Privatising the Anti-Corruption Drive: The Case for a Corporate Corruption Act

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The richest persons in Nigeria today may have been born here but they are not really citizens of this country. They may be as Nigerian as you and I, but they will never have the right to vote or be voted for. They are the oldest persons in this country, but they are not even people - they are artificial persons, created in the main under the Companies and Allied Matters Act.

The corporation is a curious being. Demonised by many, they are indispensable to life as we know it today. Scripted into the DNA of the joint stock company is the one gene that the human being is most envious of: immortality. For the well-run company will never die. However rich we grow, however well we care for ourselves, you and I will eventually pass on. The well-run company need never die. It need never have its LL.B certificate mothballed or binned. It will never have its assets divided between death-duty and children. It continues to acquire assets and experience, to merge and to morph - and that is mostly a good thing for us.

Yet there is one aspect of the corporation that continues to trouble us, and that it is the fact that it does not go to the mosque. Or to church for that matter. In place of a Moral Compass, a company might have a CSR project; this has led some to describe the corporation as *immoral*, but a more accurate description would probably be *amoral*.

The corporation is a specie of Economic Intelligence, one of the most innovative inventions of the human race. Here are immortal, incorporeal beings that can be wiser - and richer - than Solomon, control more territory and resources than many states... indeed, some companies have more staff than some nations have citizens, and for all their size, they are extremely nimble: if you want to mobilize men and materials to achieve any goal under the sun, if you can pay for it, call up a multinational.

But with size and power comes complications. Corporations have become so powerful that although they are under the rule of law, they have the clout not only to unmake rules but laws as well. Although they have no right to vote, they can influence the composition of governments, the establishment of policy, and when it comes to corruption in Nigeria, corporations are major partners and vehicles of official and political corruption.

To take us from the realms of the speculative into the anecdotal, I will cite here the case of SEC v. Halliburton Company, (reported as No. 4:09-CV-399, U.S. District Court for the Southern District of Texas, 2/11/2009) where "The SEC alleged in its complaint that beginning as early as 1994, members of the joint venture determined that it was necessary to pay bribes to officials within the Nigerian government in order to obtain the construction contracts." In penalty for the $180 million in bribes paid by Haliburton/KPR to Nigerian government officials as well as a political party, a record combined fine of $579 million was imposed and paid, earning the defendants the distinction of having paid the largest corporate fine ever imposed in the history of the US Foreign Corrupt Practices Act.

The question for the developmental Bar is simple: what kind of legislative structure

can prevent colossal frauds of this nature? A quick glance through our statute books will confirm the obvious, we are not slackers on the subject. Our corporate legislation is not soft on corruption, being at par with many a modern economy. This brings us to the supplementary question: why do multinationals which do relatively ethical business all over the world come to Nigeria to become the bulwark of corruption? And the corollary: why do Nigerian companies which engage in sharp practice within our shores register in foreign countries and excel as ethical corporations?

The answer lies not merely in our laws, which as this audience will bear witness, have mirror images in the West. The answer lies between the systemic failings of the Nigerian operating environment (which benchmarks corruption as the defining factor for success) and the 'DNA' of the Joint Stock Company, which predisposes the company to act in such a way as to assure the health of its balance sheet.

In other words, if a corporation's only client is government, and it refuses to kickback, the likely consequence is voluntary liquidation in due course. On the other hand, if it does kickback carelessly and is caught out, the likely post conviction consequence is the relatively modest fine regime that makes corporations campaign to be sued in Nigeria rather than the West.

Put yet another way, in an ethical system, the crooked company is an endangered species; but in a decadent system like ours, the ethical company is endangered.

Every Nigerian anti-corruption legislation suffers this Catch 22 conundrum: If conscientiously applied, the law will clean up a rotten system. However, since the system is rotten, the law will not be conscientiously applied.

The only law with a chance of breaking this cast-iron conundrum is one that gets the corporate world to spontaneously self-regulate itself. In a sense, we have to innovatively privatise the Anti-Corruption drive by transforming our legislative operating environment such that the corporate sector - which can be so much more efficient, so much more resourceful that the ungainly public sector - moves from cosy collaborator to super-efficient policeman. How can this be achieved? We have to communicate with the corporate world in their native tongue. Not in sermonising language borrowed from the Quoran or the Bible, not in patriotic rhetoric modulated for flesh-and-blood citizens, but in language that resonates in the boardroom, that registers indelibly on the corporate balance sheet, on the assets register. Because when we speak to Economic Intelligence, we have to speak intelligent economics. Enter our proposal for the Corporate Corruption Act, the full text of which can be referenced in the schedule to this paper.

The basic idea of the CCA is to port the concept of 'capital punishment' into the corporate sector by making offences that involve official corruption up to and in excess of a million naira punishable by the liquidation of the offending company. There will be no fine options (Halliburton's $579million fine appears large until set beside the $6 billion value of the contract), but in appropriate cases - where for instance the convicted company is publicly quoted and outright liquidation is inimical to the national interest, or will prejudice innocent shareholders, customers and staff - the employment of directors and managers within the Arc of Governance may be terminated and the beneficial interests of the major shareholders who control the board of directors, expropriated.

Of course the liberal temperature of criminal jurisprudence which currently disfavours capital punishment for the human is unlikely to favour its equivalent in the corporate sector. Nor, for that matter, is this proposal likely to endear many on the trail of

international capital. After all, if a country is already acceptably profitable, why change the formula? Why rock the boat? Yet, any intuitive Nigerian (or newspaper-reading Nigerian) will see that the ship of state will not stay afloat much longer on its current course. A visionary intervention is essential, and for once, we are compelled to appraise our situation not on the basis of what is acceptable to others but what will work for us. Currently Nigeria is treated as the Lavatory of the World. Companies and businessmen are on their best behaviour in the drawing rooms of the East and banquet halls of the West, but they come to the Lavatory of Nigeria to do their dirty business. It is our radical responsibility as lawyers and citizens of this country to clean up, The CCA can be that deodoriser. The CCA is a potentially transformative legislation whose arrival on our statute books could mend the systemic failings of the Nigerian operating environment. Of course it will have no retroactive power, and will have enough safe-guards built in to avoid witch hunts...

What it says - to the most ruthlessly efficient organisations known to man - is: organise your corporate structure so that none of your staff issues a bribe in your name, or go under. No sound operational corporation will risk liquidation for a shot at the next contract. In 2012 Nigeria, corruption is merely an operating expense: kickbacks are built into the contract prices so that a N10 billion contract costs the tax payer double and where it is not executed at all, compliance is booby-trapped because the chief accounting officer who should have kicked up a rumpus has been 'kicked back' a bung. Post CCA, companies will walk away from contracts, rather than pad it beyond N999,999.00. And they will walk away with the confidence that their competitors are doing likewise. For what the law also suggests to every company of substance operating in Nigeria is equally simple: None of your rivals can take the risk either, so tender transparently.

The impact of the CCA on national development will be significant because:

1. there should be a greater through-flow of budgetary allocations from the national, state and local government treasuries to street level, as probity returns to the budgeting process;
2. making business more transparent and predictable will stimulate knock-on economic activity and enhanced private capital formation;
3. there should be improved service and infrastructure delivery as previously compromised chief operating officers acquire new independence, not just in supervising contractors, but in exerting disciplinary control over their departments;
4. we should experience a greater professionalism as carpetbaggers who hog political offices for the kickbacks leave the field for technocrats and politicians with an eye for history;
5. we should see a slump in the capital flight of Nigerian budget billions illicitly flowing to off-shore theft havens, and
6. over time we should see a reduction in petty corruption as the probity in the official sector funnels down to the street level.

The knock-on effect of cleaning up official corruption cannot be overestimated. The recent report from Global Financial Integrity, *Illicit Financial Flows from Africa: Hidden Resource for Development, (Dev Kar & Devon Cartwright-Smith)* suggests that Africa lost $854 billion in illicit financial outflows in the 39 years leading up to 2008. Of this total, Nigeria - naturally - had the highest outflow of $89 billion, compared to South Africa's $24.9 billion. 'at the end of 2008, every African lost $989 though total illicit capital that was transferred over the 39-year period.' (- pp12.)

If there is any surprise in the report, it is in the opinion of the researchers that counter-intuitively, the lion share of illicit flows - is not in fact, due to political

corruption. Worldwide, only 3% of the illicit flows are due to political corruption. The lion share - 60-65% is due to commercial activity. But in a Nigerian context, it is that critical '3%' bung that blinds and deafens and mutes the regulators, allowing, inter alia, an estimated one barrel of every four barrels of crude oil pumped in Nigeria to be stolen at source. (UN figures) The CCA should raise the quality of governance in Nigeria by making regulators and officials up and down the land, lean, mean and up to the task of doing the work for which they are paid.

We may well ask what prevents the CCA from suffering the fate of the other excellent laws lying comatose in our statute books. Two points may suffice:

- Corrupt politicians cannot offer corporate collaborators effective protection from the CCA. Companies have to think longer term than a politician's term of office. While liability under the CCA is not retroactive, it is never statute-barred either. If companies are still paying fines for their malfeasance in Nazi Germany, it makes no sense to incur potential liabilities that could trigger liquidation proceedings if a politician-collaborator were to drop dead in office.
- The CCA cannot not be caged for the duration of a regime like other legislations merely by the appointment of a corrupt or compliant Director General. Proceedings can be opened by state or federal authorities based on final judgements obtained from anywhere in the world (within scheduled OECD territories).

We may also wonder if the CCA will trigger such a capital flight from Nigeria as to bring the country to her knees. One hopes indeed that it would trigger the flight of companies whose obsolete products and services are only competitive when accompanied by substantial kickbacks. But any law that improves governance and infrastructure, and moves Nigeria from the league of the most corrupt to the club of the least corrupt has to be good for investment.

The Bar & the Bench

The joke is told of the criminal lawyer called upon to defend a man accused of issuing rubber cheques. The fellow pleaded ‘not guilty’, the lawyer secured an acquittal, but when his fees were tendered, he insisted on cash.

It is not often that we can create such a careful distance between the contagion of a client's dodgy business and the integrity of our own finances. Between being paid with the rubber cheques of a forger or the cows of a cattle rustler, the challenge for lawyers engaged in the trial of criminal - and dare one say, political cases - is to ensure that the modifier ‘criminal’ continues to modify the kind of cases they handle, as opposed to the kind of lawyers they are.

It is the fundamental tenet of our profession that we cannot - everything being equal - discriminate against the client. However black his reputation, however vile the offence he is alleged to have committed, he is entitled to representation.

What distinguishes counsel however is the passion and inventiveness he brings to the succour of his client. In other words: were a prosecuting counsel to replace our criminal lawyer’s guardian angel and follow him throughout the most private moments of his defence of his client, would the prosecuting counsel have enough material to file criminal charges against our hero when he finishes his trial. That is the test, and it is at root a test of integrity.

As members of the Bar we are attitudinally disposed to seeing the two sides of a case. Of any case. Often the published position we take on a subject depends on

which client knocks on our doors first. Indeed the lucky ones amongst us will be found in reported cases arguing passionately on opposing sides of the same issue. And where we have regular clients, over time the interests of our clients will naturally become congruent with our professional interests.

However, developmental issues like this are issues sui generis, because, before we were briefed by any client, retained by any interests, we were called to a superior, overriding and indefatigable cause. We are called to be Barristers and Solicitors of the Supreme Court of... Nigeria, and every step we take in this calling, whether it takes us to the inner bar or to the loftiest berth on the bench only heightens our call to nation.

It is that capacity that I call on Conference to sponsor and support a Bill for the Corporate Corruption Act at the National Assembly of the Federal Republic of Nigeria.

Thank you for listening,

Chuma Nwokolo.

Schedule

A Draft Bill for

The Corporate Corruption Act

The 1 Minute Summary

A company convicted of giving or taking a bribe up to N1million may be liquidated. In the case of a public company with shareholders who are not involved in management, instead of a liquidation, the employment of the board of directors may be terminated, while the main, controlling shareholders lose their investments.

The Corporate Corruption Act

1.An Act to make provision for the structured liquidation of incorporated Companies, where such Companies, or their Principal Officers acting in furtherance of the Companies' purpose, are convicted of a scheduled offence involving the corruption of a Public Officer.

Part 1.

Definitions:

2(a) 'Sphere of Governance'

Refers to anyone who has the power to set policy, execute strategy, and generally direct the affairs of the company (including but not limited to shadow directors as defined in section 245 (1) of the Companies and Allied Matters Act, shadow or non-registered shareholders, shareholders, employees and part-owners of a company such as Directors or Departmental Managers).

2(b) Company

Shall include any artificial person incorporated under the Companies and Allied Matters Act.

2(c) Public Officer

Shall include civil servants working in any tier of government in Nigeria, any political office holder at any tier of government in Nigeria, any

parastatal or executive agency of government, and any person exercising powers granted by the constitution of Nigeria, and staff of any of the international organs of the United Nations and its affiliates operating in Nigeria.

2(d) Act

Shall include any amendment to The Corporate Corruption Act as well as any rules and subsidiary legislation enacted under the provisions of the Act.

2(e) Liquidation

Shall refer to the compulsory winding up of the company under Companies and Allied Matters Act, as moderated by the provisions of this Act.

2(f) Offences Involving Corruption

Are offences in which corruption is a principal element, especially (but not limited to) offences under chapters 12, 13 and 14 of the Criminal Code.

2(g) Principal Officers

For the purpose of attaching liability to a company, a person shall be considered a principal officer of a company if such person is a director, trustee, secretary of the company, or if such a person occupies a managerial position in the company, or if that person is within the company's Sphere of Governance as defined in section 2(a) of this Act.

2(h) The Rules:

Refers to the Corporate Capital Punishment Rules made or amended pursuant to this Act.

2(i) The Treasury:

Refers to The Treasury of the Federal Government of Nigeria, and where the prosecution under this act is successfully carried out by a State Government, then shall refer mutatis mutandis to the Treasury of the relevant State government.

2(j) Jurisdiction:

The Federal High Court shall have jurisdiction over proceedings instituted pursuant to the provisions of this Act.

Part 2.

Compulsory Liquidation of Companies

3. From the date of the commencement of this Act, any company which is convicted of a scheduled offence, or whose Principal Officer, acting in furtherance of the company's purpose or for the company's benefit, is convicted of a scheduled offence, will be liable to the sanctions provided by this Act.

4. Where the offence involves the offer or payment by the company of a bribe valued N1 million or above, or an inducement of equivalent value, or the receipt by the company of benefits valued at N1million or above, the company shall be summarily liquidated under the provisions of the Rules.

4(a) A company shall also be liquidated under the powers conferred in this section notwithstanding the fact that the company may not have received any benefits after offering or paying the bribe.

4(b) Provided that separate transactions may be reckoned as one transaction for the purpose of this section if they took place between the same parties or representatives of the same parties.

5. In every case in which a company is liquidated pursuant to the provision of this Act, every step shall be taken to ensure that the special liquidation rules contained in the rules shall take effect in priority to the provisions of the Companies and Allied Matters Act, 2004, and that the primary purpose of the liquidation process is

5(a) To secure the overall public interest

5(b) To secure the interests of the company's customers,

5(c) To secure the interests of the company's staff (provided that such staff do not fall within the category of 'the Sphere of Governance')

6. No proceedings for the liquidation of a Company under the provisions of this Act shall be commenced unless the following conditions precedent are met:

6(a) There must be a conviction by a court with the status of a High Court or higher.

6(b) There must be no pending appeals against the conviction.

6(c) A period of 45 days must have elapsed since the delivery of the judgement, or the most recent appeal.

7. Where there is no manifest public interest (pursuant to s.5) in the continuation of the Company (such as in small firms where most of the staff fall within the Sphere of Governance, or where the principal business of the Company is an unlawful activity), it shall be liquidated and the net assets (if any) after the settlement of debtors and obligations to staff shall be paid into the Treasury.

8. Pursuant to (s.5) above, in every appropriate case, the liquidator shall ensure that the Company shall continue as a going concern, and that the business of the Company, as well as the staff of the Company shall continue with minimum interruption,

8(a) Provided that every director or employee within the Sphere of Governance of the Company must be terminated; and

8(b) The equity or beneficial interest in the share capital of the company belonging to any person (corporate or incorporate) adjudged to be within the Sphere of Governance shall be entirely appropriated for the benefit of the Treasury.

8(c) For the avoidance of doubt, the equity and other interests of shareholders outside the Sphere of Governance, and who are not otherwise involved in the control or management of the Company shall survive in the restructured Company, and they shall in all events be compensated pursuant to the regulations made under this Act.

9. Any Company liquidated pursuant to this Act shall be administered by the liquidator or team of liquidators who shall, in all appropriate cases, hand over to a new board of Directors appointed by the new shareholders of the Company.

The Rules

10 To ensure the efficient execution of the objects of this law, the procedural rules governing the investigation, administration and enforcement of the Act, and the liquidation of the contravening Companies effected pursuant to this Act may be modified from time to time by the Chief Justice of the Federation. Such Rules shall make provision for any supplemental objects, including:

10(a) Applications to be brought in advance of substantive proceedings under this Act, for the protection, compensation and succour of whistleblowers in appropriate cases, without prejudice to any liabilities that may subsequently lie for penury.

10(b) Applications to be brought for preemptive orders to preserve the res of a contravening Company, where dissolution is threatened, without

inhibiting the commercial operations of the said Company.

Retroactive Effect

11. The Act shall not have any retroactive force, and no person or Company shall suffer any sanctions under the provisions of this Act for an offence wholly committed prior to the commencement of this Act, provided that nothing shall prevent the application of this act, where

11(a) the offence consists of a series of transactions and a significant transaction capable of satisfying the provisions of this Act has taken place after the commencement of this Act,

11(b) the action comprising the offence was taken prior to the commencement of the Act, and the company received the benefit of the action, in contravention of this Act, after the commencement of the Act.

Fines

12. There shall be no alternative of a fine for any penalties prescribed by this Act against a Company.

13. The courts shall have power to impose unlimited financial penalties (including the tracing and confiscation of assets) to ensure that no persons or companies retain the benefits and proceeds of corruption.

14. International Application

For the avoidance of doubt, the provisions of this Act shall apply to Companies and Principal Officers of Companies who are convicted for offences involving the corruption of a public officer in proceedings outside Nigeria, provided that where foreign currency is involved, the value of the inducement or benefit must, at the date of the offence, satisfy the minimum threshold prescribed by the Act.