

From the above, it is clear that the basis for the company's liability then could only be found under the

<sup>35</sup> Ekpo, *Op cit.* at pp. 192 & 193, see also *the Lady Gwendolen* (1965) 2 All E. R. 283

<sup>36</sup> Orojo, *Op cit.* at pp. 102 & 103

<sup>37</sup> Duda, J. A. *Principle of Nigeria Company Law* Calabar, Optimist Publishers (1997) p. 95

<sup>38</sup> Williams, G. *Criminal Law: The General Part*, 2<sup>nd</sup> ed. London (1961) p. 853

<sup>39</sup> (1915) K. B. 893

<sup>40</sup> *Supra*

concept of agency and vicarious liability. It is submitted, with respect, that these concepts and their applications occasioned a lot of hardship to both the company and the third parties. Therefore, the formulation of the organic theory or alter ego principle by which the acts and thoughts of certain agencies of a corporation must be regarded as those of the corporation itself and by which criminal acts of these agencies, therefore, become attributable to the corporation came as a relief, extending as it did companies liability not only to the acts of the company's organs but also to area of criminal law.

It is instructive to note that the decision in *Lennard's Case* [41] appears to remain the highest judicial authority for the concept of the organic theory of a company. It has been of great persuasive value to our courts and Section 65 of CAMA incorporates this concept into our law.

### The Principle of Organic Theory and Its Usefulness

As already pointed out, the organic theory is that aspect of law which deals with liabilities of company for the acts of its organs, agents and officers. The term organic is used in the sense that only the organs of the company are contemplated in this theory. Consequently, the acts of these organs bind the company. There are primarily two organs of a company; the board of directors and the members at general meeting. These two are the organs whose duties, obligations and liabilities will be regarded as those of the company [42]. This is mainly so because by the concept of corporate personality, once a company has been incorporated, it maintains a separate legal personality from its members [42].

The company as an artificial personality acts through human agents and the acts of these human agents, for example, the organs, are imputed to the company as if they were done by it [42]. Therefore, the rights, duties, obligations, and liabilities are separated from those of its members [42]. It should be noted; in passing that the organic theory is an extension of the principle by which liability is imposed on companies. As earlier pointed out, in the past, the basis of companies liability could only be found under the concept of agency and vicarious liability. But then these were inadequate. The formulation of the organic theory came as a relief extending as it were companies liability not only to the acts of the company's organs but also to the area of criminal liability.

From the foregoing, it means that the doctrine of the organic theory was enunciated to cover the inadequacies of the earlier existing doctrine of agency and vicarious liability. The theory is useful in various ways, both to the company and to the society at large. Right at its basis, the theory recognises that the act of

certain responsible officers of the company is to be treated as that of the company itself. By so doing the theory fixes the company with the responsibility for the actions of this cadre of officers. What is necessary, therefore, is whether the acts complained of was committed by the company's organ. Once this is determined in the affirmative, liability is imputed to the company, in which case the right party to be sued becomes the company itself. So, one aspect of the doctrine's usefulness is that the theory provides for certainty and predictability as to whom the outsider can sue when the organ of the company has wronged him. Also, the company, if it needs to, sues in its own name.

Another aspect of the theory's usefulness, perhaps the most important one, is its applicability in the arena of criminal jurisprudence. It was a controversy over the years that a company being an artificial person could not be held liable for criminal wrongs. The reason was the difficulty involved in having to prove the *mens rea* of the company. It is instructive to note that proof of such intention is fundamental for most crimes. It was difficult to decide where the company's mind lay and even more difficult to discover the intention of such a mind. This ingredient of *mens rea* has even been an unruly horse in the determination of criminal liability even with natural persons. If this difficulty exists, and indeed it does, it is only natural that such difficulty will be more pronounced in the case of abstract or artificial persons such as companies. The consequences of this were that companies were not generally held liable on account of criminal wrong until recently. The resultant injustice and inconvenience to the outsider were manifestly enormous. It is in this light that Lord Haldane's illuminating lead judgment in *Leonard's Carrying Co. v. Asiatic Petroleum Coy. Ltd.* [42] which later metamorphosed into the present organic theory of liability was a relief to the previously unsatisfactory situation. Thus, it was established that certain officers or organs of the company represent the directing mind and will of the company. "The state of mind and will of these managers (or organs) is the state of mind and will of the company and is treated by law as such..." By these basic principles, the search for the company's mind is no longer elusive. The company's criminal mind can in these circumstances be found and subsequently convicted for such a criminal act.

Furthermore, the fact that the theory concerns itself with the activities of the company's organ has its useful purpose. It is recognised that the organs are the sole bodies charged with the control of the company's affairs. The management of the company's business is the exclusive responsibility of these organs. It is worthy to note that the usefulness here can be said to have a double-barreled effect, one to the company and the other to the society. On the one hand, since the organs

<sup>41</sup> *Supra*

<sup>42</sup> (1915) A. C. 705

have the controlling powers in the management of the company's affairs, it is expected that the company's liability in that respect will be minimised. Being directly involved, they know how to act and how to forbear. This way the company avoids unnecessary litigation. On the other hand, society benefits, because the settlement of claims is likely to be direct and prompt. The reason being that those concerned with decision making are the very people that commit the company. It is only natural that they will often want a speedy settlement of the issue involved.

One point has to be made at this stage that the usefulness of this theory is extensive. The above are just some of them, they are in no way exhaustive, but are considered to be the major ones. One hopes that they will help in providing a meaningful guide to the merits and perhaps the demerits of the concept.

### The Applicability of the Organic Theory in Nigeria

The principle that a company can only act through biological persons, the likes of directors and shareholders whose thoughts and actions can be attributed to the company were succinctly explained in the locus classicus case of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*<sup>[43]</sup>. In that case, a cargo of benzene on board a ship was lost by fire caused by the unseaworthiness of a ship with defective boilers. The ship owners and the managing owners were two limited companies. Mr. Lennard, Managing Director of the latter company, knew or had the means of knowing about the defective condition of the boilers, but gave no special instructions to the captain or chief engineer of the ship regarding their supervision nor did he take any steps to prevent the ship from the voyage with defective boilers. The main question in issue was whether the loss suffered by the plaintiff had occurred "without the actual fault or privity of the defendant company, within the meaning of Section 502(1) of the Merchant Shipping Act 1894<sup>[44]</sup>. The company tried to escape liability by claiming the protection of Section 502. The section relived a ship owner of liability for damage by fire to goods on board a ship, which occurred without the ship owner's actual fault or privity.

There was no dispute about the fact that the loss resulted from default by Lennards, Managing Director of the defendant company. But the argument of the defendant company was that it had no actual fault or privity in the events that led to the disaster. The House of Lords not only rejected the argument but also held the defendant company liable on the grounds that Lennard's act were those of the company itself. In a memorable judgment, Viscount Haldane L. C. said:<sup>[45]</sup>.

<sup>43</sup> Supra; see also Ekpo, *Op cit.* at p. 176

<sup>44</sup> See the Nigerian Merchant Shipping Act (1962), Sections 338 and 383

<sup>45</sup> See also *Bolting and Another v. Association of Cinematograph, Television and Allied Technicians*

My Lords, a Corporation is an abstraction; it has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself.

Denning L.J. (as he then was) put the situation more vividly when he said in the case of *Bolton (Eng.) Co. Ltd. v. Graham and Sons*<sup>[46]</sup> that:

A company may in many ways be likened to a human body. It has a brain and 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 the corporation are mere servants and agents who are nothing more than 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 control what it does.

Another very important and instructive case on this subject is that of *H. M. S. Truculent*<sup>[47]</sup>, a case which involved a collision between SS. Divine and HMS. Truculent resulting in the death of over sixty people; it was held that the third sea Lord was the directing mind of the admiralty and that his action is the very action of the admiralty itself. The height of this concept, of the organic theory of a company, was

(1963)2 *O. B.* pp. 606, 646; *Bolton (Engineering) Co. Ltd. v. Graham & Sons Ltd.* (1957)1 *O. B.* 159. *Mitchell v. Egyptian Hotels* (1915) *A. C.* 102 *Ozarco Ekuma Ozarco Nig. Ltd. v. Eagle Silver/Agencies Ltd.* (1987)4 *N.W.L.R.* 9.

<sup>46</sup> (1957)1 *Q. B.* 159, (1956)3 *ALL E. R.* 624

<sup>47</sup> (1952)2 *ALL E. R.* 968

reached in *Daimler Co. Ltd. v. Continental Tyre and Rubber Co. Ltd.*<sup>48</sup> where the Court of Appeal in England held, in pursuit of the concept that the organic theory is extended to cover anyone who is considered to be a responsible officer of a company other than the directors. In this case, His Lordship Lord Parker stated thus:

The acts of a company's organs, its directors, managers, secretary and so forth functioning within the scope of their authority are the company's acts.

In Nigeria, the concept of the organic theory of a company as enunciated in *Lennard's case* has since become part of our laws; and has since been codified<sup>49</sup>. Thus, the Western Court of Appeal in *Ibadan City Council v. Odukale*<sup>50</sup> held, *inter alia*, that the chairman of the Ibadan City Council was an alter ego of the Council; although the case was reversed on appeal by the Supreme Court<sup>51</sup> the higher court positively approved of the Court of Appeal's view on the issue of alter ego.

Thus, Udo Udoma J.S.C. as he then was who delivered the judgment of the Supreme Court after a review of the argument on this point said:<sup>52</sup>

We consider that the criticism of the Western State Court of Appeal on this respect of the case in describing Chief Akinloye as the alter ego of the Committee and of the Council was unjustified. We are satisfied on a critical examination of the evidence and holding that the Western State Court of Appeal came to a right decision when it took the view that the Council was unanswerable for the acts or default of its official Chief Akinloye and that the latter was the directing mind and will of both the Committee and the defendant Council.

This theory has also been statutorily recognised by Section 65 of the Companies and Allied

Matters Act; it makes provision for the various organs of the company, namely general meeting, the board of director, managing directors, and secretary. Section 63 (1) of the Act stipulates that:

A 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 good meeting or the Board of Directors.

From the above provision, it, therefore, follows that a company although having a corporate personality is deemed to have human personality through its officers and agents. But not all the officers and agents in the company are regarded as the directing mind and will of the company, whose acts are imputed to the corporation. This was perhaps the reasoning behind the decision of the Supreme Court of Nigeria in *Yesufu v. Kupper International N. V.*<sup>53</sup> to the effect that:

A director of a company is the very corpus, the think tank the alter ego and the directing mind and will of the company.

Similarly, in the case of *Delta Steel (Nig.) Ltd. v. American Computer Technology Inc.*<sup>54</sup> the Court of Appeal held that where the law requires the persons' acts or faults of an individual so as to make a legal fiction like a company liable, the directors, managers or the managing directors are in the eyes of the law, the directing mind and will of the company. Upholding this theory again, the Court of Appeal stressed through *Aderemi J. C. A. in Kunle Ladejobi v. Odutola Holdings Ltd.*<sup>55</sup> thus:

.... a limited liability company is a mere legal fiction that exists only in the eyes of the law. It has neither eyes nor brain of its own. It acts through biological persons the likes of directors and shareholders whose actions are binding on it....

The Companies and Allied Matters Act further contains provisions in respect of companies' liability for the acts of these organs criminally or civilly to the

<sup>48</sup> (1916)2 A. C. 307, p. 340

<sup>49</sup> Right from the Companies' Ordinances 1912

<sup>50</sup> Unreported Suit No. CAN/102/68 of 30<sup>th</sup> April 1969

<sup>51</sup> (1972) SC. 128, pp. 146-147

<sup>52</sup> *Ibadan City Council v. Idukale*, *Supra*

<sup>53</sup> (1995)5 NWLR (pt. 416)17 at p. 29

<sup>54</sup> *Supra*

<sup>55</sup> (2002)3 NWLR (pt. 753) at p. 153



extent as if it were a natural person<sup>[56]</sup>. Furthermore, provisions are made for acts of the officers and agents by extension to be acts of the company in subsequent sections<sup>[57]</sup>. Thus, the company law which is administered in Nigeria at present is well in line with other common law jurisdictions as regards the organic theory of corporations if not in advance of those legal systems.

## CONCLUSION

In this paper, we have attempted to highlight the concept and applicability of the organic theory of corporate management under the Nigerian company law. The paper has found that initially two main groupings in the corporate set-up qualify as the directing mind and will of the company, namely: the shareholders in general meeting and the board of directors. The study has further found that presently the managing director and the secretary<sup>[58]</sup> have been added to this selected club as the organs of the company. Whether the company is managed through its board of directors or through the shareholders in general meeting, or the managing director and secretary, such management must be undertaken by human beings<sup>[59]</sup> who comprise these bodies and in this respect, these people may be referred to as the organs of the company<sup>[60]</sup>.

Invariably the issue of who has authority to bind the company has been settled by the new Act. It is now specifically provided<sup>[61]</sup> that the act of the members in general meeting, the board of directors or a 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 thereof as if it were a natural person. It is pertinent to note that for the act of any officer or agent of the company, other than aforementioned, to bind the company, it must be shown that the company acting through its members in general meeting, board of directors or managing director, has expressly or impliedly authorised such officer or agent to act in the matter or that the company, acting as aforesaid, has represented the officer or agent as having its authority to act and the third party has entered into

transaction in reliance on such representation.<sup>62</sup> The paper also reveals that both the board of directors and the members in general meeting are primary organs of the company between whom the company's powers are divided. The simplistic view is that the *de facto* control of the management of the affairs of the company is vested with the board of directors while *de jure* control is with the general meeting<sup>[63]</sup>. This *de jure* control is in the sense that the general meeting can either remove the directors or restrict their powers by suitably altering or amending the articles by special resolution. The concept of the organic theory is equally important for the effective administration of the company law because prior to the development of this theory, the old attitude of the common law and commentators was that a company would not be indicted for a criminal offence requiring *mens rea*. However, the common law attitude no longer holds sway especially in the 19<sup>th</sup> century as the English Court of Appeal in the civil case of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*<sup>[64]</sup> held *inter alia* for the first time although in passing that a corporation is criminally liable for the offence requiring *mens rea*.

In Nigeria, this theory has been statutorily recognised by Sections 63, 64, 65 and 66 of the Companies and Allied Matters Act. This Section expressly renders the company criminally liable for the acts of its members in the general meeting, the board of directors or of the managing directors and the secretary. This Provision supports the assertion that corporate criminal responsibility only arises from the acts of specific corporate organs whose minds and wills can be identified as the company's mind and will and this, it is submitted, has simplified matters for third parties.

## RECOMMENDATIONS

On the whole, as analysed above, it is clear that in Nigeria, the CAMA, 2004 has finally laid to rest the controversy as to who controls the company and has given statutory recognition to the supremacy of the board of directors in a matter of day-to-day management. The Act further contains a far-reaching Provision in respect of companies' liability for the act of its primary organs criminally and civilly to the extent as if the company is a natural person. This notwithstanding, it is our humble view that whatever changes that were brought about by the CAMA, 2004 on the subject matter under consideration cannot by any stretch of imagination be described as satisfactory. We shall, therefore, posit a few recommendations in this connection which we think should be given consideration for the overall interests of the shareholders, company's creditors, and the general public:

<sup>56</sup> Section 65 of Companies and Allied Matters Act

<sup>57</sup> Section 66 of Companies and Allied Matters Act

<sup>58</sup> *Daimler Co. Ltd. v. Continental Tyre & Rubber Co.* (1918)2 A.C. p. 340 per Lord Parker

<sup>59</sup> *Automatic Self Cleansing Filter Syndicate v. Cunningham* (1909)2 C.H. 341

<sup>60</sup> *Daimler v. Continental Tyre and Rubber Co. Ltd.*

(1919)2 A. C. 307, *Mandilas & Karaberis v. I. G.*

(1958) E. S. C. 20, *John Henshel Quarries Ltd. v.*

*Harvey* (1965)2 Q. B. 233; *Tesco Supermarkets Ltd. v.*

*Nattrass* (1977) A. C. 153; *Bolton (Engineering) Co.*

*Ltd. v. Graham & Sons* (1957)1 Q. B. 159 at 172 – 173.

<sup>61</sup> See Section 65 of the Act

<sup>62</sup> Section 66 (i) (a) and (b) of the Act

<sup>63</sup> The report at 65

<sup>64</sup> *Supra*

1. This paper reveals that presently the board of directors has supremacy over the general meetings in matters of management. Our concern is that if directors are men who are given supremacy over every other person in the corporation, then such persons should be people well qualified in terms of business experience, academic qualification, knowledge, and skill so as to be well able to tackle difficult problems of such company. At present, there is no statutory or common law specification of the quality of persons occupying the seats of a board room both in England and Nigeria. Consequently, a board accommodates diverse personalities some of whom are least qualified to be on board. This is not conducive to the progress of a company. A result-oriented board is predicated on the right caliber of men on the board. Therefore, to enhance performance and productivity, some sorts of professionalism should be introduced. Accordingly, we strongly recommended that Sections 246 and 255 of Companies and Allied Matters Act be amended to reflect this.
2. In Nigeria, neither the criminal nor the penal code expressly provides for the criminal liability of corporate bodies as distinct from individual liability of the members composing the company. Thus, our courts only rely on the general principle that a corporate body can be held criminally responsible, the actual issue as to when to hold a corporate body criminally liable is an issue that is largely left to the discretion of the courts. Each case has to be looked at separately, based on its individual facts and circumstances. It is recommended that both the criminal and the penal codes be amended to provide for the actual employees that can ground corporate criminal liability as well as the scope or extent of corporate involvement in criminal activities.
3. Conflict is a normal phenomenon and unavoidable in Nigeria; as in most other less developed jurisdictions, litigation through ordinary courts of law has been and substantially remains the major process for conflict resolution. However, with the attendant prohibitive costs, delays, technicalities, and frustrations inherent in its adversarial nature, I am of the humble opinion that in view of our present adversarial judicial system whereby some cases can last for onward of 10 years before a final decision is made and for the effective and efficient administration of the company in Nigeria, there is a dire need for the establishment of the Federal Commercial court to take care of Corporate disputes that occur between directors *inter se*, shareholders *inter se*, or between shareholders and directors. We, therefore, advocate the establishment of the Federal Commercial court. The court should have both civil and criminal jurisdictions in cases relating to corporate disputes. The Companies and Allied Matters Act should accordingly be amended to allow for this.
4. In this paper, we have seen that the basis of corporate liability is sought in some persons who are the organs, agents, and officers of the company. We submit the present position of those whose hands, minds and wills are regarded as the hands, minds, and wills of the company are not reflective of the dynamics of contemporary business and commercial practice. We submit that in reality the business of the company may be carried out by a manager, supervisor, foreman, superintendent, chief financial officer or anyone else of lower designations much more than the managing director or board of directors. We, therefore, recommend that the determination of corporate liability of incorporated companies be reviewed from the circumstances of each case. This will, undoubtedly, give more meaning and credibility to the operation of the concept of organic theory and thereby improve the overall interest of the shareholders, creditors and the general public. More importantly, it might, in fact, make the investment in company stock more attractive to investors.