An Analysis of the Structural Failings of Corporate Governance in Nigeria: the UK Companies Act and US Sarbanes Oxley Act as Models for Reform of the Regulatory Framework of Corporate Governance under the Nigerian Companies Act and Governance Code

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Abstract

The recent corporate scandals at Cadbury Nigeria Plc and Oceanic Bank Plc in Nigeria not only uncovered devastating incidents of corporate malpractices within Nigerian firms but they also appear to highlight the ineffectiveness of the existing regulatory structure of companies in the country. This study offers a theoretical analysis to corporate governance practices and regulation of public companies in Nigeria from a legal and regulatory standpoint. It analyses the effectiveness of the regulatory framework of corporate governance under the Nigerian Companies and Allied Matters Act 1990 ("CAMA 1990") and the Code of Corporate Governance 2011("2011 SEC Code") in terms of ensuring good governance and promoting ethical practices amongst corporate actors such as directors, auditors, shareholders and stakeholders. This thesis argues that the CAMA 1990 and the 2011 SEC Code have naturally been rendered inadequate in curtailing corporate malpractices and ensuring good governance in Nigeria because important mechanisms pertaining to directors' accountability, auditing, shareholders' protection, compliance and enforcement are weak and defective. By using the UK's Companies Act 2006("CA 2006") and US' Sarbanes-Oxley Act 2002("SOX") as models for reform, the author explores ways to enhance these mechanisms and how to further strengthen the current regulatory framework in Nigeria. The author recognises that the UK and the US, having experienced their own fair share of corporate collapses are by no means perfect, but they are widely known to have robust and well-developed regulatory frameworks, which could provide instructive lessons on practical solutions to existing regulatory lapses in Nigeria. This thesis tackles fundamental questions, which previous studies have ignored, e.g. how effective is the current regulatory framework under the CAMA 1990 and 2011 SEC Code, and to what extent does it facilitate good corporate governance practices in Nigerian public firms?

Chapter 1: Introduction

1.1 Background of the Study

The high-profile corporate scandals at Enron,[1] WorldCom[2] and Lehman Brothers[3] in the US and the demise of Barings Bank[4] in the UK not only accentuate the importance of effective corporate governance in both developed and developing countries but they also stress the need to ensure that adequate regulatory mechanisms are in place to minimise issues of corporate misconducts and financial irregularities. In Nigeria, insider malpractices perpetrated by directors have led to the collapses of several prominent companies such as, Intercontinental Bank Plc in 2009; Oceanic Bank Plc in 2009; Wema Bank Plc in 2007; Cadbury Nigeria Plc in 2006 and Spring Bank Plc in 2007.[5] It is noted that the corporate executives of these said companies were not only involved in the embezzlement of corporate funds,[6] but the auditors and audit committees appointed to detect financial irregularities were also in connivance with the managing directors to cover-up these illicit activities.[7] The unscrupulous behaviours exhibited by corporate actors in Nigeria provide an indication that companies need to be strengthened through regulation to better monitor corporate executives, ensure their effectiveness and improve the auditing practices in the country. This is particularly essential because a recent study of Nigerian public corporations has revealed that several firms (up to 55% in some industries) surveyed on the Nigerian Stock Exchange ("NSE") lack adequate governance practices and principles.[8] The study revealed a slow-down in the corporate

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[1]Enron was an American Energy company based in Texas: its collapse in 2001 was mainly due to poor financial and accounting practices perpetrated by both the company's executives and auditors where by the use of accounting loopholes and poor financial reporting, the executives concealed billions of dollars in debt from failed projects. For more details on the Enron scandal, see 'Cato Handbook for Congress: Enron, Worldcom and Other Disasters, Policy Recommendation for the 108th', [2003] Cato Institute, Washington DC, 215-221 <http://object.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2003/9/hb108-22.pdf> accessed 22 August 2013.

[2]WorldCom was declared bankrupt in 2001 after the directors used fraudulent accounting means to raise stock prices.

[3] Collapsed in 2008 due to malpractices perpetrated by Lehman's executives who regularly used illicit and false accounting methods to conceal the company's financial debts.

[4] Barings Bank failed in 1995 after suffering losses of £827 million resulting from poor speculative investments in future contracts.

[5] For more details on these corporate scandals see O.A Akinpelu, *Corporate Governance Framework in Nigeria: an International Review* (Iuniverse, Inc. 2011) 339-343.

[6] ibid.

[7] N. Okoye, 'The Corporate Governance Code in Nigeria and the Behaviours and Personalities of Board Members; a Stretch Beyond the Norms' [2012] ICCLR 317.

[8] E. Y. Akinkoye and O.O. Olasanmi, 'Corporate Governance Practice and Level of Compliance among Firms in Nigeria: Industry Analysis' [2014] 9(1) Journal of Business and Retail Management Research 13, 29.

governance practices of public companies in Nigeria particularly in terms of disclosure and transparency, directorial accountability, the protection of shareholders rights and interests, auditing practices and compliance with governance Codes.[9] While Nigeria's goal is to improve corporate governance practices and to align itself with international best practices,[10] it appears from the above study and the several corporate collapses that this goal is far from becoming a reality. Rather, the risk of future corporate collapses in Nigeria only seems to be heightened by the dismal performance exhibited by the companies surveyed in the above study. This statement is true because it is widely considered that companies with poor corporate governance practices (e.g. Enron) are more prone to experience corporate collapses as opposed to those which discharge good governance practices.[11]

A thorough review of the corporate scandals in Nigeria seem to also suggest that even companies within reputable industries such as the banking sector have not been spared from the unfortunate malaise of misconduct. For instance, in 2004, an audit of 89 mega banks carried out by the former governor of the Central Bank of Nigeria ("CBN"), Charles Soludo, revealed high levels of fraud and self-dealings amongst members of the boards and management; weak compliance with laid down internal codes of corporate governance; ineffective and poor risk management practices and poor auditing practices.[12] In this audit, 14 banks were also classified as marginal, 11 were deemed to be unsound while, 2 of the banks failed to produce any returns in 2004.[13] Similarly, in 2009, Sanusi Lamido, the succeeding governor of the CBN, also discovered that alongside Oceanic Bank, top managers of a number of banks were granting loans to close relatives without adequate securities or adherence to the lending principles of the banks.[14] Undoubtedly, these failings, which highlight

[9] ibid.
[10] See Akinpelu (2011) 356-357.
[11] Some who share this view include: A. M Pacces, *Rethinking Corporate Governance: the Law and Economics of Control Powers* (Routledge Publishing 2012); D. Prentice 'The United Kingdom' in S. Bruno and E. Ruggiero (eds) *Public Companies and Role of Shareholders,: National Models Towards Global Integration, (*Kluwer Law International 2011); S. Djankov et al. 'The Law and Economics of Self – Dealings' (2008) 88 JFE 430.
[12] Akinpelu (2011) 343.
[13] ibid.
[14] He also submitted that regulatory lapses coupled with poor corporate governance accounted for over 70% of the failings within the banking sector between the period of 2002 -2009; See L.S. Sanusi 'Reporting, Regulation and Risk Management: Repositioning the Nigerian Financial System' Keynote Address by Governor of Central Bank of Nigeria, Lagos Nigeria, January 7, 2010. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.452.1367&rep=rep1&type=pdf#page=42 > Accessed 7th September 2014.

corporate governance weaknesses within the Nigerian banking sector, also appear to undermine the position of the financial system in Nigeria as one of the main engines for economic development. For instance, the banks in Nigeria are not only seen as important sources of funding for most companies but they are also the primary depositories of the country's savings and earnings.[15] In this regard, it is clear that if the banking sector in Nigeria fails then the economy will also suffer immensely.

As a fast emerging economy and Africa's most populous country, Nigeria has generated approximately 1.2 million incorporated (registered) companies,[16] trading in industries such as services, agriculture, manufacturing and industrial sectors.[17] This figure is up from the 600,000 companies originally registered in 2008,[18] though, it is somewhat fewer than the UK, which currently has over 3.7 million incorporated companies,[19] and significantly lesser than the US which presently has over 6 million registered companies.[20] Nevertheless, irrespective of the overwhelming numbers of registered companies in the latter countries, it is interesting to note that in the last 250 years, only about 10 major corporate collapses/scandals caused by poor corporate governance have been recorded in the UK.[21] Meanwhile, 18 major collapses and scandals were recorded in the US.[22] This is a far cry from Nigeria where it is extensively documented that in the last three decades alone, there have been over 25 major corporate collapses and scandals instigated by poor corporate governance, with a majority of the companies emanating from the banking sector.[23] Two conclusions can be inferred from this information. Firstly, while all aforementioned countries have suffered some form of corporate governance related crises; it appears that on average, the number of corporate failures

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[15] U. Kama and C. Chuku 'The Corporate Governance of Banks in Nigeria: How Effective are the Board of Directors?' [March 2009] Available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350735> accessed July 20th 2015.

[16] See A. Alao, 'Nigeria's CAC Registers 1.271 Million Businesses in 2013' (December 2013) available at <http://www.worldstagegroup.com/worldstagenew/index.php?active=news&newscid=12688&catid=2>accessed on July 20th 2016.

[17] See N. D. Felix et al., 'A Comparative Analysis of the Contribution of the Agricultural Sector and the Industrial Sector Towards the Development/Growth of the Nigerian Economy' (2015) 5 GJSFR 4.

[18] See International Business Publications, *Nigeria: Investment and Trade Laws and Regulation Handbook - Volume 1* (International Business Publication, 2015).

[19] See Companies House, ' Statistical Release: Incorporated Companies in the United Kingdom – June 2016' (2016) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541176/Incorporated_Companies_in_the_UK_June_2016.pdf> accessed August 8th 2016.

[20] See Statistics of U.S. Business, '2013 Annual Dataset by Establishment Industry' (2016) available at <http://www.census.gov/data/datasets/2013/econ/susb/2013-susb.html> accessed on 21 July 2016.

[21] See Akinpelu [2011] 127 -130.

[22] ibid, 119 – 125.

[23] See B. Adeyemi and A. O. Olowu, 'Corporate Governance: Has the Nigerian Banking Sector Learnt Any Lesson?' (2013) 3 IJBSR 49 – 59. See also Akinpelu (2011) 340 - 343

and scandals per companies are somewhat higher in Nigeria as opposed to the UK and the US. Secondly, it also seems to suggest that poor corporate governance practices are more frequent (at least a more likely occurrence) in Nigerian public companies than the UK and the US. As initially illustrated, the corporate culture of several Nigerian companies is fraught with manipulations and frauds, which seem to negatively affect all stakeholders and threaten job security and investment prospects. It is a clear indication that Nigeria needs a change in its corporate governance structure; companies need to adopt better governance standards and practices, which are effectively shaped by a robust legal and regulatory framework.

In Nigeria, the Companies and Allied Matters Act 1990[24] and the Code of Corporate Governance For Public Companies 2011[25] prescribe the main regulatory framework governing corporate governance of public companies. Naturally, both the CAMA 1990 and the 2011 SEC Code stipulate provisions, which outline best practices with regards to the duties and accountability of directors, the role of auditors and audit committees, and the rights and protection of shareholders. However, unlike the CAMA, which is statutory, the Code is only characterised by a principled-based approach of regulation, which relies on soft laws and principles.[26] The drawback with this is that the Code lacks a robust legal structure, which means that adequate compliance, enforcement and sanctions mechanisms are not provided.[27]

It is argued here that the Code's reliance on mere principles has rendered it weak in terms of adequately regulating companies and ensuring effective corporate governance in Nigeria. For instance, as will be demonstrated in chapter 6, the lack of legal backing under the Code has in practice failed to incentivise companies to comply with its fundamental principles especially in light of the fact that directors are bestowed with the power to decide whether companies should comply or

[24] Cap 59, Laws of Federation of the Republic of Nigeria 1990: Hereinafter referred to as CAMA 1990.
[25] Hereinafter referred to as 2011 SEC Code or the Code.
[26] Notably, the UK's Corporate Governance Code 2014 also shares the same principles as the 2011 SEC Code: it also operates on the basis of principles and soft law. The nature of the UK's code will be examined in chapter 6.
[27] N. Ofo, 'Code of Corporate Governance in Nigeria 2011: its Fourteen Fortes and Faults' (October 2011) Igbinedion University –College of Law available at <http://ssrn.com/abstract=1937896> accessed on June 2014; see also N. Ofo. 'Nigeria: Capital Market- Revised Listing Rules' [2012] International Company and Commercial Law Review N-66.

not.[28] It is explained that this undermines the Code as a regulatory device, particularly since it can easily be contravened without any consequences. Essentially, it is noted that a violation of the Code, which appears to be widespread in few Nigerian firms hardly results in any sanctions.[29] Simply put, the Code can be best described as 'an empty shell' given that its fundamental governance provisions are merely menu of options, which can be flouted at the behest of the company. For instance, the recent study conducted by Akinkoye and Olasanmi on the level of compliance with corporate governance principles also revealed that many companies within the Nigerian Stock Exchange attained only 55% level of compliance with codes.[30] This is not surprising considering the fact that the Code lacks any form of mandatory compliance; companies can simply decide not to follow its principles even without any just reason.

This thesis also questions if the principle-based approach adopted by the Code is effective in tackling and regulating corporate issues such as the agency problem (i.e. the conflict of interest between management and shareholders), which is understood to also plague some Nigerian public companies.[31] The agency problem in Nigeria as will be seen later emanates from the fact that public firms are characterised by a dispersed ownership structure where large numbers of shareholders command a small percentage of shares in the company.[32] In such a corporate arrangement, ownership is usually separate from control, as managers/directors are appointed to run the company while shareholders merely provide funding through their investments: portfolio investment is prevalent, as the latter is not involved in management.[33] Berle and Means explained in their seminal work that the problem with separation of ownership from control is that it can sometimes lead to expropriation of corporate assets by management.[34] As succinctly demonstrated in the corporate collapses mentioned

[28] See section 1.3(b) of the 2011 SEC Code.
[29] Ofo (October 2011).
[30] Akinkoye and Olasanmi [2014] 13.
[31] E. Dabor and B Adeyemi, 'Corporate Governance and Credibility of Financial Statement in Nigeria' [2009] Journal of Business Systems, Governance and Ethics 4.
[32] According to Amao and Amaeshi, shareholding in Nigeria's public companies has grown from a few thousand people in the early 70s to an estimated 5 million in 2008; see O. Amao and K. Amaeshi 'Galvanising Shareholders Activism: A Prerequisite for Effective Corporate Governance and Accountability in Nigeria' (2008) 82(1) Journal of Business Ethics 119-130.
[33] E.N.M. Okike, 'Corporate Governance in Nigeria: The Status Quo' (2007) 15(2) Corporate Governance: An International Review 173-193.
[34] They noted that, the negative consequences of dispersed ownership in large public companies is that, as shares become more dispersed, shareholders acquire less control over the corporation, they surrender the control of their property to the

earlier, this conflict of interest is clearly a matter of concern in the Nigerian corporate sphere.

The author considers in chapter 6 if a rule-based approach of regulation similar to the US' Sarbanes-Oxley Act 2002 ("SOX"),[35] which prescribes mandatory compliance could be adopted under the Code, as a regulatory response to tackle corporate malpractices in Nigerian public companies, and to improve compliance and enforcement of the Code. The US, which shares similarities with the Nigerian corporate culture,[36] has highlighted the negative ramifications of self-regulation or insufficiently regulated firms through the collapses of companies such as Enron and WorldCom. SOX, as explained by the US congress is a legislative remedy to combat fraud at corporate level; it was considered that in order to adequately regulate corporate practices and to tackle accounting scandals, it was necessary to introduce mandatory governance rules by making compliance a substance of law.[37] The author does not present the approach under SOX as a perfect model but rather, as a necessary regulation to address peculiar problems in Nigeria. In this regard, this thesis acknowledges in chapter 6 that a rule-based regulation has its weaknesses as well as strengths: while it is capable of ensuring consistency in terms of compliance and enforcement, it is considered that, its clear edges, if not properly constituted makes it more susceptible to circumvention,[38] and difficult to respond to fast changing corporate environments if not regularly reformed.[39] There is also the concern that rules might be difficult to implement due to differences in corporate structures, objectives and sizes.[40] This concern is somewhat averted here since the proposed rule-based code applies to only Nigerian public companies, which have similar ownership and board structures (i.e. a dispersed ownership structure and a unitary board structure). To further mitigate difficulties in implementation, it is also recommended in chapter 6 that the proposed rule-based code should have distinct sections tailored to specific industries in Nigeria. It is thought that

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management who can divert a portion of the corporate assets to their own uses. See A. Berle and G. Means *The Modern Corporation and Private Property* (Transaction Publishers 1932) 311.

[35] Hereinafter referred to as SOX.

[36]They are similar in the sense that most public companies in both countries are characterised by a dispersed ownership structure with portfolio investors: directors and managers are appointed to run the company, thus a management dominated firm is prevalent in both jurisdictions.

[37] Z. Rezaee, *Corporate Governance Post Sarbanes Oxley: Regulation, Requirement and Integrated Process* (John Wiley & Sons Inc. 2007) .5.

[38] C. R. Sunstein, 'Problems with Rules' (1995) 83 California Law Review 953.

[39] I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation* Debates (Oxford University Press 1992) 110, 129.

[40] ibid.

this would also prevent against a 'one-size-fits-all approach' issues,[41] and also make application, compliance, and enforcement more fluid.

While the 2011 SEC Code lacks a robust legal structure, the problem with CAMA lies in the fact that the statutory mechanisms and provisions relating to directors' accountability, auditing and shareholders' protection are considered to contain statutory defects, which have rendered the act inadequate against contemporary corporate governance issues.[42] In fact, given that the CAMA has not received any significant reforms since its enactment in 1990, most of the provisions are perceived to be obsolete and ineffectual.[43] For instance, as will be demonstrated in chapter 4, statutory mechanisms such as derivative actions,[44] which are meant for enforcing directors' breach of duties, incorporates an outdated common law practice. The action requires the establishment of fraud on the part of the directors[45] and this is widely seen to limit shareholders' ability to address corporate wrongdoing.[46] Therefore, it is considered that raising a derivative action in Nigeria is more difficult than initiating the same action in the UK.[47] In practice, the problem with the fraud condition is that it is understood to include actual misappropriation of assets and not directors' gross negligence.[48] Cases such as *Yalaju v A.R.E.C*[49] have shown that, if a director causes significant losses to the company as a result of gross negligence, a shareholder cannot effectively challenge the former if the shareholder fails to show that the director has benefited or enriched himself.[50] It is explained in chapter 4 that this approach is an obstacle against effective corporate governance in Nigeria, as it

[41] Some of the problems of this approach include unnecessary regulation and unnecessary cost for compliance and inconsistent rules.
[42] C.O. Akoje, *The Nigerian Company Law and Practice under the Companies and Allied Matters Act 1990 at a Glance* (Okija Nigeria Devine Venture, 2003) 23.
[43] ibid.
[44] Derivative action is defined by section 303(1) of the CAMA 1990 as an action brought on behalf of the company by a shareholder to seek relief for wrong done to the company normally by a director.
[45] *Gombe v P.W (Nigeria) Ltd.* (1992) 6WWLR (pt.402) 403.
[46] The Law Commission in the UK submitted that the rules regarding the common law derivative action were inflexible and archaic. See The Law Commission *Shareholder Remedies* (Consultation Paper No 142, 1996) Para 14.1 (hereinafter referred to as Consultation Paper 1996); see also A. Dignam and J. Lowry, *Company Law* (7th edn, Oxford University Press 2012) 195-200.
[47] See Akinpelu (2011); See also O.A Nwafor, 'Shareholder Derivative Action - Nigerian Statutory Innovation - Not Yet a Victory for the Minority Shareholder' (2010) 7 Macquarie Journal of Business Law 214.
[48] See *Adenuga v Odumeru* [2002] 8 NWLR 163.
[49] (1990) 1 NILR 29, SC.
[50] This used to be the case in the UK prior to the Companies Act 2006 where it was required in cases such as *Pavlides v Jensen* (1956) 2 ALL ER 518 for shareholders to show fraud and misappropriation on the part of directors. This requirement has now been abolished by the CA 2006.

clearly undermines shareholders' ability to address corporate mismanagement and to protect their interests. One of the benefits of the UK's comparable action over the Nigerian action can be found in s. 260 of the Companies Act 2006,[51] which allows a shareholder to bring an action against a director for any default or any wrongdoing relating to directors' negligence, breaches of duties, trust and omission. In effect, the proposed directorial wrongdoings, which can be addressed in the UK, are not limited to only fraud or misappropriation. It is suggested in this study that the CAMA should be reformed to include provisions similar to the UK's provision in s. 260 of the CA 2006, which appears to offer a broad scope for shareholders to challenge directorial misconduct in comparison to the Nigerian derivative action, which requires the establishment of fraud. Nonetheless, it is shown in chapter 4 that the UK's action also has its shortcomings. For example, in deciding whether to allow a claim, the courts must take into account a non-exhaustive list of factors/conditions[52] in s. 263, which are difficult to prove. It is understood that these factors have historically stood as obstacles against shareholders' ability to bring a derivative claim in the UK. However, it is shown that these factors are necessary in order to deter against unmeritorious and vindictive claims.

While there is consensus on the importance of good corporate governance, its definition remains an issue, as it lacks a universal definition and differs from jurisdiction to jurisdiction.[53] This has consequently led to the adoption of various conflicting definitions: narrow ones which tie corporate objectives to solely the protection of shareholders' rights and interests, and broad definitions, which stipulate that governance involves balancing and protecting the many interests and rights of a company's stakeholders.[54] In line with the latter definition, this thesis submits (and advocates particularly in chapters 2, 4 and 6) that a good corporate governance system should recognise and protect the interests and rights of all stakeholders, as it is considered that stakeholders constitute a valuable resource to building competitive and profitable companies, and contributing to

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[51] Hereinafter referred to as CA 2006.
[52] E.g the claimant must prove amongst many other items that the action is brought in good faith (see section 263(3)(a) of the CA.
[53] J. Dine and M. Koutsias, *The Nature* of *Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar Publishing Inc. 2013) 67.
[54] S. Jill and S. Aris, *Corporate Governance and Accountability* (John Wiley & Sons Ltd 2004).

their long-term success.[55] While research on corporate governance in Nigeria is slowly gaining traction, studies on the regulation of corporate governance are relatively scarce, and even the few existing ones[56] only tersely highlight the governance laws without examining in detail their fundamental provisions and mechanisms. This study fills this scholarly vacuum by providing a comprehensive analysis of the regulatory framework of corporate governance under the CAMA and the 2011 SEC Code and analysing their fundamental governance mechanisms and provisions. This thesis is the first of its kind to advance the case for modern reforms to address the regulatory lapses found under the CAMA and the Code in Nigeria. Through suggested regulatory reforms, this thesis proposes ways to address fundamental failings within the Nigerian corporate governance system.

1.2 Outline and Structure of the Thesis

Corporate governance structures adhere to the economic and social factors of a country, which reflect the core norms and values of that society.[57] In Nigeria, the CAMA and the 2011 SEC Code were implemented to regulate various areas such as directors' duties and to improve their accountability towards the company, to enhance shareholders' rights and protection, auditing and disclosure practices. The outline of this thesis is therefore organised in a manner that reflect these various dimensions. Chapter 1 presents the background of the study, the research objectives and questions, the hypothesis of the thesis and briefly highlights the issues, which will be discussed in the following chapters.

Chapter 2 provides the conceptual and theoretical framework of corporate governance in order to shed more light on its exact nature, boundaries, definition and development. Although there is no universally accepted definition of the concept of corporate governance, it is generally defined as

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[55] See Principle IV of the G20/Organisation for Economic Co-operation and Development's Principles of Corporate Governance (OECD Publishing, Paris 2015) ("G20/OECD"). Available online at < http://www.oecd-ilibrary.org/docserver/download/2615021e.pdf?expires=1485238820&id=id&accname=guest&checksum=F059D2B7384D19953036CE7BC56C3FD9> Accessed 26 December 2016.
[56] See e.g. E. Adegbite, 'Corporate Governance Regulation in Nigeria' [2012] 12(2) International Journal of Business Society 257-276; A. Babatunde and O. Olaniran, 'The Effect of Internal and External Mechanisms on Governance and Performance of Corporate Firms Nigeria' [2009] Corporate Ownership and Control 2; A. Oyejide and A. Soyibo 'Corporate Governance in Nigeria' (2001) Development Policy Center Ibadan Nigeria.
[57] D. C. Mueller, 'Corporate Governance and the State' (2014) 15(2) CRNI 177.

'the system by which corporations are directed and controlled.'[58] This chapter explores the most appropriate definition attributed to the term. In so doing, it also analyses the theories that contribute to the development of corporate governance, such as the contractual theory, concession theory, and stakeholder theory, which are considered to affect the objectives of corporations. Furthermore, the various models of corporate governance are thoroughly analysed with their strengths and weaknesses highlighted. In this study, the Anglo-American model and the German model of corporate governance were selected primarily because the three countries selected in this study adhere to the former model, and secondly because their analysis is necessary to appreciate the distinct features of the various governance systems around the world. It is shown in chapter 2 that these models differ in terms of the structures and objectives of public corporations, their ownership pattern and source of capital, the model of capitalism, and the nature and aims of corporate governance and regulatory frameworks. Particularly, the German model, which is widely considered as the exact opposite of the Anglo-American-model, also serves as a suitable model to offer a comparative analysis on the models of corporate governance. For instance, as will be examined later in chapter 2, one distinguishing feature between the two models is that the Anglo-American model is shareholder-oriented and the German model is stakeholder-oriented. In light of this, chapter 2 argues that no two systems of corporate governance are identical, as the level of regulation imposed on companies and the objective and components of corporate governance are influenced by a country's economic, social and historical background. Therefore, the theories and factors analysed in this chapter aim to explore the sources and apparatuses of corporate governance, and to explain the rationale behind the peculiar configuration of different governance systems around the world including Nigeria. This chapter not only provides the main tools and theories used in this study but it also provides the framework upon which the analysis in the subsequent chapters will be based on.

Chapter 3 complements the central argument in chapter 2, which articulates that the objective of corporate governance and level of regulation imposed on companies are influenced by a country's historical, social and economic background. Accordingly, chapter 3 analyses the peculiar economic

[58] Cadbury Report of the Committee on 'The Financial Aspect of Corporate Governance' [December 1 1992] at para 2.5.

and social challenges Nigeria faces as a developing country and presents the corporate governance mechanisms in place. These mechanisms are then extensively analysed in chapters 4, 5 and 6 of this thesis. As noted above, Nigeria enjoys a number of specific economic factors, such as the proliferation of dispersed ownership in public companies, where the conflict of interest between shareholder and management sometimes emerge due to the separation of ownership and control. In addition, a relationship-based system is also said to be predominant; personal relationships occasionally influence the decision-making processes in public companies. Chapter 3 recognises that the existence of these aforementioned factors impede the development of an effective corporate governance system in Nigeria. These issues are further highlighted in chapter 6 in order to demonstrate the need for robust regulation under the 2011 SEC Code. The analysis of the economic and social state of Nigeria's corporate governance presented in chapter 3 is essential to this study, because it is important to understand the economic and social aspects in Nigeria before embarking on the analysis of its legal and regulatory system. The rationale for this is to ensure that the recommendations provided in chapter 7 are compatible with Nigeria's social and economic needs.

Chapters 4, 5 and 6 advance the main objective in this thesis by providing a thorough analysis of the corporate governance framework as stipulated by CAMA 1990 and the 2011 SEC Code, with the aim of highlighting fundamental areas of weaknesses and prospective reforms. The important corporate governance mechanisms examined under the CAMA include provisions relating to directors' duties and accountability,[59] shareholders' protection against mismanagement,[60] stakeholders' protection and auditing.[61] Chapters 4 and 5 analyse the effectiveness of these mechanisms under the CAMA using a comparative approach. Thus, equivalent provisions under the UK's CA 2006 are used as a basis for assessment and as a model for reform: as previously mentioned, the UK's comparable statutory mechanisms for instance, the derivative action is more practical and suitable for addressing managerial wrongdoings. The central argument in these chapters stresses that the scope of the aforementioned mechanisms under the CAMA, especially the ones

[59] See section 279 of the CAMA on duties and accountability of the board of directors.
[60] E.g. see the derivative action and oppression remedy in sections 301 and 311 of the CAMA respectively.
[61] See section 331 and 359 of the CAMA on company's account, statement and auditing.

relating to shareholders' protection, are inadequate because the statutory grounds for minority shareholders to protect their interests and challenge directors' mismanagement are too narrow. For example, as explained above with regards to a derivative action, shareholders are allowed to challenge directors for wrong done to the company on this basis nonetheless, the grounds for initiating the action does not encompass directors negligence even if it results in significant loss to the company. It is explained in chapter 4 that this is very limiting in terms of shareholders' rights to protection from insider abuse. One of the proposed reforms to improve the situation in Nigeria will be based on the UK's derivative claim under part 11 of the CA 2006, which happens to encompass all directorial conducts relating to negligence, breach of trust or any of the directors' duties.[62]

In respect to auditing, the thesis criticises the failure of the CAMA to prescribe auditors' criminal liability and the failure to also provide means for auditors to obtain information from overseas subsidiary companies. It is demonstrated in chapter 5 that these omissions undermine auditors' accountability and their duties in financial reporting, which hinders good corporate governance practices. Reforms to improve auditors' accountability and liability are suggested. Finally, reforms on the practices of the statutory audit committee under the CAMA are also proposed. While the audit committee is considered to be an important corporate governance tool in auditing, the required independence expected of the committee is lacking under the CAMA: the statutory composition of the audit committee is comprised of executive directors and shareholders' representatives. It is explained in this thesis that such an approach does not guarantee the audit committee the necessary independence required from the board of directors and the company they are supposed to be overseeing. The recommendation calls for an audit committee, which is comprised of only independent non-executive directors: this is in line with international best practice and procedures in many other jurisdictions.

The analysis in chapter 6 focuses on reforms to improve the regulatory framework of the 2011 SEC Code. As explained in the introductory section, although the Code is designed to prescribe

[62] See section 260(3) of the UK's CA 2006 on scope of derivative claim.

guidelines to facilitate good corporate governance in Nigeria,[63] compliance with the principles of the Code has been inadequate. Furthermore, due to the non-statutory nature of the Code, enforcing the Code to impose relevant sanctions for non-compliance is also difficult. As will be demonstrated in chapter 6, it is considered that the lack of statutory backing under the Code also provides companies with the liberty to disregard its fundamental governance principles given that there is no legal obligation on their parts to comply.[64] In this respect, this thesis proposes that a rule-based approach of regulation, which stipulates obligatory rules, is necessary not just to improve compliance and enforcement but to also provide the Code with the necessary robustness required to regulate the conducts of public companies in Nigeria. Furthermore, it is anticipated that within a statutory framework, existing and potential provisions implemented to improve directors' behaviours, accountability and auditing under the Code would be more effective.

Chapter 7 summarises the main analysis and issues of this thesis with particular focus on future recommendations that would not only enhance the corporate governance framework under the CAMA and the SEC Code but would also improve governance practices in Nigerian firms. Drawing from the findings in chapters 3, 4, 5 and 6, the recommendations include reforms to improve the provisions regarding shareholders' protection against insider abuse by directors and reforms to improve directors' accountability and the auditing framework under the CAMA. The recommendations also encompass reforms to improve the overall regulatory structure of the SEC Code and its compliance and enforcement mechanisms.

1.3 Research Objectives and Aims

The primary objective of this thesis is to analyse the regulatory framework of corporate governance under the CAMA and the 2011 SEC Code with a view of highlighting existing defects and proposing areas for future reforms. To attain this goal, the secondary objectives are considered as follows:

[63] Okoye [2012] 317.
[64] ibid

- To analyse the regulatory framework of corporate governance under the CAMA and to investigate the effectiveness of the regulatory mechanisms pertaining to directors' accountability, shareholders' and stakeholders' protection, and audit.
- To analyse the regulatory framework under the 2011 SEC Code and to evaluate the effectiveness of the principle based-approach of regulation in terms of ensuring adequate compliance and enforcement.
- Finally, to highlight the existing shortcomings under the regulatory mechanisms of the CAMA and the 2011 SEC Code and to propose relevant reforms using the UK and the US' companies legislations as models.

1.4 Research Questions

The hypothesis of this thesis is that, the regulatory framework under the CAMA 1990 and 2011 SEC Code is inadequate in terms of ensuring good governance and ethical practices in Nigeria because important regulatory mechanisms relating to directors' accountability, shareholders' remedies, auditing, compliance and enforcement are both defective and weak. To test this hypothesis, two primary research questions were formulated primarily to investigate the scope and efficacy of the regulatory framework of corporate governance under the CAMA and the Code, and to explore the extent to which this framework facilitates corporate efficiency in Nigeria.

1. How effective is the corporate governance regulatory framework under CAMA 1990 and to what extent does it ensure effective directors' accountability, shareholders' and stakeholders' protection, and effective audit within Nigerian public companies?

This research question is comprised of two main parts, which is further divided into sequences of sub-questions. The first part involves a historical approach to trace and identify whether the corporate governance mechanisms under the CAMA were adapted effectively in comparison to its predecessors. The second part involves an analysis of the relevant corporate governance provisions under CAMA with the aim of assessing their effectiveness and highlighting their existing shortcomings; relevant reforms are suggested.

The first sub-question is: Within what framework has corporate governance regulation emerged under Nigerian company law? Addressing this sub-question provides a basis to analyse the historical and societal roots of the rules applicable to corporate governance under the CAMA and to explain the rationale behind their emergence in chapter 3, before analysing their legal ramifications in chapters 4 and 5. Nigeria, being a former British colony has a legal system similar to the English legal system.[65] In effect, English common law and company law have historically continued to shape and influence the Nigerian company law and statutes.[66] In fact, the Nigerian companies' legislation (i.e. CAMA 1990) mirrors the UK's Companies Act 1985[67] and the English common law, which prescribe the nature of shareholders' rights, and the duties of directors in Nigeria.[68] However, the author acknowledges that despite these similarities, some differences exist in the social and economic structure of both the UK and Nigeria. Accordingly, this thesis ensures that any reforms that are proposed herein are compatible with the socioeconomic situation in Nigeria.

The second part of the question adopts an analytical approach by evaluating the corporate governance provisions and mechanisms provided under the CAMA 1990. Are the corporate governance provisions relating to directors' accountability, shareholders'/stakeholders' rights protection and audit under the CAMA adequate? To address this question, the scope and ambit of the mechanisms pertaining to directors' responsibility, shareholders' remedies and audit under the CAMA were thoroughly examined with reference to comparable provisions under UK's CA 2006. Hence, a comparative law approach has been applied. The comparison is not aimed at determining which jurisdiction is superior; rather, since the UK is more advanced in the practices of corporate governance, the UK's CA merely serves as a model for suggesting appropriate reforms to improve the provisions under the CAMA. The analysis in chapters 4 and 5 clearly reveal that statutory defects

[65] J. Abugu, 'Re-examining the Basis of Auditors Liability in Nigeria and the United Kingdom' [2013] Commercial and Industrial Law, Faculty of Law, Lagos.
[66] Akinpelu noted that during the colonial era in Nigeria, British companies, subject to British laws, dominated the greater part of the Nigerian economy and even now the company legislations in Nigeria significantly mirrors the English company law and common law principles. Thus, a significant part of the Nigerian corporate governance system is also influence by the English system. See Akinpelu [2011] 204.
[67] Hereinafter referred to as CA 1985.
[68] Akinpelu also noted that apart from the customary laws and norms, the Nigerian Legal System is almost identical to the English system including the court system. In interpreting the Act (CAMA), the courts also apply English common law and equitable principles. See Akinpelu [2011] 204.

exist under the latter act. However, caution is applied to ensure that the reforms borrowed from the UK's Act are carefully considered and selected (not carelessly transplanted), as the analysis also reveals that the UK's statute, albeit more suitable, is not without imperfections.

2. How effective is the regulatory framework of the 2011 SEC Code and to what extent does the principle-based approach of regulation facilitate effective enforcement and compliance in Nigerian public firms?

This research question adopts both an analytical and a comparative law approach with a view to evaluate the defects found under the SEC Code and to propose relevant reforms to improve its regulatory structure. It questions whether the principle-based approach of regulation adopted by the Code is adequate because, while the SEC Code is designed to regulate the corporate governance practices of all public companies in Nigeria, [69] its lack of a robust legal structure and its non-statutory nature is understood to result in weak enforcement and compliance and it therefore provides insufficient deterrence against corporate misconduct. [70] In the aforementioned study by Akinkoye and Olasanmi on the level of compliance to codes in Nigeria, it was highlighted that deliberate flouting of existing codes is common in various companies because compliance is optional.[71] This thesis, which aligns with the views of Akinkoye and Olasanmi, further demonstrates that the principle-based approach is not in practice suitable or sufficient to tackle the conflict of interest that exists in many Nigerian companies, because some corporate executives in Nigeria are more inclined to act unethically within a flexible framework. These types of unethical behaviours, as will be elaborated in chapters 3 and 6, were also perceived to be the primary reason for the collapses of companies such as Cadbury Nigeria Plc, Unilever Plc, and Oceanic Bank Plc.[72]

In light of the abovementioned issues, this thesis posits that a robust form of regulation is necessary under the 2011 SEC Code. In this regard, the author considers the possibility of adopting a

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[69] L.S. Sanusi 'Reporting, Regulation and Risk Management: Repositioning the Nigerian Financial System' Keynote Address by Governor of the Central Bank of Nigeria, Lagos Nigeria, January 7 (2010).
[70] Ofo (2011).
[71] Akinkoye and Olasanmi [2014] 13.
[72] B.J. Inyang, 'Nurturing Corporate Governance System: The Emerging Trends in Nigeria' [2009] 4 Journal of Business Systems, Governance and Ethics 1.

rule-based approach of regulation, which relies on mandatory rules and compliance as an alternative to the existing principle-based approach of regulation. It is explained in chapter 6 that by prescribing a statutory structure for the Code, compliance and enforcement would be improved through its mandatory framework. It is also posited that a robust and a mandatory code is necessary to effectively regulate corporate activities in Nigeria and to also deter against the unscrupulous behaviours exhibited by several directors in Nigerian public companies. As Okoye rightly said, one of the major contributory factors in the failure of many companies in Nigeria was the inappropriate behaviour of the executives, ranging from manipulation of accounts, to the concealment of debts and embezzlement of company's funds.[73] Hence, provisions under the Code should be compulsory and forceful enough to be able to alter directors' personalities in Nigeria and not simply function as menu of options, which can be disregarded whenever the company wants.

1.5 The Importance and Contribution of the Study: Why Nigeria?

It is widely considered that regulatory lapses contributed immensely to the recent corporate governance failings and corporate collapses in Nigeria.[74] Therefore, the importance of this thesis stems from the fact that it aims to suggest robust and modern reforms to strengthen the existing regulatory structure of corporate governance in Nigeria. It is thought that reforms to the CAMA and the 2011 SEC Code are necessary in order to improve corporate governance practices in Nigeria and to minimise future corporate collapses in the country. For instance, the recommendation to adopt a rule-based approach under the SEC Code is envisioned to enhance both compliance and enforcement mechanisms under the Code and to strengthen its overall regulatory structure. Furthermore, the statutory reforms suggested under the CAMA are envisaged to improve the overall protection afforded to shareholders, enhance directors' accountability to the shareholders/company and also improve auditing practices within Nigerian public companies; these are important areas of corporate governance. It is commonly stipulated that there is synergy between regulation and governance, as

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[73] Okoye (2012) 317.
[74] B. Esuike and S.Ejuvbekpkpo, 'Corporate Governance Issues and its Implementation: The Nigerian Experience' (2013) 3(2) JRIBM 53.

company laws are necessary to regulate the various relationships within the corporate environment.[75] Nonetheless, it is argued here that the efficacy of any regulatory measures within companies depends directly on the effectiveness of existing corporate governance laws and codes in the country.[76] Accordingly, this thesis also aims to develop the existing corporate law in Nigeria.

From an international standpoint, this study particularly contributes to the improvement of the Nigerian economy because, by developing the laws and regulations necessary for the protection of shareholders/investors, individuals (both foreign and domestic) would feel more confident investing in Nigeria. Arguably, the country should enjoy greater foreign direct investment and capital flow. The participation of foreign investors is particularly important to the development of the Nigerian economy in terms of public relations, and the encouragement of foreign capital is critical for economic stability and growth.[77] Surely, the lack of a well-established corporate governance framework would invariably deter international investors in Nigeria.

The literature on corporate governance regulation in Nigeria is considered to be somewhat scarce.[78] While academic texts on corporate governance is extensive in developed countries, the paucity of literature on the topic in Nigeria has hindered scholarly knowledge on the subject. This thesis further contributes to the development of this evolving literature in Nigeria, particularly from a legal standpoint. Through a legal analysis, it highlights the regulatory failings of corporate governance in Nigeria and recommends appropriate reforms necessary to improve corporate governance practices in the country.

Certainly, regulatory deficiencies and the absence of literature are factors that are common in many developing countries. Thus, *why did the study focus on Nigeria and what is particularly*

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[75] R. B. James, M. M. Cornett and H. Tehranian 'Board of Directors, Ownership, and Regulation' [2002] 26 Journal of Banking and Finance 1973.
[76] C. Thomas Baxter Jr. 'Governing the Financial or Banking Holding Company: How Legal Infrastructure can Facilitate Consolidated Risk Management' [2003] 9 Current Issues in Economics and Finance 1.
[77] D. Alford, 'Nigerian Banking Reform: Recent Action and Future Prospects' [2010] Journal of International Banking Law and Regulation 337.
[78] Adegbite [2012] 257.

important about Nigeria as a developing country? The choice of the author's country of study is not an arbitrary selection. Aside from the author's desire to develop the literature and laws on corporate governance in Nigeria, the study was particularly motivated by the need to investigate the rationale behind the widespread, high volume of corporate scandals and failings in the economy, particularly within its financial sectors. Undeniably, this has brought to light the imperativeness of effective corporate governance and accountability in Nigeria, considering the fact that modern corporations are the catalyst for economic growth and development in any given country. Moreover, with regards to the objective of this study, the evolving regulatory system of corporate governance in Nigeria provides a suitable theme from which to examine the evolutionary nature of corporate governance in developing countries. In particular, the economic and social phenomenon in Nigeria, such as the issues of corporate corruption and the agency problem, also provide a philosophical basis to investigate the barrier to effective corporate governance and accountability in emerging countries.

Nevertheless, while the study focuses on Nigeria as the primary theme, the thesis also encompasses an element of significant theoretical contribution to the analysis of Western[79] and developed countries. Through a comparative law approach, it identifies the differences between certain fundamental corporate governance principles, rules and practices between Nigeria and countries such as the UK and US with particular reference to how they apply in practice. It suggests that more caution should be taken when attempting to transplant systems or practices across different societies. In this regard, the thesis specifically provides an understanding of the relevance of a rule-based system of regulation as a suitable method under the Nigerian Code as opposed to the existing principle-based approach. By incorporating relevant discourses from Western countries, this research particularly contributes to the field of international corporate governance research and comparative studies between Nigeria and developed countries. Essentially, this study is the first of its kind to comprehensively examine corporate governance in Nigeria, from a social, economic, legal and comparative standpoint.

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[79] This term is widely used in this study to broadly represent developed countries such as the UK and US.

1.6 Research Methodology

This thesis integrates both a library-based methodology and a comparative law approach. The library-based methodology, which involves a theoretical analysis, was applied specifically to examine the corporate governance framework under the CAMA 1990 and the 2011 SEC Code with a view to highlighting existing shortcomings with fundamental provisions and to propose future reforms. Within this ambit, provisions relating to shareholders' protection/remedies, directors' accountability and audit under the CAMA, and the enforcement and compliance mechanism of the SEC Code were thoroughly analysed. The analysis revealed a statutory lacuna and defect under the existing framework of the CAMA and the SEC Code; relevant reforms were proposed.

The comparative aspect of this research evaluates the above-mentioned provisions of the CAMA 1990 with comparable provisions under the UK's CA 2006. The comparison was necessary so as to expound on the scope of the provisions of the CA 2006, which the author intended to use as model for suggesting reforms under the CAMA. Given that both countries have identical legal systems, compatibility issues are averted. It is perceived that by making this comparison, this research will identify solutions to the existing legal flaws in Nigeria, flaws that were already encountered in the UK, and it is therefore possible to identify the regulatory steps and initiatives taken to tackle such deficiencies.

Chapter 2: The Theoretical and Conceptual Framework of Corporate Governance

2.1 Introduction

This chapter examines the various theories, systems and models of corporate governance in order to shed more light on its scope, concept and significance. This examination is particularly important because it provides a lucid understanding of the relevant theories that shape and define the content of the corporate governance system in Nigeria. Corporate governance is broadly recognised as one of the most elusive and complex concepts in the field of law and economics.[80] Its definition remains an issue, as it varies from discipline to discipline and jurisdiction to jurisdiction. For instance, it differs in term of the accountability that the firm should discharge and to whom responsibilities should be discharged.[81] On the one hand, it is said that firms should only be accountable to their shareholders.[82] This view lends itself a narrow definition and limits the responsibility of corporate executives to only members of the company. On the other hand, a wider approach is applied to suggest that corporate accountability should be discharged towards all stakeholders in the company.[83] These conflicting notions have generated considerable debates and raised fundamental questions such as what is the objective of a corporation and whose interest should management represent? The examination in this chapter considers both the narrow and broad conceptions and the debates surrounding them. It explores the most appropriate definition of corporate governance and the nature of the responsibility required by corporations in order to ensure overall efficiency.

In addition to the foregoing, several theories - both legal and economic - have contributed to the development of corporate governance systems around the world. Therefore, in the advancement of the theoretical discourse, this chapter focuses on three theories, which are widely considered to have direct influence in shaping the objectives and responsibilities of companies: i.e. the contractual,

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[80] A. Young 'Rethinking the Fundamentals of Corporate Governance: the Relevance of Culture in the Global Age' [2008] Company Lawyer 168.
[81] ibid.
[82] J. Jacques du Plessis and A. Hargovan and M. Bagaric, *Principles of Contemporary Corporate Governance* (2nd edn, Cambridge University Press 2011) 4-5.
[83] ibid.

the concession and the stakeholder theories. As will be seen later, the contractual theory views a company as a 'nexus of contract,' founded in private contract; meanwhile, the concession theory considers the legal concept of companies as an entity created by the state.[84] On the other hand, the stakeholder theory considers companies as social institutions, accommodating diverse stakeholders' interests.[85] It is noted that these theories are useful in investigating the historical evolution of corporations and the rationale behind their governance structures, components and orientations.[86] However, this also means that not all the theories are suited to every jurisdiction, as the application of a theory depends on the legal system and corporate culture/structure of that country. This chapter analyses these specific theories and considers the debates surrounding their distinct configurations.

Two factors are also considered to affect the content of corporate governance, namely, the model of corporate governance and the ownership structures of corporations. The ownership structure is viewed as a primary dimension of corporate governance because it influences the priority set by the board, whereby such priority usually determines the performance of the directors and whose interest they represent.[87] On the other hand, the model, which varies from country to country, determines the legal, regulatory framework outlining the rights and responsibilities of all parties involved in the corporation.[88] To date scholars have identified two popular models namely, the Anglo-American model[89] and the German model.[90] Each model highlights distinct essential features: the primary players in the corporation, the ownership structure, the composition of the board of directors, the regulatory framework, the nature and level of protection shareholders enjoy and their rights.[91] These models, their distinct features are critically analysed later with particular focus on their relative strengths and weaknesses, and their ability to ensure overall economic growth and efficiency. This chapter argues that no model is perfect or superior to the other as they each adhere to their peculiar local circumstances, social norms and regulations to enable a balanced economic

[84]H.N. Butler, 'The Contractual Theory of the Corporation' (1989) 11 George Mason University Law Review 99.
[85] S. William *How to Govern Corporations so they Serve the Public Good: A Theory of Corporate Governance Emergence* (Edwin Mellen Press Ltd. 2009) 3-4
[86] Dine and Koutsias (2013) 93.
[87] Jacques du Plessis, Hargovan and Bagaric [2011].
[88] A. C. Fernando, *Corporate Governance: Principles, Policies and Practices* (3rd edn, Person Education, 2009) 54.
[89] The term is used in this study to refer to countries such as the UK and the US.
[90] The German model governs corporations in Germany.
[91] See Fernando (2009) 54.

growth. For instance, the Anglo-American model adopts the neo-liberal economic model, which promotes free market capitalism and emphasises contractual freedom and shareholders' supremacy in public corporations.[92] Meanwhile, the German model is built upon social institutions, fostering relationships between corporations, their shareholders, stakeholders and the society. [93] The respective benefits and drawbacks of these distinct approaches are also examined later. The chapter concludes by presenting the Nigerian model of corporate governance, which also adheres to its distinct corporate culture/characteristics, capital market, historical trajectory and regulation.[94] Pertinently, the examination of the abovementioned factors provides a platform for understanding the rationale behind the emergence of the modern corporate governance systems and principles around the world and also in Nigeria. This chapter is therefore structured as follows. The first section considers the debates surrounding the definition of corporate governance. The subsequent chapter analyses the various abovementioned theories followed by an analysis of the different ownership structures and their impact on corporate governance. It proceeds with a thorough analysis of the various models of corporate governance and concludes with an examination of Nigerian model of corporate governance and the rationale for its emergence.

2.2 The Concept of Corporate Governance: Definitional Issues and Debates

Corporate governance as a subject of study has been an issue of interest to the global community long before the collapses of large companies, such as Parmalat in Europe in 2003 and Enron in the US in 2001.[95] It is a topic as old as corporate form itself. According to Marc**,** the corporate governance of companies has been in existence since the inception of joint stock companies, and given the fact that the company is arguably the most important business form in

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[92] Dine and Koutsias (2013)

[93] J. Grundei and T. Talaulicar, 'Company Law and Corporate Governance of Start-ups in Germany: Legal Stipulations, Managerial Requirements, and Modification Strategies' (2002) Journal of Management and Governance 1- 27.

S. O. Kajola, 'Corporate Governance and Firm Performance: The Case of Nigerian Listed Firms' [2008] European Journal of Economics, Finance and Administrative Sciences 17..

[95] For more information on the collapse of Enron in 2001 and Parmalat in 2003 involving accounting fraud and mismanagement See Morrison, J. 'Legislating for good corporate governance' (2004) 15 Journal of Corporate Citizenship 121.

modern economies, corporate governance is as important as the government of a country.[96] In light of this notion, it is surprising to find that there is still an astonishing lack of transparency in the manner in which some corporate executives may function as evident from the scandals in companies such as Enron and WorldCom. The debates about the importance of effective corporate governance are said to have intensified following the potential 'agency problem' created by the separation of ownership from control in modern companies.[97] The agency problem implies that while directors are bestowed with the powers to manage the company, there is a potential for conflict of interest to arise between the management and the shareholders as the directors cannot be expected to watch over the investment of others as they would over their own.[98] In essence, proper corporate governance is essential in order to prevent this potential conflict, avert insider abuse and fraud by management and to ensure the reconciliation of the interests of shareholders in the company.

The importance of effective corporate governance in most economies is most apparent, since companies contribute immensely to the economic and social wellbeing of societies. Therefore, it is accepted that corporate governance is associated with positive national growth and companies seen to adopt sound corporate governance practices are prone to attract foreign investment and prevent corporate failure, as opposed to those companies whose practices are below international standards.[99] However, while corporations are considered useful for industrial and social purposes, by creating profit for shareholders, jobs for employees and a market for suppliers, companies can also engender a disastrous impact in the form of loss of investment, unemployment and environmental damage if not properly governed or regulated.[100] Consequently, effective corporate governance is central to most developing countries in order to promote economic growth and development, attract domestic and foreign investment and build their markets' competitiveness.[101] Against this context, it is without

[96] G. Marc, *International Corporate Governance* (Prentice Hall 2012) 32.
[97] S. Gillian 'Recent Development in Corporate Governance' [2006] 12 Journal of Corporate Finance 381-402.
[98] ibid.
[99] S. William *How to Govern Corporations so they Serve the Public Good: A Theory of Corporate Governance Emergence* (Edwin Mellen Press Ltd. 2009) 2-8.
[100] M. J. Roe, *Political Determinations of Corporate Governance: Political Context, Corporate Impact* (Oxford University Press 2003).
[101] E. N. M. Okike 'Corporate Governance in Nigeria: the Status Quo' (2007) 15(2) Corporate Governance: An International Review 173-193.

surprise that substantial resources have been deployed into the study and identification of best practice and laws in corporate governance in both developed and emerging economies, which has resulted in the adoption and enforcement of corporate governance rules, principles and codes amongst corporations with interests and concerns stemming from diverse academics of different disciplines.

The presence of corporate governance in company law, its undeniable popularity in academic discourse, the great concern of policy makers and the participation of scholars from different disciplines such as law, business management and politics have yet to make corporate governance an autonomous subject.[102] The review of literature on corporate governance demonstrates that as an interdisciplinary subject, it comprises a diverse range of definitions proffered by different scholars from various disciplines and fields. Nonetheless, these definitions normally range from a narrow definition that focuses on the companies and their shareholders, to wider definitions that incorporate the accountability and social responsibility of companies to stakeholders and society as a whole.

From a narrow perspective, corporate governance has been defined by the Cadbury Committee to mean a 'system by which companies are directed and controlled'.[103] This definition is widely understood to refer to the rules and principles that allocate powers and responsibilities to key constituencies (i.e. shareholders and directors/managers) responsible for directing and controlling the company.[104] In other words, it involves the regulation of the internal affairs of a company and the relationship between the board of directors and the shareholders where strong emphasis is placed on the maximisation of shareholders wealth.[105] Essentially, the definition adopts the traditional view adduced by Lord Cranworth in the case of *Aberden Rly Co v Blaike Bros*[106] where it was held that the articles of association of a company engenders a contractual setting between the agent (directors/managers) and the principal (shareholder), where directors are viewed as agents of the

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[102] Marc (2012).
[103] Cadbury Committee Report on the Financial Aspects of Corporate Governance (Gee, 1992), para. 2.5.
[104] S. Jill and S. Aris, *Corporate Governance and Accountability* (John Wiley & Sons Ltd 2004).
[105] ibid.
[106] [1854] 1 Macq 461; see also the case of *Dodge v Ford Motor Co.* 170 NW 668 (Mich 1919), where the courts ruled that the business corporation is organised and carried out primarily to maximise shareholders profit.

company and are obliged to only act in the interests of the company alone where the financial wellbeing of the shareholders are paramount.

While the above approach may be considered suitable, since it entails a proper objective of corporate governance in reconciling shareholders' interests, [107] it fails to consider the negative implications for the company in terms of generating value in the long run. For instance, critics of this approach hold that the approach encourages managers and directors to focus on short-term performance at the expense of long-term value and competiveness of the organisation, since managers are only required to concentrate on the maximisation of profit for shareholders.[108] It is therefore suggested that since the objective of a modern corporation is more equitable and socially driven, it would be appropriate for definitions to also recognise the interests of other stakeholders constituencies as a means to promote the overall value of the company and its shareholder.[109] Accordingly, Roe defined the term corporate governance as involving a system where corporations are made responsive to the rights and wishes of stakeholders.[110] This definition differs from the one given above, since it adopts the stakeholder view of corporate governance as opposed to the principal-agent relationship previously outlined. It highlights the relationship within the company as part of a wider socio-economic relationship and emphasises that the management must out of concern also reconcile the interest of all stakeholders within the corporation with the notion that the protection offered by corporate laws are not sufficient to ensure the ultimate protection of all stakeholders' interests.[111]

Much of the legal arguments in support of the relevance of non-shareholder constituencies have been founded in court decisions, which have observed that other constituencies are also proper objects of management concern. For instance, in the case of *Herald Co. v Seawell,*[112] the courts

[107] Marc (2012).
[108] William (2009) 1-6.
[109] See the G20/OECD Principles (2015).
[110] Roe (2003).
[111] ibid.
[112] 472 F.2d 1081 (10th Cir. 1972).

emphasised the welfare of non-shareholder constituencies regarding a defensive manoeuvre against a takeover bid when it observed that: 'a corporation publishing newspaper has other obligations besides making profit. It has an obligation to the public who buy and rely on the content of the newspaper as well as to those people (non-shareholder constituencies such as employee) who make its daily publication possible'. [113]

Some academics have also supported the judicial opinions in *Herald* by arguing that since non-shareholder constituencies also share risk and are vital to the success of corporations, the broader scope of the stakeholder approach towards corporate governance is more appropriate since it requires a balance to be reached between shareholder and other constituents' interests within the corporation.[114] However, there have been questions as to the practicality of this view since several cases[115] and studies support the profit maximisation approach. For instance, there is a concern that arbitrary management decision-making may arise due to the wider management concerns, broader responsibilities on the corporation and more importantly, the idea of recognising stakeholders' interests may not be necessary since stakeholders such as employees may readily protect their interests through employment law and contracts.[116] However, the strength of this argument is weakened by the fact that, there are involuntary creditors such as environmental, tax and tort creditors, who may lack the means to protect their interests *ex ante.*[117] Thus, it is submitted that stakeholders' oriented regulations should be promoted to incentivise companies from taking appropriate safety precautions to prevent injury to these potential involuntary creditors.[118]

From a business perspective, Richard Eells also supported the broadening of corporate governance structure by arguing that, governance means the control of business organisation and a

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[113] V. M. Slyke, 'Agents or Stewards: Using Theory to Understand the Government Non-Profit Social Service Contracting Relationship' (2006) 17 Journal of Public Administration Research and Theory 157.
[114] ibid.
[115] E.g. see *Dynamics Corp of America v. CTS Corp* 794 F.2d 250(7[th] cir. 1986).
[116] K. Odaki and N. Kodama, 'Stakeholder-Oriented Corporate Governance and Firm-Specific Human Capital: Wages Analysis of Employer - Employee Matched Data' (2010) Research Institute of Economy, Trade and Industry Paper Series 10-E-014, 1-21.
[117] S. Ben-Ishai and S. Lubben, 'Involuntary Creditors and Corporate Bankruptcy (2012) 45 UBC Law Review 253.
[118] ibid.

system of accountability by those in control, whereby accountability and responsibility transcend legal rules and encompass norms of best practices and business ethics.[119] Although this definition reflects the stakeholder approach, it differs slightly from the above definitions since it focuses on the practices and social responsibilities of corporations, which go beyond the internal and organisational structure of companies. Thus, it implies that the responsibility and the structure within which a corporate entity receives its directions are prescribed and forged through corporate social and environmental responsibility, instead of via legal rules.[120]

It may be true on the one hand that the broader features of these definitions is more compatible in a modern society, where an exclusive focus on the financial aspect of the business is no longer appropriate. However, in practice, this broad approach is not without difficulties. For instance, because legislations stipulating social responsibilities of directors towards the interests of society and other stakeholders, fail to clearly define the scope of these responsibilities, the various pronouncements on the interests of the society and other stakeholders in the corporate setting have to an extent granted stakeholders with a rather vague legal status in the company.[121] This is what Lipton described as ambiguous and confusing where he stated that 'the judicial and legislative attempt to expand management responsibilities in the age of finance corporatism is generally an ad-hoc attempt to deal with symptoms of what is more complex and problematic'.[122]

The OECD offered a somewhat inclusive definition of corporate governance by stipulating that 'corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders'.[123] The significance of this definition to this thesis emanates from the fact that, rather than highlighting a strictly defined group of shareholders as the sole aim and structure of corporations, it opines that good governance requires input from a wider

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[119] R. Eells, *The Meaning of the Modern Business: an Introduction to the Philosophy of Large Corporation Enterprise,* (Columbia University Press 1960).
[120] ibid.
[121] M. T. Moore, 'Beyond Private Ordering: Towards an Intelligent Design' Theory of Corporate Law Evolution' UCL Research Seminar Paper (2010) 1.
[122] M. Lipton 'Corporate Governance in the Age of Financial Corporatism' [1990] 31 Corporate Practice Commentator.
[123] See G20/OECD principles (2015) 9.

range of stakeholders, fostered through a set of relationships with the company's management; it appears to recognise stakeholders' roles and interests. Nevertheless, the failure of the definition to describe the nature of this stakeholders' relationship with the management arguably renders it ambiguous. Moreover, although the OECD usually highlights the interests of stakeholders within its tenets, the organisation has been criticised for not providing adequate support for stakeholders' participation in the actual governance of companies. For instance, Dine and Koutsias argued with respect to the previous 2004 version of the OECD's principles that, the description of good governance to mean 'a system which provides proper incentive for the board to pursue objectives that are in the interest of the company and its shareholders'[124] clearly avoids adopting the stakeholder-centric approach on the part of the organisation.[125] However, the revised 2015 principles of the OECD similar to the 2004 version provide some flexibility on the matter by encouraging stakeholders such as employees to participate in key decision-making processes. In this regard, the principles provide that 'mechanisms for employee participation include: employee representation on boards; and governance processes such as works councils that consider employee viewpoints in certain key decisions.'[126] The problem with this principle however is that, it is strictly employee-oriented; it excludes representatives of other important stakeholders such as customer, suppliers, creditors, and the local community, even though the OECD principles require the board to have due regards and deal fairly with these stakeholder groups.[127] One may argue on this basis that introducing representatives of these stakeholders could be useful in effectively reinforcing the role of stakeholders within corporate governance because it is thought that corporations would be more inclined to consider the wider implications of their actions on other stakeholders and the society if the latters' interests and roles within companies are strongly promoted.[128] Particularly, others believe that the wider inclusion of stakeholders in governance is one of the ways that corporate accountability and responsibility could be fostered.[129] Accordingly, in chapter 6, this thesis attempts

[124] See the OECD Principles of Corporate Governance 2004, 11, available online at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> accessed August 10, 2016.
[125] See Dine and Koutsias (2013) 69.
[126] See principle IV, C of the G20/OECD principles (2015).
[127] See principle VI of the G20/OECD principles (2015).
[128] See Eells (1960).
[129] See Dine and Koutsias (2013) 13.

to suggest concrete proposals on how a stakeholder-oriented model of corporate governance could be incorporated within a rule-based code in Nigeria.

Within the ambit of company law, corporate governance usually includes legal provisions, which acquire the force of law, and quasi-legal principles adopted and applied through voluntary monitoring. The use of non-legal principles has been an essential part of corporate governance since the Second World War, where the need to scrutinise and develop the control of companies was acknowledged.[130] Fundamentally, corporate governance in company law tends to encompass the internal matters of a company, such as the institutional structure, rights, duties, interest, and the responsibilities of its key constituencies, such as shareholders and directors, though the exact interpretations and objectives may differ dramatically from society to society. [131]As such, it is not startling to discover that there is no universal definition of the term 'corporate governance' as it can be defined and interpreted from different theoretical perspectives and professions, such as jurisprudence, accountancy and business. In addition, diverse economies and societies may have different standards and requirements for corporate governance resulting in the search for a universal or single definition difficult, if not impossible.

Tricker[132] has provided significant insight on the meaning of the term 'corporate governance' by comparing it with management, which also exhibits an element of control and direction. According to Tricker, management and governance have different objectives and emphasis, though they are both essential in the operation of a company.[133] He noted that:

> The governance of a company is not concerned with running the business of the company per se, but with giving overall direction to the enterprise, with overseeing and controlling the executive actions…and with satisfying legitimate expectations for accountability and regulation… if management is about running business; governance is about seeing that the business is run properly. [134]

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[130] M. A Pickering 'The Company as a Separate Entity' (1968) MLR 181.
[131] C. Kolade, 'Board Performance Analysis' Distinguished Management Lectures (1997).
[132] R.I Tricker, *Corporate Governance: Practices, Procedures and Powers of British Companies and their Board of Directors* (Gower Pub Co. 1984).
[133] ibid, 7.
[134] ibid.

Tricker's definition implies that although the management and the governance of a corporation both entail decision-making power, the two functions can be distinguished by the nature of their powers. Thus, governance is strategically oriented (to control the action of a group for the benefit of the whole) [135] and therefore involves macro decision-making elements, whereas management is task oriented (actions taken by a company to lead the business in a positive direction)[136] which involves a micro decision-making.

The inevitable consequence of the distinction between governance and management as provided by Tricker is that, hierarchically, the powers reside at the top of the structural pyramid of the company with the board of directors. [137] At the base of the pyramid, the shareholders and employees are bestowed with certain oversight powers for pressuring and monitoring the affairs of management, with the directors acting as the drivers in terms of turning corporate objectives into realities.[138] However, within company groups with complex organisational structures, the governance responsibilities of corporate actors, such as directors and shareholders become somewhat convoluted. For instance, some of the biggest listed companies comprise of many group entities, consisting of an ultimate parent company with wholly or partly owned subsidiaries, whereby the businesses of these groups are carried out through these group entities.[139] However, these companies establish separate legal entities for variety of reasons, such as to minimise corporate taxes and to 'ring fence' their risks.[140] The problem is that since each individual company is considered as a separate legal entity, the parent company often lacks adequate oversight on the group and the subsidiaries.[141] It is therefore not surprising why most of the corporate governance failures take place within subsidiaries, which are separate from the parent company. The challenge therefore is how to enhance the responsibility

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[135] I. Lippert et al., *Corporate Governance, Employee Voice and Work Organization: Sustaining High-Road Jobs in the Automotive Supply Industry* (Oxford University Press 2014) 203.
[136] A.G. Monks and M. Nell, *Corporate Governance* (4th edn, England: John Wiley & Sons Ltd 2008) 381.
[137] J Jacques Du Plessis and M James and B Mirko, *Principles of Contemporary Corporate Governance* (United States of America: Cambridge University Press 2005) 1.
[138] ibid.
[139] A good example is Sime Darby Berhad (SDB), a Malaysian listed company trading in 6 major industries, in more than 20 countries with over 550 group entities. See <http://www.simedarby.com/our-business/overview> accessed on 30th December 2016.
[140] M. Y. Teen and C. Bennett, 'Governance of Company Groups' (2014) CPA Australia, The Iclif Leadership and Governance Centre 1. Online at <http://www.iclifgovernance.org/file/files/governance-co-groups.pdf> accessed 30th December 2016.
[141] ibid.

of parent companies and their boards in the governance of groups, and to ensure that they discharge greater oversight on group entities. Minimising the risk of governance failures in groups would surely require proactive measures to governance of groups. For example, regulators would need to ensure that the boards of parent companies recognise the importance of providing sufficient oversight and directions on the group, improve their governance mechanisms throughout the groups, particularly, key disclosure and transparency measures. Communication within the group is also important to ensure that issues of governance are well discussed and tackled across the group entities. The governance of groups is certainly a collective effort from both the parent and the subsidiaries, because it is considered that the failure of one subsidiary not only impact negatively on that individual subsidiary, but also on the parent company.[142] For instance, in countries such as Australia and Singapore, where most group subsidiaries account for up to 39% and 42% of the groups' annual profit respectively,[143] a failure of the subsidiaries will surely damage the financial performance and position of the group including the parent.

The interpretation of corporate governance can also be found within the ambit of company law. For instance, one major purpose of company law is to place limitations and provide directions for the activities and affairs of those who establish (shareholders), and those who run or manage the company (directors).[144] This goal is usually attained through legislative means or through interpretation or application of laws by judges. However, concerns regarding the drafting of detailed business rules arise as it is considered that some law drafters do lack a comprehensive and in-depth knowledge of business affairs.[145] In addition, the idea that management of companies is exclusively the responsibility of the directors begs the questions, how often should the judiciary intercede with decision-making process. For instance, in advanced jurisdictions like the UK, one may recognise a system of restraint on the part of the courts with regard to internal corporate disputes. For example, it

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[142] J. Dine, *The Governance of Corporate Groups* (Cambridge University Press 2004).
[143] See Teen and Bennet (2014) 2.
[144] P. Arthur and V. Gustavo, *The Legal Basis of Corporate Governance in Publicly Held Corporations: a Comparative Approach* (Kluwer Law International, Volume 1,1998) 262.
[145] T. L. Stark, *Drafting Contracts: How and Why Lawyers do What they Do* (Aspen Publishing 2007).

has been held in cases like *Howard Smith Ltd v Ampol Petroleum Ltd*[146] that it is not appropriate for judges to substitute their opinion for that of the management in corporations or to question the authenticity of management decisions. Understandably, this is mostly to prevent unnecessary interference with management and internal business processes but this could be highly detrimental to the shareholders' interests and stakeholders alike. By limiting external scrutiny of directors' decisions and behaviours by the courts, it consequently limits external checks and allows managerial abuse of power to thrive. The principles in *Foss v Harbottle*[147] are the best-known authority for the system of court restraint in internal corporate disputes, where it was held that business decisions should be left for the directors who are bestowed with the power under the articles of association to run and manage the company. It is said that company law is concerned with the strategic affairs of governing a company.[148] Consequently, company law has traditionally abstained from dealing with matters involving micro level decision-making, which normally have been left to the articles of association to resolve. Adversely, this could leave minority shareholders in somewhat perilous situations, given that the majority shareholders carry out most of the decision-making under the articles. The minority shareholders as it is in practice usually have little influence on the decisions affecting the management of the company; as the case of Foss v Harbottle[149] stipulates, the minority shareholders are bound by the decisions of the majority.

2.3 The Theories of Corporate Governance and their Impact on Corporate Objectives: a Critical Analysis

As illustrated above, the development of corporate governance systems is normally driven by several theories. These theories vary in multiple approaches and differ in terms of their objective, interests and responsibilities for the corporation. They normally affect the extent of state or regulatory interference deemed suitable to regulate the affairs of the company and the range of benefits that comprise the interest of the company. A starting point for imposing a convenient

[146] [1974] AC 821.
[147] (1843) 67 ER 189.
[148] S. Linda, *Due Diligence and Corporate Governance* (LexisNexis 2004) 256.
[149] Supra.

analytical structure can be achieved by considering three theories that have been influential in shaping the model and objectives of companies. These theories are the contractual theory, stakeholder theory and the concession theory. They are the by-products of the historical, ethical, political, societal and cultural context within which corporations have developed.

The contractual theory is based on private contract, which encapsulates the relationship that exists between shareholders and managers. Essentially, the managers are viewed as the agent of the principal, the shareholder, in which the responsibilities of the manager and the shareholders are brought into equilibrium within a framework of contractual relationship.[150] Hence, the firm is viewed as a 'nexus of contract', which highlights the private rights of shareholders. In stark contrast, the stakeholder theory tends to extend the responsibility of the corporation beyond contractual duties by requiring the corporation to discharge responsibilities to all stakeholders rather than only its shareholders.[151] The concession theory on the other hand views a corporation as an entity created by the state where state intervention is supported in the form of either direct regulation or the facilitation of shareholder litigation.[152] This form of corporate creation can lead in a general sense to viewing the company as a legal entity, where the separate legal personality is seen as a privilege or right granted by the state.[153] These theories are extensively analysed in the following sections in order to expound on the concept and objective of corporate governance before considering its application in the Nigerian context.

2.3.1 The Contractual Theory

According to contractual theory, the notion of incorporation and the responsibilities of a firm are based on contractual relationships, which exist between the private individuals within the company.[154] As highlighted above, this theory views the company as a 'nexus of contract,' thus, facilitating internal corporate associations. The novel aspect of the theory is to conceptualise the

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[150] M.C. Jensen and W. Meckling, 'Theory of The Firm: Managerial Behavior, Agency Costs and Ownership Structure' [1976] 3 Journal of Financial Economics 305.
[151] A. Dignam and M. Galanis, *The Globalization of Corporate Governance* (Ashgate Publishing Limited, 2009) 8-9.
[152] H. N. Butler, 'The Contractual Theory of the Corporation' (1989) 11 George Mason University Law Review 99.
[153] ibid.
[154] Jensen and Meckling [1976].

relationship between the shareholders of a company as one of contract, whereby the parties to the contract must be allowed to structure their relations as they desire.[155] In an attempt to dissect the nature of the theory, Hazen labelled it as an 'aggregate model' in that the company, being an aggregate of the contract, is neither real nor independent from the members, and in effect, any corporate rights or interests belong to the contractors alone.[156] The strength of Hazen's aggregate theory seem to rest upon the fact that it categorically defines the corporate interests by aligning them with that of the shareholders.[157] However, it is doubtful if the aggregate model described by Hazen is realistically compatible with modern corporations, given that the notion of corporate personality alongside the emergence of fragmented ownership structure means that modern companies are acquiring separate lives of their own, which are different from the members.[158] Moreover, Hazen's assertion seem to also lack any reference to a legal device for enforcing the contractual interests within the corporation. In this regard, it is noted that under the contractual theory, since a corporation is based on private contract, each contract in the 'nexus of contract' warrants the same legal and constitutional protection as other legally enforceable contracts.[159] Thus, the interests and rights of the contractors are enforced through the articles of association, which essentially constitute the corporate contract.

The implication of the contractual theory on corporate governance is that it stipulates a rather narrow objective for companies. By identifying the firm with the contracting shareholders, it implies that corporations should be run solely to protect the rights and interests of the contactors (i.e. shareholders) under the contract.[160] Consequently, if there was a conflict between the interests of shareholders and non-shareholders, the managers would only be concerned with taking actions that will benefit the former.[161] An early foundation for this theory was established in *Automatic Self-*

[155] See Butler (1989) 99; H. F. Easterbrook and D. R. Fischel. *The Economic Structure of Corporate Law* (1991) 1-9.
[156] T. Hazen 'The Corporate Persona, Contract (and Market) Failure and Moral Values' (1990) 69 North Carolina Law Review 273.
[157] Dignam and Galanis (2009) 14.
[158] The reality of corporate personality automatically separates the company's identity from its members. See *Salomon v Salomon* (1896) A.C 22 (HL).
[159] See Butler (1989) 99.
[160] A. Keay, *The Corporate Objective* (Edward Elgar 2011) 43-44.
[161] ibid, 44.

Cleansing Filter v Cunningham[162] where the courts addressed the issues of internal company management and held that the articles of association form a contract between members, which regulates the internal affairs of the company where the corporation is to be regarded as an association of individuals joined by mutual agreement.[163] Exponents of this theory have tried to justify its relevance by arguing, with reference to freedom of contract, that individuals - by virtue of their natural rights - should be free to form contractual relationships with each other in order to form a business without the prior operation of law.[164]

The objective of the theory, therefore, is to minimise state regulation of corporate affairs; the state is limited to merely enforcing contracts.[165] In the UK as well as Nigeria, this view is also reflected in section 33 of the CA 2006 and section 41 of the CAMA, which states that every member is contractually bound by the articles of association, where the statutory contract lays down the basis for the legal relationship between the members. Although the above view expresses the contractual theory explicitly, the theory has attracted enormous criticisms. For example, critics have contested the contractual theory with regard to enforcement of company's contract. In this respect, it is argued that if a shareholder is granted 'outsiders'[166] rights under the articles of association, he/she may find the contract unenforceable under the contractual notion if he attempts to enforce the right/contract in a capacity other than that of shareholder.[167]

The case of *Elley v Positive Government Life Assurance*[168] has illustrated the difficulty associated with enforcement of the articles of association by a shareholder who effectively has two relationships with the company, both as a member and an outsider. In this case, the courts prevented the plaintiff from enforcing the contract, despite the fact that the plaintiff was a shareholder. Although, the articles of the company had provided the claimant with an employment as the

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[162] [1906] 2 Ch 34.
[163] D. Kershaw, *Company Law in Context: Text and Materials* (2nd edn, Oxford University Press 2012) 396, 594.
[164] N. Foster, 'Company Law Theory in Comparative Perspective: England and France' (2000) 48 American Journal of Comparative Law 573.
[165] Butler (1989) 99.
[166] Outsiders generally refer to employees or directors of the company.
[167] J. Dine and M. Koutsias, *Company* Law (7th edn, Palgrave Macmillan 2009) 51.
[168] (1876) 1 ExD 88.

company's solicitor, he was not eligible to enforce the articles of association for breach of contract. It was held that the articles did not create any contract between a solicitor and the company.[169] Therefore, it may be that although the courts often adopt contractual terms in interpreting and enforcing a company's contract, the concept of the articles of association as a contract is misleading and they are in fact a constitutional document, which requires the application of public law in order to interpret them properly.[170] This may require the application of a concession notion of incorporation, which promotes the legal existence and enforcement of relationships within corporations through regulations. Proponents of the contractual theory nonetheless took a stronger view against the idea of imposing external regulation on firms. They normally question why corporations should be subjected to external constraints when other contractual forms of organisation, such as partnerships, are not. In response, justification for the imposition of external regulation is normally provided with reference to the effect and implication of limited liability status of corporations introduced in 1855.[171]

Iwai argues that since the advent of limited liability in 1855, modern companies are placed in a situation relatively close to the status achieved by unincorporated joint companies in 1844,[172] and therefore shareholders are only liable for the debts to the value of their shares.[173] Therefore, it is clear that without legislative intervention, limited liability could never have been achieved in a satisfactory manner so as to facilitate a contractual relationship between members of the company. As illustrated above, enforcement of contract based on mere internal relationships may prove to be difficult. Therefore the law appears to be a core element in facilitating and interpreting contractual relations. Company law in the UK for example, has always had a strong contractual element within it. For instance, incorporation is still based on the enactment of company law, which revolves around the adoption of constitutional documents (i.e. articles of association), and specifies the rights,

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[169] Dine and Koutsias (2009) 51.
[170] M. Kahan and E. Kamar, 'The Myth of State Competition in Corporate Law' (2002) 55 Stan. L. Rev. 679.
[171] Limited Liability Act 1855.
[172] Joint Stock Companies Act 1844.
[173] K. Iwai, 'Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance' (1999) 47 American Journal of Comparative Law 583.

powers, and duties of members and directors.[174] On this basis, the contractual theory cannot be viewed in isolation; indeed, the important role of corporate law in corporate governance makes it follow logically that the introduction of corporate law principles, such as corporate personalities are essential in order to simplify the web of contractual relations between a group of individuals and multiple outsider parties.[175]

Although contractual theory specifies the interests of shareholders, it fails to offer a plausible framework in terms of enforcement of rights within the company. Consequently, another shortcoming under the contractual theory rests in the manner in which the judiciary interprets the contract to determine whether an outsider or insider rights can be enforced. As illustrated above, the courts' attitude towards this issue gives rise to arguments that the company owns a constitution rather than a contract.[176] Therefore, a further consequence is that the focus on a contract between members and the company has the inevitable implication of precluding other stakeholders in the company, thereby providing a limited framework catering for the shareholders alone. Hence, the contractual theory has the propensity to limit the 'interest of the company' to just the interest of the contractors and sometimes, even exclude shareholders' rights to enforce the articles of association as illustrated above.

Stoke also argues that the contractual theory legitimises the contractual rights of the contractors alone, in that since the directors are appointees of the owners, the invocation of the notion of freedom of contract makes the power accorded to the directors legitimate, resulting in goal-oriented behaviour.[177] Thus, compliance with the contract is judged based on achievement, rather than being judged on the impact on the rights and interests of the participants.[178] This notion is justified on the basis that the emphasis on the interest of contractors highlights the traditional view of

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[174] A. Kokkinis, 'Rethinking Banking Prudential Regulation: Why Corporate Governance Rules Matter' [2012] Journal of Business Law 611-628.
[175] Iwai (1999).
[176] See *Salmon v Quins and Axtens Ltd* [1909] 1 Ch 311.
[177] M. Stoke 'Company Law and Legal Theory' in W. Twinning (ed), *Legal Theory and Common Law* (Blackwell 1986) 155-166.
[178] ibid.

the objective of corporations, which is to maximise shareholders' wealth, and since shareholders have residual ownership bestowed in their shares and bear the residual risk, it is without surprise that the contractual theory places emphasis on the supremacy of shareholders. Proponents of the contractual theory have also taken up this view. They argue that in the corporate setting, the contractual relation is incomplete due to unforeseen circumstances; therefore the supremacy of shareholders is justified, since they have fewer contractual safeguards than other stakeholders, who can always protect their interest and rights through corporate or employment laws.[179] Therefore, due to the cost of internal decision-making by management, the preference in leaving the ultimate decision making to the shareholder is justified due to the degree of homogeneity with regards to shareholders interests. This view may be true in theory; however, one may conversely argue that the notion of the supremacy of shareholders view under the contractual theory is misleading and does not necessarily represent a realistic view given that, shareholders in companies that are under managerial dominance usually have little to no influence on important decisions affecting the company. Thus, shareholders are merely theoretically dominant but realistically they are passive. There is also the concern that the theory does not always favour the corporation on the long run. For instance, one implication of contractual theory is that the emphasis on legitimising the interest and rights of contractors tends to promote a myopic market system within the firm, whereby managers are required to concentrate on short-term performance at the expense of the long-term value and competitiveness of the organisation.[180]

In this scenario, managers within the firm are viewed as the 'agent' of the 'principal' (shareholders) and since the rights and interests of the shareholders are expressed in the contract, emphasis is placed on observing and enforcing the interest of shareholders, which is to maximise their wealth - even at the expense of long-term competiveness. A well-known description of this arrangement is normally found within the economic theory called the 'agency theory', which

[179] C. O'Kelly and S. Wheeler 'Internalities and the Foundations of Corporate Governance' (2012) 21(4) Social and Legal Studies 469-498.
[180] L. Donaldson 'Ethics Problems and Problems With Ethics: Toward a Pro-Management Theory' (2008) 78 Journal of Business Ethics 299-311.

addresses the problems arising as a result of separation of ownership (investment) and control (management) in large corporations. The agency theory is a subset of contractual theory and it normally emphasises the shareholder supremacy under the contractual theory, by highlighting the relationship between the principal (shareholders) and agents (managers) as a form of contract between the managers and shareholders.[181] The agency theory is therefore concerned with the firm and managerial behaviours and tackles issues of agency cost, conflict of interest and the possible moral hazard surrounding managers.[182] The roots of the theory is often traced back to the work of Berle and Means,[183] while some attribute it to writers like Adam Smith and his influential book, *The Wealth of Nations*.[184]

Berle and Means noted that the agency theory is based on the separation of the ownership of the company and control over the affairs of the company.[185] They first observed that in common law countries such as the UK and the US where the divergence of shareholders is encouraged, due to the large financial markets, many publicly traded corporations had a dispersal of ownership, where no single shareholder owned sufficient shares or vote to control the company.[186] In this regard, the shareholders of the corporation surrender or delegate control of the company to the management, while the shareholders simply retain interests in their assets and profit,[187] thus, separating ownership from control. Writing in the eighteenth century, Adam Smith nonetheless found that the separation of ownership and control in the corporation is capable of creating agency problems.[188] Smith argues that since directors are managers of other people's money, rather than their own, they are not likely to watch over the wealth of others with the same prudence as they would if watching their own wealth.[189] In other words, directors could cease the opportunity to pursue interests which conflict with the interests of the shareholders.

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[181] M.C Jensen, and W. Meckling, 'Theory of The Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305- 360.
[182] A. Smith, *An Inquiry Into The Nature and Causes of Nations Wealth*, (Methuen & Co. Ltd. 1776).
[183] A. Berle and G. Means, *The Modern Corporation and Private Property* (Macmillan 1932).
[184] Smith (1776).
[185] Berle and Means (1932).
[186]ibid, 5 – 6.
[187] Ibid, 8; See also Akinpelu (2011) 62.
[188] Smith (1776).
[189] ibid.

The separation of ownership and control raises an important question: who has real control over the firm? In modern corporations, managers of the firm are seen as having de facto control over the firm, while the shareholders have de jure control by virtue of their residual rights as residual claimants.[190] However, McConvill argued that the notion that shareholders have control over the affairs of the company and the board of directors is a myth, since the board of directors effectively have strong influence over proxies, agendas of the general meeting and also have a say on who is to be elected as directors.[191] He further noted that directors and senior managers hold the main operational and strategic decision-making powers affecting the corporation.[192] Accordingly, Berle and Means classified shareholders as playing a passive role and being virtually powerless in asserting control over the firm.[193] They postulated that if management were not strictly accountable to passive shareholders, the problem of management furthering primarily its own interest would be exacerbated.[194] Understandably, their initial concern, which appears to focus primarily on the protection of shareholders' interests against management, and not non-shareholder constituencies could be said to have emanated from the backdrop of powerful management and passive investors who lack sufficient control over their properties. However, Berle and Means appear to have modified their positions in the last chapter of their book by speculating that corporate law may be moving towards a new era whereby owners would lose full control over the company to benefit the larger interests of the society.[195] They noted that 'should corporate leaders set forth programmes comprising fair wages, security to employees, reasonable services to the public, all of which would divert a portion of the profit from the owners of passive property, the interests of passive property owners would have to give way.'[196] Thus, Berle and Means' statement here is implying that the passivity of shareholders is not entirely disadvantageous, it could be utilised by management to pursue broader societal interests, which is considered to be socially desirable.

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[190] R. Kraakman et al. *The Anatomy of Corporate Law, A Comparative and Functional Approach*, (2nd edn, Oxford University Press 2009) 32-33.
[191] J. McConvill 'The Separation of Ownership and Control under a Happiness-based Theory of Corporation' [2005] Company Lawyer 35-53.
[192] ibid.
[193] Berle and Means (1932) 7, 8.
[194] ibid
[195] ibid, 312
[196] ibid.

Irrespective of the above views, the well-established shareholder supremacy has been well supported by company law in developed countries like the UK, where the board of directors is required to govern the firm in the best interest of the company and its members.[197] In the same vein, and from a financial perspective, the consequences of this approach entails that the main objective of a corporation is to increase the value and wealth of shareholders, in the form of share price growth and dividend payments subject to adhering to the rules embodied in laws and customs.[198] In other words, directors should be accountable to the shareholders, who should by law have the powers to appoint and remove directors when necessary. However, according to the agency problem, since it is not guaranteed that the agent will act completely in the interest of the owners, the manager or directors (as the agent) may be working to maximise their own wealth by investing in ventures that grant a high short-term return.[199] In essence, the consequences of the conflict of interest between the principal and the agent may lead to reduction of the corporate value.

In addition, the agency problem can also arise in relation to approaches to decision regarding risk. One primary distinction between the principals and the agents under the agency theory is their attitude towards risk management. For instance, the principals (owners) and agents (managers) may approach the risk from different perspectives, resulting in each of them having their own risk preference.[200] In other cases, the advent of the agency problem has also been attributed to weaknesses in the ways the contract between the shareholders and managements are drafted and enforced.[201] For instance, there might be unforeseen occurrences that have not been predicted by the contracts, which in turn requires decisions to deal with these events, where the right to make such decisions lies in the hands of the management as residual control rights.[202] However, in light of the

[197] B. Coyle *Corporate Governance* (Basingstoke Press 2003) 201-205; see also the case of *Re Chez Nico (Restaurants) Ltd v Myer* (1992) BCLC 192 where Browne-Wilkinson VC held that the corporate interest of the firm is advocated and identified with the interest of the shareholders thus, the directors are treated as the agent of the shareholders.
[198] E. Sternberg, *Corporate Governance: Accountability in the Marketplace* (Institute of Economic Affairs 2004) 130.
[199] A. Shleifer, and R.W. Vishny, ‘A Survey of Corporate Governance’, (1997) 52 Journal of Finance 737-783.
[200] K.M. Eisenhardt, ‘Agency Theory: An Assessment and Review’ (1989) 14 Academy of Management Review 57-74.
[201] E.F Fama and M. Jensen, ‘Separation of Ownership and Control’, (1983) 26 Journal of Law and Economics 301-325.

[202] ibid.

above views, it is not particularly illuminating to say that directors owe a duty to cater for the interest of shareholders alone, since the corporation accommodates different constituencies that are vital in the overall success of the company. Therefore the possible shareholder supremacy under the agency theory gives rise to an essential question: are shareholders the owners of the corporation and why should shareholders alone be considered as the manager's principals?

It is a common notion that shareholders are considered the owners of the corporation and directors should seek to only maximise the shareholder's value.[203] However, when viewed from a legal perspective, shareholders do not in reality own the corporation because of the corporate legal form, which has personified companies and separated them from their shareholders.[204] For instance, in the early case of *Salomon* v *Salomon,*[205] it was asserted that no human being owns the corporation, because corporations are legal persons independent of their members. Consequently, shareholders only own the share stock they purchase in the corporation, which entitles them to vote at general meetings and receive dividends declared by the board of directors or any funds they receive from corporate repurchase.[206] The problem with this approach is that shareholders have consequently been reduced from active participants to merely occupying passive roles in the company. As Ireland rightly said, 'professional managers were paid to run enterprises, and the great majority of shareholders were reduced to the status of functionless rentiers, receiving their income in the form (if not at the level) of interest - that is, as a return on their capital accruing with the mere passage of time.'[207]

[203] R.E. Freeman, 'Response: Divergent Stakeholder Theory' (1999) 24 Academy of Management Review 233-236.
[204] P. Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 Cambridge Journal of Economics 837.
[205] [1896] UKHL 1.
[206] H.C. Hirt 'The Company's Decision to Litigate against its Directors: Legal Strategies to deal with Board of Directors Conflict of Interest' [2005] Journal of Business Law 159.
[207] P. Ireland, 'Company Law and the Myth of Shareholder Ownership' [1991] Modern Law Review 32.; See also P. Ireland, 'Defending the Rentier: Corporate Theory and the Reprivatization of the Public Company' in J. Parkinson, A. Gamble and G. Kelly (eds), *Political Economy of the Company* (Hart Publishing 2000) 149.

As will be discussed later in this chapter, the above view seems to support the implication of the concession theory on corporation, which views the corporation as a separate legal entity and not as an aggregate of contract between members. In essence, directors are normally described as owing fiduciary duties to the corporation and they are required to make decisions for the success of the company as a whole and not for individual shareholders. For instance, in the recent case of *Hawkes v Cuddy,*[208] the Court of Appeal held that, even though shareholders nominate directors, the directors owe a duty to the company and not directly to the shareholders: that a breach of duty is therefore a wrong done to the company and the proper plaintiff is the company itself. [209]

The judgment in *Hawkes* is reasonable. However, shareholders as financiers and providers of capital own residual rights, consequently making them the main beneficiaries to the director's fiduciary duties. Although, they may not in reality be the owners of the corporation, emphasising their interest as the principal of the managers could be viewed as a suitable way of meeting their legitimate and legal expectations as shareholders. Moreover, the company's value is indirectly reflected in the shares of the shareholders.[210] Therefore, in theory it could be argued that the shareholders are indeed the owners of the corporation. This view was also maintained in the early case of *Dodge v Ford,*[211] where the courts held that that a business corporation is organised primarily for the profit of the shareholders, as opposed to its employees, and the discretion of the directors is to be exercised in the choice of the means of attaining and maximising shareholders value. Consequently, the judgment of the courts in *Dodge* reinforced the central implication of the contractual theory, which views the shareholders as the owner of the corporation and the only principal to managers of the firm.

In contrast, others have dispelled the notion that shareholders own the firm. For instance, Bolodeoku argued that although the shareholders are residual claimants and the main beneficiaries of

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[208] [2009] EWCA Civ 291.
[209] A. Dignam and J. Lowry *Company law,* (6th edn, Oxford University Press 2010) 314; see also the decision in *Foss v Harbottle* (Supra) which emphasises the corporate personality and proper plaintiff principle.
[210] Dignam and Lowry (2010).
[211] [1919] 204 Mich. 459.

the director's fiduciary duties, the nexus of the contract theory adopts the real entity concept, which implicitly disassociates the corporation from its shareholders. [212]Bolodeoku further contended that the unit of contract in the corporation binds all the stakeholders together, without any special affinity to any group or individual.[213]

Regardless of the above views, the proponents of the nexus of contract theory accept the inevitable agency costs arising as a result of risk bearing and management function. Consequently, it has been argued that granting residual control rights to managers may lead to a conflict of interest, by encouraging them to pursue their own interests rather than those of the owners of the company.[214] As such, with the advent of conflict of interest and residual control rights bestowed on the managers, shareholders are faced with the duty to monitor and oversee management to ensure that the managers are acting and making appropriate decisions that will not cost the principal in turn, resulting in the so-called agency cost.[215] Particularly, the agency cost has been observed to be very high especially where the separation of ownership and control is enormous.[216] Therefore, the task for proponents of agency theory is to determine how to decrease the agency cost. A numbers of solutions have been adduced to solve - or at least minimise - the agency cost, by overseeing the affairs of the agents. Jensen and Meckling recommended adequate oversight over the agents as a solution to tackle the bonding loss and residual loss.[217]

One of the proposed solutions for solving the agency problem was by requiring managers to be granted long-term incentive contracts by offering them a share of ownership, a stock option in the company or a threat to dismiss them if returns were below expectations.[218] These approaches are seen

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[212] I. O. Bolodeoku 'Economic Theories of the Corporation and the Corporate Governance: a Critique' [2002] Journal of Business Law 427-438.
[213] ibid.
[214] O. Bailey *The Regulatory Framework of Ensuring Good Corporate Governance: A Focus on Insurance Industry* (FITC Publication, Lagos, 2003) 189.
[215] L.F. Klapper and I. Love 'Corporate Governance, Investors Protection and Performance in Emerging Markets' (2000) World Bank Policy Working Research, Working Paper 2818.
[216] A. Dignam, and J. Lowry, *Company Law* (5th edn, Oxford University Press 2009) 368.
[217] Jensen and Meckling (1976) 737-781.
[218] M. Huse, *Boards, Governance and Value Creation* (Cambridge University Press 2007) 30.

to motivate managers to align their own interest with the shareholders' interests. Likewise, Fischel argued that direct monitoring by appointing independent directors or accountants, and indirect monitoring, by providing an incentive clause in the manager's contract, might help reduce the agency cost. [219] More importantly, the threat of takeover deals in the market is also considered to reduce the agency cost, since managers will take all necessary means to keep the value of the shares high in the corporation, in order to prevent their dismissal as a result of a takeover by other corporations.[220] In this regard, Manne noted that:

> courts, as indicated by the so-called business-judgment rule, are loath to second -guess business decisions or remove directors from office. Only the take-over scheme provides some assurance of competitive efficiency among corporate managers and thereby affords strong protection to the interests of vast numbers of small, non-controlling shareholders.[221]

Essentially, take-overs appear to provide an extra layer of control on management and ensure some degree of accountability on the parts of directors/managers.

The emergence of the potential agency cost under the contractual theory has nonetheless led some to question if the theory leads to corporate efficiency. The term efficiency while lacking a universal meaning has been defined to mean achieving maximum output with relatively low input or cost.[222] In this regard, the realities of corporate agency relationship and the efficiency doctrine dictate that the company's managers must adopt the best possible contractual terms and strategies to raise capital at the lowest possible price.[223] Therefore, management inefficiency would be understood to include not only the failure to minimise costs and maximise profits through current operations, but also the failure to distribute excess cash flow, the failure to take advantage of acquisitions and restructuring opportunities, and even the failure to communicate to the stock market the health and prospects of the company.[224] It is noted that the focus on the agency relationship under the contractual theory has led some to presume under the efficiency doctrine that share prices will not only be fair, but also that corporate managers will have incentives to maximise share value.[225] This notion implies that by focusing on the contractors (i.e. shareholders) within the contract, the total cost

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[219] D.R. Fischel, 'The Corporate Governance Movement', (1982) 35 Vanderbilt Law Review 1259-1292.
[220] ibid.
[221] H. G. Manne, 'Mergers and the Market for Corporate Control' (1965) 73 The Journal of Political Economy 110.
[222] B. Kallay, 'Contract Theory of the Firm' (2012) 5 Economics and Sociology 39.
[223] See Butler(1989) 99.
[224] Ibid.
[225] ibid.

of the company's operation can be reduced thus ensuring efficiency.[226] Of course, this assumption is not strictly true because not only is the market imperfect but as depicted above with several corporate collapses, some incompetent and even dishonest managers may decide to act contrary to the interests of shareholders thereby creating further cost and impeding corporate efficiency. However, as highlighted above, the so-called market for corporate control and threat of takeover usually compel managers to be concerned about their shareholders and the maximisation of the company's value.[227] Nonetheless, it is noted that the identification of companies trading below their potential values due to management problems is considerably expensive because of the cost involved in monitoring and measuring management deficiency.[228] In this regard, the firm enters into a contract with the managers, which include their expected performance and remuneration. However, some managers may work less for their wages, consequently requiring experts to evaluate their performance against the expectations under the terms of the contract.[229] If the company's performance is not up to the expected market conditions, efficient managers would then be appointed to replace the inefficient managers, whereby the company gains a large profit as the stock prices rises to reflect the increased earning potentials under the more efficient managers.[230] Thus, monitoring and measuring strategies may lead to immediate cost, but in the long run, it could also be useful in lowering the total cost of operation caused by management incompetence, thereby ensuring efficiency.

2.3.2 The Stakeholder Theory

The key argument and debate supporting the stakeholder theory is that the principal-agent or agency model of corporate governance, as found under the contractual theory, is not pragmatic. This is because, by focusing primarily on reconciling the interests of shareholders alone, there is a negative implication for the corporation in that the managers are over-concerned with shareholders, who are only interested in short-term profits, thereby disregarding the interests of other important

[226] See Kallay, (2012) 39.
[227] Manne (1965) 110.
[228] J. Macey and F. McChesney, 'A Theoretical Analysis of Corporate Greenmail' (1985) 95 Yale Law Journal 13.

[229] Kallay, (2012) 39.
[230] Butler (1989) 99.

stakeholders such as employees.[231] Consequently managers neglect the long-term goals in a phenomenon, which Blair[232] describes as 'market myopia'. Therefore the stakeholder theory highlights the interest of all non-shareholders and shareholders in general as a suitable model of corporate governance. The 'stakeholder theory' as a phrase was first used by Freeman and gained particular prominence during the 1980s.[233] The bedrock of the theory is that as companies became bigger, particularly after the Second World War, they inevitably influenced non-shareholders and, as a result of this effect, the company is also required to discharge their accountability towards other stakeholders and not just the shareholders of the company. [234]

As illustrated previously, the objective of corporate governance under the contractual theory and agency theory is always interpreted to mean the financial well-being of the shareholders as a general body. However, there has been a shift from that notion towards a broader stakeholder perspective, which holds that the objective function of the corporation is more equitable and more socially efficient than one confined merely to the shareholders' wealth.[235] Clarke describes this shift, when he explains that:

> The notion of shareholder's value has always been restricted to short termism and neglect of the wider corporate responsibilities in the interest of immediate profit maximisation. But there is now a wider interpretation of shareholders' value which holds that it is only when all of the other constituent relationships of corporation- with customers, employees, suppliers, distribution and wider community-are fully recognised and developed that long term shareholders' value can be realised.[236]

Clarke's views imply that the goal of corporate governance is to maximise the value of the corporation as a whole, where the welfare of other groups with long-term interests, such as employees, customers, consumer and creditors are also considered. The general view of proponents of stakeholder theory is that any group or individual who is affected by or who can affect the

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[231] Akinpelu (2011) 63.
[232] M.M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century*, (Washington, DC, The Booklings Institution 1995).
[233] R. Freeman, *Strategic Management: A Stakeholder Approach*, (Boston, MA: Ballinger 1984) 31.
[234] ibid.
[235] P.R.P Coelho and J.E. McClure and J.A. Spry, 'The social Responsibility of Corporate Management: a Classical Critique' (2003) 18 Mid-American Journal of Business 15-24.
[236] T. Clarke, *International Corporate Governance: a Comparative Approach* (Routledge Publishing, 2007).

objectives of the firm is categorised as a stakeholder having interest in the business.[237] These views were formulated on the basis that modern corporations are affected by a large set of interest groups, including lenders, customers, employees and minority shareholders who are essential to the survival of the business.[238] From this angle, corporate governance discourse normally begins with a fixation on the relationship between the company's personnel and managers, with a presumption of only one right answer, to move in favour of the stakeholder theory, where it is declared that the involvement of all stakeholders in the corporation play a major role in ensuring the success of the company.

It is argued that shareholders normally lack the necessarily skills and expertise to manage the assets of the company and are normally hesitant to exercise all the responsibilities of ownership in publicly held companies, whereas other stakeholders - particularly employees - will often exercise their rights and duties associated with ownership and monitoring.[239] Germany, for instance, is a good example of where the participation of other stakeholders, such as employees is recognised within the corporate governance regime. In Germany, corporate governance has a strong labour co-determination, where half of the members of supervisory boards are required by law to be appointed by the employees, with the supervisory board in turn appointing members of the management board.[240] The rationale behind the enactment of such a corporate governance system is that, in reality, a system that recognises the interest of all stakeholders (including shareholders and employees) inevitably will lead to greater profit and wealth maximisation, since all stakeholders play a major role in ensuring the success of the company.

Supporters of the stakeholder theory refused to accept that the main theme of corporate governance reform - which has been based on recommendations relating to non-executive directors, shareholder involvement in the decision making process and wider access to information regarding

[237] See Freeman (1984).
[238] M.A Pacces 'Controlling the Corporate Controllers Misbehavior' [2011] 11 Journal of Corporate Law Studies 177-214.
[239] S. Jill and S. Aris, *Corporate Governance and Accountability* (John Wiley & Sons Ltd. 2004) 12-15.
[240] Co-Determination Act 1976: the law in Germany requires that companies of over 2000 employees should have half the supervisory board as representative of workers.

the affairs of the company - are sufficient for supervision of managerial affairs.[241] Instead they proposed that the fundamental objective of corporate governance should involve managerial freedom with accountability, which permits executive management the powers to develop a long-term business, while holding them exclusively accountable to all stakeholders involved in the business.[242] As a result, one scholar has argued that the shortcomings of the shareholder perspective under the contractual or agency theory was one of the reasons for the collapse of the Enron firm, due to the fact that the conception of shareholder wealth maximisation has a deep negative influence on management practices, requiring the directors to take unreasonable and unnecessary risks to achieve short-term profit.[243] This position also finds support in the view formulated by Garrets which holds that: 'directors who fail to consider the interest of customers, employers, suppliers and the community fail in their duty to shareholders; a company that neglects those interests will surely decline since the success of modern corporations depends on the collective responsibilities of all stakeholders'.[244]

The above stakeholder view held by Garrets is usually contested on the basis that it deviates (even distracts companies) from the traditional objective of corporate governance, which is to tackle the conflict of interest between managers and shareholders, arising as a result of the separation of ownership and control.[245] However, it can be argued that the primary goal of corporate governance is to ensure the smooth operation of the company for all corporate actors, including shareholders and stakeholders. Focusing on the interests of stakeholders in the organisation is not necessarily a bad thing given that, it emphasises social responsibility on the part of the company by accommodating the interests of all those who contribute to the growth of the company. The real plausible issue with the stakeholder approach surely relates to how accountability of management towards the broad stakeholder parties is measured. It is noted that the interested parties within the stakeholder

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[241] A.L. Friedman and S. Miles 'Developing Stakeholder Theory' (2002) 39 Journal of Management Studies 1-22.
[242] ibid.
[243] D. Crowther and R. Jatana, *Agency Theory: A Cause of Failure in Corporate Governance, International Dimensions of Corporate Social Responsibility* Vol. 1: (Hyderabad: ICFAI University Press 2005) 135- 143.
[244] A.D. Garrets 'The Themes and Variations: The Convergence of Corporate Governance Practice in Major Worlds' [2003] 32 Denv. Intl. J & Pol'y 145-151.
[245] E. Sternberg, *Corporate Governance: Accountability in the Marketplac*e (London: Institute of Economic Affairs 2004)130.

conception is too broad to ascertain.[246] Thus, if the stakeholder theory states that the corporation is accountable to everyone, then in reality it is accountable to no one, since modern technology revolution, which makes exchange of information easier, means that anybody could be considered a stakeholder in the company. In essence ambiguity is created with regards to the group of individuals to whom the managers and directors should be accountable.

In an attempt to clarify the question as to which corporate constituencies managers should legitimately represent, Dodd[247] and Berle and Means[248] have adopted two different views. Dodd, in supporting stakeholder theory has responded by asserting that 'corporate managers must serve as trustees for a wide variety of constituencies in addition to shareholders'. In contrast, Berle and Means, who had previously supported contractual theory took the view that, management should inevitably represent the interests of shareholders. Thus, they disregarded Dodd's broad concept of corporate responsibility where they observed that: 'one cannot disregard the emphasis on the position that business corporations exist for the sole purpose of making profit for their stockholders until such time as they are prepared to provide a lucid and justifiably enforceable mechanism of accountabilities to someone else.'[249]

Dodd's broad classification seems to accentuate modern aspects of corporations, which now have diverse goals, which inevitably give rise to social responsibilities. However, Berle and Means' views may be considered more pragmatic since the narrow focus on shareholders wealth maximisation will streamline and specify the interests of the constituencies that directors/managers should serve in the firm, especially within modern corporations where the ownership and control have been irreversibly separated. As Berle and Means warned, a departure from the view that the board should focus on wealth maximisation would abdicate the responsibility of the board towards

[246]ibid.
[247] E. Dodd, 'For Whom are Corporate Managers Trustees?' [1932] Harvard Law Review 1145.
[248] Berle and Means (1932).
[249] ibid.

the corporate shareholders.[250] Therefore, for the measurement of the director's performance to be possible, the interest of the company should be seen as coextensive with the interest of shareholders.

Tricker, nonetheless argued that, the shareholder-oriented perspective of corporate governance formulated by Berle and Means, and their dismissal of stakeholder theory, undoubtedly reflected the traditional and orthodox environment of boardrooms in both the UK and the US at the time, and does not represent current corporate settings.[251] Tricker further contended this point by presenting the benefits of what he called a 'wider cybernetic view' of the stakeholder, when he observed that: 'stakeholders thinking has continued to be attractive in modern society where the expectation of companies are changing with growing demands for better consumer and societal behaviour.... stakeholder theory is better seen as values and belief, appropriate relationship between the individual, the enterprise and the state'.[252]

Advocates of the stakeholder theory subsequently adopt the view that its effectiveness is evident in two primary ways. Firstly, that those corporations initiating a reputation for the ethical treatment of customers, employees and suppliers subsequently develop trust relations, which in turn supports profitable investment and mutually beneficial exchanges, because ethical behaviour reduces the cost of social association.[253] In addition, where corporations develop reputations for ethical collaboration over a long period, they are able to substitute dishonest behaviours with good practices.[254] Thus, such corporations are able to attain competitive benefit through both external and internal relationships.

Morten nonetheless argued that the stakeholder theory is fundamentally flawed by strongly advocating the ownership rights perspective.[255] Morten further elaborated on his views with reference to 'collective contract theory', where he argued that a corporation is simply a collective

[250] ibid.
[251] Tricker, *Corporate Governance* (1984).
[252] ibid.
[253] Jensen, and Meckling (1976) 305.
[254] ibid.
[255] H. Morten, *Boards, Governance and Value Creation*, (Cambridge University Press 2007) 23.

name for its members and their aggregate rights, and individuals cannot genuinely act as a group but are united legally by contract.[256] Thus, since the corporation comprises the aggregate rights of stockholders, the prime duty of the board of directors is to reconcile the interest of the shareholders. In contrast, other commentators present the usefulness of the stakeholder theory by drawing attention to the system in countries like Germany and Japan. They argue that these countries represent a successful industrial society, where extensive stakeholder involvement within the firm is pervasive, and usually corporate objectives are clearly expressed more widely than simply through shareholders' wealth and profit. [257]The view of both countries is that companies or corporations are seen as enduring social institutions, with aspirations, personalities and characters, with a proper public interest - the interest of a wider community with public responsibilities where the customers, suppliers and employees are hinged to the corporation through interlocking shareholding and cross directorship.[258]

While the above discourses may be true, it is appropriate to argue that regardless of the evolution of thought and the recent shift from the traditional status quo of the shareholder's perspective, corporate governance should not be isolated from social and other economic factors such as social relations and institutional context. In essence, the search for an effective and efficient governance system requires a more flexible approach in order to regulate the complexity and heterogeneity of corporate reality. This approach, however, should reject the idea or assumption that corporate governance is ideal, universal or absolute. Rather, it should acknowledge instead the idea that corporate governance models around the world have emerged from their own cultural, political and social and historical context and shareholders' and stakeholders' interests should be viewed as interdependent, mutually influential and reciprocally supportive in corporations.

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[256] ibid 24.
[257] M.V. Slyke, 'Agents or Stewards: Using Theory to Understand the Government Non-Profit Social Service Contracting Relationship' (2006) 17 Journal of Public Administration Research and Theory 157-187.
[258] M. C. Jensen, 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 7 European Financial Management 297.

2.3.3 The Concession Theory

The concession theory, in contrast to the contractual theory, gives deference to state regulation, which views the corporation as a legal fiction created by state laws and having those rights granted by the state.[259] Traditionally, the basis of corporate existence was founded on a contractual relationship between private individuals. During the medieval period, canon law allowed religious foundations to form associations in order to obtain property as a means to avoid tax; private contract was therefore the initial basis of these recognised bodies, but later evolved into common law partnerships and civil law.[260] Hence, the original existence of such bodies was dependent upon the private initiatives of contracting individuals. However, in the late nineteenth century, incorporation became possible only with the granting of special charter by the state, by way of decree.[261] The corporate form at that time was used for the expansion of foreign trade and colonisation or the national monopolies in finance, transport and utilities.[262] Therefore, in order for corporate associates to acquire legal status, a concession by the state was necessary. Hence, according to the concession theory, the foundation and responsibilities of firms rested in the regulatory powers of the state rather than the individual initiative of contracting parties.

Although the concession theory has lost most of its relevance following the decline in chartering authorities,[263] it has not entirely lost its significance since incorporation is still based upon enactment of company laws by the state. With the presence of general company law, it is argued that the state still has a dominant role in regulating corporations on the macro-level.[264] For instance, in the case of *First National Bank of Boston v. Bellotti*,[265] the courts applied a presumptive (as

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[259] S J. Padfield, 'The Silent Role of Corporate Theory in the Supreme Courts Campaign Finance Cases' (2013) U.S.F.L Rev. 831.
[260] R. Posner 'The Ethical and Political Basis of the Efficiency Norm in Common law Adjudication' (1980) 8 Hofstra Law Review 500.
[261] D.L. Mazumdar 'The Modern Corporation and the Rule of Law' (1965) 114 University of Pennsylvania Law Review 187.
[262] ibid.
[263] Following the enactment of the Joint Stock Companies Act 1844, incorporation was attained by means of registration as opposed to the granting of charter by the state. Presently in the UK incorporation is established by registration under the CA 2006 and likewise in Nigeria, under the CAMA 1990.
[264] D. Campbell and M. Klaes 'The Principles of Institutional Directions: Coarse's Regulatory Critique of Intervention' [2005] 29 Cambridge Journal of Economics 263-288.
[265] [1978] 435 U.S. 765.

distinguished from directive concession)[266] concession where it was justified that there is a presumption in favour of the state to regulate the affairs of the corporations in order to determine which constitutional protections are incidental to its existence. Therefore, much of the debates surrounding the concession theory of corporate governance have been centred on the legal origin, nature and status of corporation, since the implications arising from these points are very important from a corporate governance perspective. Thus, the status of the corporation determines the responsibilities, objectives and relationships between members and managers within the corporations. The extreme view of the concession theory sees the corporation as a creature of the state and having only those rights granted by the state.[267] However, in this thesis, the concession theory is used to denote the principles and practices of corporations that are subject to government regulations, as opposed to lifting all boundaries to the state's privileges to regulate corporations.

Along this line, the concession theory makes certain claims about the legal status and personality of the corporation. Firstly, that the centrality of law in the formation of the corporation strips the firm of any real or natural existence by viewing it as a mere construct of law, existing artificially based on law.[268] Hence, the theory does not dispute the existence of the corporation; instead, it treats the corporation as a constructed entity, which is capable of owning rights and duties separate from the members of the company. Consequently, a renowned advocate of the concession theory, Freidrich Karl Von Savigny**,** labelled it as 'fiction theory'.[269] While describing the implication of the theory on the nature of corporations, he asserted that a legal relationship can only exist between persons or subjects and where such a relationship could exist, such persons need to recognise each other as capable of assuming the role of a legal subject.[270] Savigny further concluded that, under the concession theory, a corporation does not fall under the definition of a real person,

[266] The directive concessions recognise essentially unlimited rights on the part of the state to determine corporate rights and responsibilities.
[267] S. J Padfield 'Rehabilitating Concession Theory' [2013] Okla Law Review, Akron Research Paper No. 12-13 <http://ssrn.com/abstract=2259831> accessed on the 2 September 2013.
[268] M. Phillips, 'Reappraising the Real Entity Theory of Corporation" (1994) Florida State University Law Review Vol.21 1061.
[269] F. V. Savigny, *Jural Relations: or, the Roman Law of Person as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny's System of Modern Roman Law*, W.H. Rattigan (Transl. and ed), (Wildy & Sons 1884)) 1.
[270] ibid.

since corporations do not have a real corporeal existence as human beings.[271] Thus, individuals can be easily identified as natural subjects in a legal relationship, but the corporation on the other hand can only exist as a legal person simply because the law has made them so. A good illustration of this view was contained in the case of *Salomon v Salomon*[272] where Lord Halsbury stressed that the company in the beginning is merely an 'artificial creation', but once properly incorporated the company has a real legal existence capable of being subjected to legal relations. This concept is popularly known as corporate separate personality, which basically implies that once a company is legally incorporated under statute, it becomes a legal person with its own rights and liabilities separate from its members.[273] The implication of this concept on governance is that shareholders cannot be considered as the owners of the corporations, and as a result the corporation is not run for the sole benefit of the shareholders. Thus the shareholder supremacy promoted by the contractual theory loses its relevance under this theory.

Following the above reasoning of Savigny, the law appears to be a core element in the concession theory since it grants a legal status to the corporation. However, although the concession theory attempts to describe the nature of corporation, it fails to provide a clear explanation of the relationship between ownership and control, which is important to the concept of corporate governance. Thus, even if the firm can exist as an entity, the theory fails to determine the exact nature of the relationship between the members, directors, and the firm as a legal entity; instead it is more useful in simply explaining the role of the state in corporate governance. Since the law is crucial to corporate existence, and the state is the primary advocate of the law, it means that the state can have influence on the affairs of the company. In effect, the company has to conduct its business in the manner that is prescribed by the law and behave in a socially sensitive way by taking into account the stakeholders and impact of their decisions on the society. However, given that a company's personality and privileges are granted through state concession, it is clear that the freedom of the members to easily create associations without state influence is uncommon under this

[271] ibid.
[272] Supra.
[273] J. Cassidy, *Concise Corporation Law 5th edn,* (The Federation Press 2006) 41.

theory. This fundamental weakness explains why the concession theory has attracted much criticism in terms of private contract as opposed to the contractual theory. For instance, contractual theory affirms the principle of freedom of contract, and since the corporation is formed by a contract between members, the state automatically becomes an outsider with no legitimate influence on the activities or affairs of the firm. In addition, the contractual nature of the contract theory not only describes the origin of the corporation, but it also determines the nature of the relationship between the members and the corporation by legitimising the norms of shareholder supremacy in corporate decision-making.[274] Therefore, since there is no real or distinct corporate entity, it would appear that the rights, interests and duties contained under the contract would be the ones that are observed and enforced.

The concession theory may not seem to strongly advocate private contract as much as contractual theory, but its conception of a corporation as a legal entity created by the state emphasises the concept of limited liability, which is also brought about by state laws, such as the Limited Liability Act 1855. As explained above, the corporate personality doctrine distinguishes between the company's identity and the members, and one of the major advantages stemming from this is limited liability, which essentially limits the liability of shareholders to what they invest in the company.[275] In other words, shareholders are not personally liable for the debts of the company, other than for the amount already invested or for any unpaid shares.[276] Under the concession theory, the limited liability is considered to originate as a privilege conferred by the state as a result of the act of incorporating or forming other type of limited liability business.[277] However, it is argued that legal rules providing for limited liability, far from conferring a privilege, are irrelevant because the parties can contract for limited liability on their own.[278] It is highly doubtful if this view is compatible with the real corporate world because in practice, if the parties have not complied with legal/statutory formalities such as incorporation then a company and its shareholders cannot enjoy

[274] S. Schane 'The Corporation is a Person: The Language of a Legal Fiction' (1987) 61 The Tulane Law Review 563.
[275] Cassidy (2006) 41. See also section 3 of the CA 2006 and Section 21 of the CAMA.
[276] ibid.
[277] L. D. Solomon and K. J. Collins, 'Humanistic Economics: A New Model for the Corporate Social Responsibility Debates' (1987) 12 Journal of Corporation Law 338.
[278] See E. Meiners, J. Mofsky and R. D. Tollison, 'Piercing the Corporate Veil of Limited Liability' (1970) 4 DEL. J. Corp. Law 351.

limited liability. This position is also reflected in the UK and Nigeria, where it is considered that corporate status with limited liability can only be acquired after registration.[279] Thus, without incorporation, parties cannot enter into or enforce limited liability contracts. The benefit and justification of the limited liability is that, it is designed to protect shareholders/investors from colossal cost/risk of doing business, and also, the limited liability attracts capital from investors, which consequently lead to a growth in the public capital market.[280] However, Ireland has argued that limited liability encourages corporate irresponsibility.[281] He noted that 'the no liability nature of shares permit their owners to enjoy income rights without needing to worry about how the dividends are generated, they are not legally responsible for corporate malfeasance, and as such they have little incentive to ensure that the managers act legally or ethically.'[282] There is also the concern that, by shielding shareholders from corporate risk, limited liability transfers such risk to less risk bearers such as unsecured creditors, the society and tort victims.[283] Therefore, it would seem that while the limited liability promoted by the concession theory is fundamental to modern corporations, it might also adversely affect fundamental stakeholders in the company or lead to insufficient monitoring of managers by shareholders.

2.4 Two Factors Affecting the Content of Corporate Governance: The Dispersed and the Concentrated Ownership Structures.

As noted above, corporate governance is not universal or absolute and its content can be influenced or affected by different elements such as economic and social factors depending on the governance regime. In this research two factors are worthy of study due to their relevance and direct influence on the performance of corporation. They are the ownership structure of corporation (i.e. dispersed ownership structure and concentrated ownership structure). The ownership structure is seen

[279] In the UK: see *Salomon v Salomon* (Supra); *Macaura v Northern Assurance Co Ltd* [1925] AC 619. Nigeria: see *Agro Allied Development Entertainment Ltd. v Reefer (2009)* 31 WRN 185 and *Dansa Foods(Nig) Ltd v Isong* (2011) ALL F.W.L.R. 595.
[280] R. Thompson 'Piercing the Corporate Veil: an Empirical Study' (1991) 76 Cornel Law Review 1036.
[281] P. Ireland, ' Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) Cambridge Journal of Economics 9.
[282] ibid.
[283]Thompson (1991) 1036.

as one of the primary dimensions of corporate governance and it is widely determined by the country's level of corporate governance characteristics, such as the development of the capital market, and the nature and sizes of companies.[284] A corporation is either characterised by a dispersed ownership structure, where shareholding is fragmented and the corporation is widely controlled by management, or a concentrated ownership structure where controlled ownership is prevalent and control is normally exercised by controlling shareholders.[285] As will be discussed below, the differences in the ownership structures have two inevitable consequences in corporate governance. Firstly, although dominant shareholders in concentrated firms have the incentive and power to discipline management, this situation can create a new problem where the interest of controlling shareholders and minority shareholders are not aligned. On the other hand, the controlling management in a dispersed ownership structure has the propensity for creating agency problems, as a result of the separation of ownership and control. Either way, both structures of ownership have the tendency to encourage expropriation, either by controlling shareholders or controlling management.

2.4.1 The Dispersed Ownership Structure

It is observed that the ownership structure in a firm has an important influence on the priorities set by the board and in turn such priorities will normally determine the performance of the board of directors within a corporation.[286] In particular, within a dispersed ownership structure, the separation of ownership and control is viewed to favour shareholders by providing for the maximisation of return of profit with little effort on the part of the shareholders. However, as will be illustrated below, this wide ownership dispersion accordingly brings about the well-known agency conflict between a strong management and many dispersed shareholders who are unable or rationally unwilling to participate in the company's management strategy.[287] Therefore, the primary difficulty in

[284] K. A Desender 'The Relationship Between the Ownership Structure and the Role of the Board' [2009] University of Illinois at Urban –Champaign, Centre for International Education and Research in Accounting 2 http://www.business.illinois.edu/Working_Papers/papers/09-0105.pdf> accessed on 26 August 2013.
[285] M. Pagano and A. Roell 'The Choice of Stock Ownership Structure: Agency Costs, Monitoring and Decision Making to Go Public' [1998] 113 Quarterly Journal of Economics 187-225.
[286] Desender (2009).
[287] B. Cheffins 'Corporate Ownership and Control: British Business Transformed' [2011] 12(1) European Business Organisation Law Review 173-175.

publicly held firms lies in closely aligning the personal interests of managers with those of the shareholders and ensuring that the managers do not opportunistically expropriate the shareholders.[288]

In terms of the ownership of corporations, the dispersed ownership structure is normally seen as a characteristic of the outsider-oriented system of corporate governance, which focuses on the interest of outside investors and shareholders of firms. The outsider-system of corporate governance is normally found in countries such as the US and UK, where there is a predominance of large firms and large capital markets.[289] In such systems, corporations are characterised by high a fragmentation of ownership where no single shareholder has sufficient voting powers to effectively control the company or influence corporate decision-making. [290] Accordingly, the shareholders - as the financiers who provide capital for the firm - appoint managers to govern the firm with the aim of maximising the value of their investments. Therefore, a clear separation between ownership (i.e. shareholders) and control (i.e. managers) is fostered, where managerial control is highly predominant. In this regard, it is argued that the dispersion of ownership structure tends to promote the contractual theory, since the separation of ownership and control highlights the agency relationship, which stresses the voluntary and contractual nature of corporations.

This notion of dispersed ownership takes the view that the uniformity of ownership and control is not sufficient for corporate performance; rather, the primary concern of the agent (managers) should be the maximisation of the value of the shareholders' investment, whilst the contractual relations amongst the participants in the firm must convince the shareholder that the managers will not abuse the shareholders' interest. [291] While the above opinion may represent the traditional views of corporation, it is interesting to note that public firms with dispersed ownership structures are mostly affected by external constraints from the state, which one may rightly argue supports an element of concession theory. For instance, due to the opportunistic tendencies of

[288] A. Shleifer and R. Vishny, 'A Survey of Corporate Governance' (1997) 52 Journal of Finance 737.
[289] R.J. Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' (2001) 49 American Journal of Comparative Law 329 -358.
[290] J. Dine and M. Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar 2013) 77.
[291] H. N Butler, 'The Contractual Theory of the Corporation' (1989) 11 George Mason University Law Review 99.

management arising as a result of the separation of ownership and control, external regulations such as company law and market regulations are normally adopted in order to align the interests of management and shareholders.[292] These legal constraints are normally found under a country's company law, which contains legal mechanisms for the regulation of the internal affairs of corporations. For example, in the UK and Nigeria, incorporation is attained by registration under the CA 2006 and CAMA 1990: these pieces of legislations are promoted by the state. Consequently, the state still has a dominant role to play in regulating modern corporations from the outside.

Certainly, the success of publicly held corporation is not only dependent upon the effectiveness of a single business structure, but also on the triumph of external regulations in order to reconcile the contractual relationships within the firm. However, while specialised governance mechanisms/regulation may improve the effectiveness of corporate management, it may also move the company beyond the powers and control of shareholders. In context, this may be beneficial on one hand and disadvantageous on the other. For instance, when viewed from the perspective of an unincorporated business, shareholders may not only be permitted to manage their resources, but also be pressurised and required to partake in business ventures due to the presence of unlimited liability, which in turn may expose all the investors to the liabilities and debt incurred during the course of the business.[293] Consequently, in this circumstance, the alignment of the interests of the investors and management is recognised and whilst there is a clear distinction between management and shareholders, their interests may essentially vary. However, in large corporations, there is a risk that the management may act contrary to the interest of shareholders. Accordingly, in large publicly held corporations, a dispersed ownership structure is more likely to lead to conflict of interest where management may expropriate shareholders wealth. This risk is not a new development.

[292] J. Solomon, *Corporate Governance and Accountability* (2nd edn, John Wiley 2007) 187.
[293] T. Nenova, 'The Value of Corporate Voting Right and Control- A Cross Country Analysis' (2003) 68 Journal of Financial Economics 325-351.

Our understanding of the complexity associated with the dichotomy of management and control is mostly hinged to the work of Berle and Means,[294] which today has become the bedrock and foundation for research on the topic of corporate governance. By using the US as a case study, Berle and Means observed that since public corporations were getting bigger and new shares were being issued to raise capital, shareholding was becoming more dispersed. [295] As a consequence, shareholders were becoming less interested in partaking in the activities/management of the corporation and directors were left with the utmost autonomy to run the company.[296] As a result, the notion that shareholders had ultimate control over management through their shareholding powers and rights was a myth since the board of directors had ultimate control over the agenda and proxies at general meeting and therefore can influence directorial election.

Berle and Means concluded that the separation of ownership, as a result of dispersed ownership structure in modern corporations, has made shareholders powerless and they normally take on the role of mere passive observers with very little control over management.[297] However, it has been argued that by providing managers with mandatory options to acquire shares within the corporation, the agency problem can be reduced.[298] Therefore, a manager who holds substantial shares in the firm is forced to align his/her interest with the rest of the shareholders, as managers directly benefit from their professional efforts and would suffer losses from any potential opportunistic activities.[299]

Additionally, various explanations have been provided to justify the apathy of shareholders to assert direct control over corporations. For instance, it has been observed that due to the involvement of many shareholders in dispersed ownership structures, there is no justifiable reason to expect all shareholders to possess the necessary business skills, experience or commitment to

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[294] Berle and Means (1932).
[295] ibid.
[296] ibid.
[297] ibid.
[298] J.C. Coffee, ‘Convergence and Its Critics: What are the Preconditions to the Separation of Ownership and Control?’ (2000) Columbia Law and Economics Working Paper No. 179.
[299] ibid.

management, as opposed to the expertise expected of the directors.[300] Moreover, shareholders are predominantly portfolio investors whose focus is on the overall market and share price rather than on the management process of companies. In addition, the complexity and burdensome formalities associated with shareholders' referendums have been considered as another factor that may impact on shareholder activism and involvement in corporate management. Consequently, it is not unreasonable to see why directors have been given de facto control over large public corporations.

Questions have been raised as to the extent to which dispersed shareholders should be regarded as having full ownership rights. In response, it has become the accepted norm amongst countries like the UK and US to concede that while the separation of ownership and control may give rise to a divergence of interest between shareholders and management in large public companies, the objective of corporate governance must be to ensure the accountability of management towards shareholders or the alignment of the interest of shareholders and management.[301] Therefore, the dominant view of these countries is to acknowledge shareholder value as the proper objective of management and the shareholder-management relationship as a principal-agent one.[302] In contrast, one may argue from a strictly legal perspective that the dominant view of shareholders' ownership/supremacy outlined above may have been somewhat misconstrued, since after incorporation, shareholders lose actual ownership of their contributions, which are normally owned by the company as a separate entity; rather what they own instead is simply their shares.[303]

2.4.2. The Concentrated Ownership Structure

The traditional interpretation of the Berle and Means' theory of company structure is that the 'management dominated corporation', which is a result of the separation of ownership and control, has been greatly attributed to the dispersed shareholding pattern amongst corporations, which in turn leads to shareholders' apathy and agency problems as demonstrated above. It must be noted however

[300] J. J. McCall, 'Employees Voice in Corporate Governance: A Defense of Strong Participation Rights' (2001) 11 Business Ethics Quarterly 195-215.
[301] P. Davies and S. Worthington, *Gower & Davies' Principles of Modern Company Law*, (9th edn, Sweet & Maxwell 2012) 291-292.
[302] Jensen and Meckling (1976) 305-360.
[303] K.J. Hopt 'Comparative Corporate Governance: The State of the Art and International Regulation' [2011] 59 AJCL 1-73.

that, such a shareholding pattern is largely associated with western countries such as the UK and US, and not every shareholding pattern is dispersed.[304] Therefore, in contrast to dispersed ownership, concentrated ownership is common in countries where public security markets are less developed and publicly traded corporations offer their shares to fewer individuals.[305] Certain scholars have even noted that the concentrated ownership structure in some countries is also attributed to the lack of effective legal protection afforded to minority shareholders.[306]Therefore, in order to align the shareholders' interests, controlling shareholders use their large shareholdings to influence management and possibly partake in management. This type of ownership pattern is said to promote the insider system of governance.[307] This type of governance system is predominant in continental Europe, where there is a stronger correlation between the control and ownership, whereby corporations are normally characterised by concentrated ownership and controlling shareholders.[308]

In fact, recent studies and empirical work carried out in countries like Germany have revealed that the shares of their public corporations tend to be concentrated in the hands of a few groups of shareholders.[309] The study reveals that in 85% of German public companies, there is at least one large shareholder who owns more than 25% of the shares in the company.[310] The corporate governance system in these countries adopts a monolithic scheme where control of a public corporation is normally placed in the hands of single individuals or groups. In effect, it has been observed that the concentrated ownerships structure is suitable in aligning and reconciling the interest of managers and shareholders, as well as improving the protection of investors, since the better protection of shareholders' rights that it promotes reduces the need for the emergence of a large

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[304] B. Holmstron and S. N Kaplan 'Corporate Governance and Nerger Activity in the United State: Making Sense of the 1980s and 1990s' [2001] 15 Journal of Economics Perspective 121-144.
[305] B.R. Cheffins, 'Putting Britain on the Role Map: The Emergence of the Berle-Means Corporation in the United Kingdom' in J.A. McCahery et al. (eds) *Corporate Governance Regimes: Convergence and Diversity* Oxford University Press 2002).
[306] K. Gugler, and D.C. Mueller and B.B. Yurtoglu, 'Corporate Governance and Globalization' (2004) 20(1) Oxford Review of Economic Policy 129-156.
[307]ibid.

[308] ibid.
[309] S. Djankov et al., 'The Law and Economics of Self-Dealing' (2008) 88(3) Journal of Financial Economics 430-465.
[310] ibid .

investor to control management.[311] However, this type of ownership structure can affect the corporation in a variety of ways. It may be useful in monitoring the management and improvement of performance; however, ownership concentration may also permit the majority shareholders who are in control to expropriate the minority shareholders who do not have control over the corporation. Since the controlling shareholders own most of the shares, they are granted with sufficient voting powers to influence the management of public companies; in effect therefore, the managers of public companies within a concentrated ownership system lack the degree of management powers/control available to directors/managers in societies with dispersed ownership structure. The problem of excessive management control over the company is hardly an issue in concentrated ownership systems; rather the concern is instead placed on how to protect the interests of minority shareholders against possible oppression by the controlling shareholders. [312] It would appear that one of the main distinguishing factors between the two types of ownership structures outlined here is that, the dispersed structure grants corporate control to management, meanwhile, the concentrated structure grants control to the majority shareholders. However, as highlighted above, both structures are somewhat similar in the sense that they both have the potential to create conflict of interest in the company. The shareholder-dominated companies in concentrated structures could lead to oppression and expropriation of minority shareholders by controlling shareholders. On the other hand, management-dominated companies in dispersed structure could lead to expropriation of shareholders by management. Therefore, the challenge for lawmakers in both systems would be to ensure that adequate regulations are in place to align the interests of the outside shareholders with those in control of the companies.

[311] R. La Porta and F. Lopez-de-Silanes and A. Shleifer, 'A Corporate Ownership around the World' (1999) 54(2) Journal of Finance 471-517.
[312] M. V. Slyke, 'Agents or Stewards: Using Theory to Understand the Government Non-Profit Social Service Contracting Relationship' (2006) 17 Journal of Public Administration Research and Theory 157-187.

2.5 Assessing the Models of Corporate Governance: The Anglo-American Model Versus the German Model – Fortes and Flaws

The historical evolution of the different regional corporate governance systems has proved very different in terms of their orientations and outcomes, with the sources of funding and monitoring of companies adhering to diverse forms of capitalism, economic structures and values found in different countries.[313] For many decades, the question of which pattern of corporate governance is more suitable has been vigorously debated on the premise that the 'one-best-way' strategy proposed by the convergence thesis[314] is incompatible with the diversity of corporate structures around the world. For instance, in Asia and some parts of continental Europe, closely held public corporations have survived, meanwhile in other countries such as the UK/US, management dominated public firms with dispersed ownership structures have thrived and are still intact.[315] These distinct historical trajectories of companies and systems justify the assumption for plurality of models, each adhering to local circumstance, supported by various social norms, regulation enabling balanced economic development.[316] From this, two parallel models of corporate governance have been identified by mainstream literatures: the Anglo-American model and the German model, which differ markedly in terms of their configurations, objectives and economic ramifications. The former which is predominant in the UK and US[317] is characterised by a dispersed ownership of public companies; institutional investors (outside shareholders); a well-developed legal framework defining the rights and responsibility of three key actors, namely management, directors and shareholder; equity financing is a common method of raising capital and the market for corporate control is the ultimate disciplining mechanism.[318]

In sharp contrast, the German model has a concentrated ownership structure of public companies, characterised by controlling shareholders; the source of finance or capital comes from the

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[313] Akinpelu (2011) 67.
[314] See Hansmann and Kraakman (2001).
[315] Akinpelu (2011) 67.
[316] T. Clarke, 'A Critique of the Anglo-American Model of Corporate Governance' (2009) 5 Comparative Research in Law and Political Economy 2.
[317] As will be examined later, Nigeria also adheres to the Anglo-American model.
[318] Akinpelu (2011) 68; See also J. Coffee, 'Convergence and its Critics: What are the Preconditions to the Separation of Ownership from Control?' in 'J.A McCahery et al. (eds) *Corporate Governance Regimes: Governance and Diversity* (Oxford University Press, 2002).

inside of the company either in the form of shareholders' contributions or from banks who also have a large stake in the company.[319] This closed form of capital creation under the German model means that the German stock market capitalisation tends to be smaller in comparison with the UK and the US where there is mass ownership. For instance, the New York Stock Exchange ("NYSE") is the largest in the world with a market capitalisation of $19.2 trillion whilst the London Stock Exchange ("LSE") is the third largest with a market capitalisation of $6.1 trillion.[320] Germany is trailing behind as the tenth largest with a smaller market capitalisation of $1.7 trillion.[321] It is noted that while public companies in the UK/US resort to attract capital from the stock market and attract more shareholders and in turn expand their securities markets, the German public companies normally look to acquire finance from inside, where the change in shareholders and control is not so radical.[322] In this regard, it is noted that corporate securities in Germany are insufficiently developed as compared to the UK and the US.[323] However, the US/UK public companies potentially render themselves wide open to new and constantly changing shareholders, simultaneously making the development of long-term relationships difficult as opposed to Germany where institutional shareholders maintain their positions and usually aim to foster and preserve long-term relationships with the company. Consequently, the UK/US Anglo-American model is considered to be unsuitable for long-term planning although, it provides more flexibility.[324] These factors are simply indicative of the German conservative way of doing business (i.e. seeking capital 'inside'), which differs from the US/UK's more liberal approach.

The Anglo-American model remains wedded to financial liberalisation,[325] with increasing reliance on large stock market for corporate finance. In this regard, the dominant view in the UK/US is that the company is completely a capitalist concern and it owes its origin to the funds subscribed

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[319] Dine and Koutsias (2013) 242.
[320] World Atlas, 'The Biggest Stock Exchanges in the World' (2016) <http://www.worldatlas.com/articles/biggest-stock-exchanges-in-the-world.html> Accessed December 10th 2016.
[321] ibid
[322] Dine and Koutsias (2013) 242.
[323] T. Bucki, A. Shahrimi, S. Winter, 'Executive Stock Options in Germany: The Diffusion or Translation of US-Style Corporate Governance?' (2004) 8(2) Journal of Management and Governance 173.
[324] Dine and Koutsias (2013) 243-244.
[325] S. Soederberg, *The Politics of New International Financial Architecture: Reimposing Neoliberal Domination in the Global South* (Zed Books Ltd, 2004)

by the shareholders, the company is therefore founded on and governed by the relationship between owners and the managers seeking to optimise benefits for the former.[326] This idea resonates with the neo-liberal doctrine, which essentially favours free-market capitalism, free contractual market and advocates shareholders' supremacy. This ideology has been criticised on the premise that it creates inequality, and particularly within the corporate context, non-shareholders' constituencies are usually not well represented or unjustifiably disadvantaged.[327] Notably, powerful organisations such as the OECD and the World Bank ("WB") are strong supporters of the UK/US neo-liberal capitalism. They have devised neo-liberal rules and principles strongly overwhelming the societies who wish to adhere to a stakeholder-centric model of corporate governance.[328] In this respect, Dine and Koutsias showcased how the template of the WB and the principles of the OECD propagate this neo-liberal paradigm and facilitate corporate inequality. They noted that the first section of the WB template and second section of the OECD principles, which are titled: 'ownership and control' and 'the rights of shareholders and key ownership functions' respectively, are significantly tilted against stakeholders other than shareholders; the sections advocate the idea that shareholders are the owners of the company, and as such, are entitled to special privileges and rights which other stakeholders lack.[329] This is evident by the fact that principles II of both the previous 2004 version of the OECD principles and the newly revised 2015 edition specify unique rights, equitable treatments and key ownership functions, which cannot normally be exercised or enjoyed by non-shareholders constituencies. The special treatment given to shareholders also explains why the WB template and the OECD principles tend to segregate the rights, interests and roles of non-shareholders constituencies from that of shareholders. For example, question 277 of Chapter V of the WB template provides: 'Do any law provide rights to stakeholders (employees, trade union, creditors, customers, suppliers consumer and the community) to have input in the corporate governance?'[330] Likewise, the G20/OECD's principles provide that: 'Corporate governance framework should recognise the rights of stakeholders

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326 Akinpelu (2011) 68.
327 Dine and Koutsias (2013) 1, 12, 22.
328 ibid 1.
329 ibid 12.
330 <www.worldbank.org/ifa/CG_template.pdf> .

established by law,'[331] with stakeholders broadly classified as creditors, suppliers, consumers, and the community. These sections clearly separate shareholders (the alleged owners) from the rest of the stakeholders, indicating that shareholders are entitled to special and preferential treatments in terms of their ownership rights, protection and control in the company. The problem with this however is that not only does it weaken the role of stakeholders in corporate governance, but it also appears to indicate that non-shareholders constituencies are less important in the company when compared to shareholders. As Dine and Koutsias rightly said:

> The division between stakeholders and shareholder are very glaring, and the template clearly separates the sheep from the goats. Shareholders are a privileged class, not part of the company's community. They are 'owners' and the rest of the stakeholders of the enterprise are not part of the polity.[332]

In line with Dine and Koutsias' above observations, Clarke also argues that the form of capitalism propagated under the Anglo-American model further creates a larger economic problem; discrimination for the wider society, whereby the appropriation of the vast wealth of corporations by the CEOs impact upon the relations with other stakeholders and displaces directors' social objectives.[333] He noted that 'CEOs used their control of boards not only to prevent any challenge to their position, but to aggregate to themselves an increasing share of the wealth generated by the company, both in terms of rapidly inflating salaries, and massively growing stock options.'[334] It said that similar practices were considered to have also contributed to some of the collapses and scandals of the US and the UK's large companies such as Enron, WorldCom, and Barings bank.[335] It would therefore seem that another problem posed by the neo-liberal Anglo-American model is that it also encourages opportunistic tendencies by directors and management, and promotes selfishness and arguably utilitarianism.[336]

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[331] See principle IV of the G20/OECD (2015).
[332] Dine and Koutsias (2013) 13.
[333] Clarke (2009) 4.
[334] ibid.
[335] See Akinpelu (2011) 122.
[336] S. Ffokes-Goldson, (ed), *Commonwealth Caribbean Corporate Governance'* (Routledge, 2016) 22.

The German model in contrast is built upon the foundation of social institution, fostering relationships and interactions between the corporation, its shareholders and stakeholders.[337] This is evident by the two-tier board structure of German companies, which comprises of a separate management board and a supervisory board in which stakeholders' representatives are allowed to sit on the latter board. It is noted in this regard that there is an extra layer of monitoring and control placed on management.[338] This is an essential feature in which the Anglo-American model currently lacks. In the UK/US, there is simply a one-tier board structure comprising of management who run the company and non-executive directors who occupy advisory and supervisory role.[339] Hence, while decision-making by management is under the scrutiny of owners in both models (although less so in the UK/US), other stakeholders' participation is considered to further guarantee the existence of strict controls upon management that the respective UK/US directors will rarely experience. Insufficient monitoring and supervision of management have thus been highlighted as drawbacks of the Anglo-American model, with the conflict of interest between management and shareholders as a potential side effect.[340] It is therefore not surprising to see why the alignment of the interests of management and shareholders, and the shareholders' supremacy doctrine is strongly advocated by the company law of countries with the Anglo-American model. However, this shareholder-centric model is known to also create the problem of short-termism, whereby the directors who are under enormous pressure to maximise shareholders' value sometimes take unwarranted risks, which could ultimately lead to a demise of the company including loss of investment by shareholders and loss of jobs by the employees.[341] This problem was highlighted in the Enron scandal where the former CEO, Jeffrey Skilling applied risky and unauthorised accounting methods to inflate share prices so as to attract more investments and to increase the value of the company.[342] In contrast, the German model's closely held corporate structure is not without problems. Given that the system is characterised by a concentrated ownership, and large shareholders maintain their positions to exercise control, the

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[337] See Grundei and Talaulicar (2002) 1-27.
[338] Dine and Koutsias (2013) 243.
[339] Ibid. 148-149.
[340] See Dine and Koutsias (2013) 243.
[341] A. Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge, 2013) 232-233.
[342] Akinpelu(2011) 122-123.

participation of minority shareholders are usually muffled as their interests are not sufficiently protected. Hence, it is noted that not only do minority shareholders face potential expropriation from majority shareholders in German public corporations, but also the protection offered to minority shareholders is usually weak.[343]

From the above, it is clear that both models have their weaknesses and strengths. Therefore, it cannot be said that one model is superior to the other. This has however not stopped academics from asking the question, which model ensures overall economic growth and efficiency? To consider this question we must first briefly define growth and efficiency, which unfortunately lack universal definitions. Surprisingly, even the OECD, which referred to efficiency and growth in their governance principles failed to define them. Essentially, growth has been defined as an increase in value and services in a country, meanwhile efficiency means optimal allocation of resources to best serve individual and entities while minimising waste.[344] Given that both models have diverging objectives and structures, it would appear that what amounts to growth and efficiency would somewhat depend on the country and the model they adopted. For instance, Soederberg noted that the most marketised version of good corporate governance is the Anglo-American model, which accords primacy to shareholder activism and financial market, and has been heralded as one of the key pillars of a vibrant and a well-functioning economy.[345] She further noted that there is a neoclassical assumption under the Anglo-American model that financial liberalisation like trade liberalisation leads to economic growth and stability.[346] This assumption appears to coincide with Kaldor-Hicks'[347] efficiency doctrine which accepts as efficient 'a policy which results in sufficient benefit for those who gain such that potentially they can compensate fully all the losers and still remain better off, thus, leading to overall growth.'[348] The problem with this theory is that it assumes that those who gain (e.g. shareholders) would ultimately distribute some of their wealth to the

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[343] Bucki, Shahmiri and Winters, (2004) 173.
[344] S. Dercon, 'Social Protection, Efficiency and Growth' (2011) Centre for the Study if African Economics 1.
[345] S. Soederberg, *Corporate Power and Ownership in Contemporary Capitalism: The Politics of Resistance and Domination* (Routledge 2010) 4.
[346] Soederberg (2004) 3.
[347] See N. Kaldor 'Welfare Propositions in Economics and Interpersonal Comparisons of Utility' (1939) 49 The Economic Journal 549 and J. Hicks 'The Foundations of Welfare Economics' (1939) 49 The Economic Journal 696.
[348] K. Greenfield 'From Right to Regulations' in F. Macmillan Patfield (ed) *Perspective on Company Law*: Vol 2 (Kluwer, 1997) 10; See also Dine and Koutsias (2013) 25.

disadvantaged when clearly there is no reason for them to do so. It is rather noted that under this doctrine, the loser who is already disadvantaged will become more deprived and as such lead to economic inequality and inefficiency.[349]

Clearly, the Anglo-American model, which is hinged upon the contractual theory, fits well into Kaldor-Hicks efficient doctrine. This is because growth and efficiency would mostly be measured in terms of positive financial returns, profit for shareholders and growth of investment in the company. Adversely, under this context, there is little consideration on the risk borne by the deprived or the inequality created for them. In contrast, the German model's measurement of growth and efficiency would mostly adopt a more socially oriented approach by focusing on the overall wellbeing of the stakeholders (e.g. in a company) and the society. Social protection and welfare of society is considered as an effective way of reducing poverty, inequality and ensuring growth.[350] However, it is considered that this may lead to excessive cost, thereby resulting in low profitability and financial returns.[351] Moreover, it is noted that there has been lower economic growth and higher unemployment in European countries with German model (except Germany) as compared to the Anglo-American countries since the mid-1990s.[352] This somewhat undermines the German social model as a means to promote overall economic growth and efficiency. However, the German model seems more socially desirable, as it promotes fairness and equality with better stakeholders' protection within the corporate setting.

2.6 Contextual Evaluation: A Brief Overview of the Nigerian Model of Corporate Governance, its Configuration and Rationale

Nigeria, as a common law country and a former colony of Britain is greatly influenced by the UK's Anglo-American model of corporate governance. Consequently, Nigeria conforms to the UK's

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[349] Dine and Koutsais (2013) 25.
[350] See S. Dercon, (2011) 1.
[351] Bucki, Shahmiri and Winters, (2004) 173.
[352] See Clarke (2009) 1.

shareholder-centric model where emphasis is placed on protecting the interests of shareholders.[353] This choice may also be on the one hand linked to the state's desire and efforts to attract foreign investments and capital from western countries traditionally accustomed to the Anglo-American model and on the other hand, the need to tackle the agency problem, which is considered to plague several Nigerian public companies with dispersed ownership structures.[354] As will be discussed later in chapter 3, the ownership structures of Nigerian public firms are currently dispersed. This is mostly attributed to the government's actions to privatise commerce and businesses in Nigeria in the late 1980s. During this time, the Nigerian government embarked on a large-scale indigenisation programme,[355] which significantly reduced foreign and state corporate ownership, and paved the way for private equity holdings and the diversification of investors based in Nigeria.[356] This was an attempt to enhance economic, political independence and indigenous ownership; however, this singular act facilitated a fragmentation of ownership in the vast majority of public companies in Nigeria, where management-domination became prevalent.[357] Consequently, a tilt towards a shareholder-centric model of corporate governance was necessary in order to protect shareholders' rights and most especially to deter the management who controlled the firms from expropriating the wealth of investors/shareholders.

The conformance to the UK's system of corporate governance, as part of Nigeria's colonial heritage, is particularly evident in respect to its company law. During the colonial era, the British established business entities to suit their political interests and to protect their investments by laying the foundation of company law in Nigeria.[358] Hence, the early companies in Nigeria were British based and due to the colonial statutes enacted between 1874[359] and 1912,[360] the law applicable to

[353] Akinpelu (2011) 202.
[354] V. Nmehielle, and E. Nwauche, 'External-Internal Standards in Corporate Governance in Nigeria' (2004) The George Washington University Law School Public Law and Legal Theory Working Paper,115, 1-50.
[355] Privatisation was formally introduced through the Privatisation and Commercialisation Act 1988.
[356] E.N.M. Okike, 'Corporate governance in Nigeria: The Status Quo' Corporate Governance: [2007] An International Review 173-193.
[357] F. Ajogwu, 'Corporate Governance in Nigeria: Law & Practice' (2007) Centre for Commercial Law Development, Nigeria 22.
[358] M.O. Sofowora, *Modern Nigerian Company Law* (2nd edn, Soft Associations, Lagos, 2002) 29-30.
[359] Supreme Court Ordinance 1874.
[360] Companies Ordinance Act 1912.

companies in Nigeria derived their origin from English common law and the principles of equity.[361] Consequently, a mismatch of the entrenched English corporate governance model is evident within the Nigerian economy and the legal framework of corporate governance. As will be examined in the following chapter, it is evident that despite the reforms made to company laws in Nigeria, the legal system of corporate governance in Nigeria remains fashioned along the lines of the English system.[362] A rationale for this fact is that, it has been done in this manner in order to maintain market competitiveness and attract foreign investment from developed countries like the UK, by providing a legal framework that is similar to theirs. [363]

A thorough review of CAMA 1990 also reveals that the corporate governance provisions, which specifically relate to directors' duties, disclosure, minority shareholders' protection and executive compensation have historically been influenced by English laws.[364] Consequently, similar to the system found in the UK, shareholders - albeit in theory - enjoy the same degree of rights in Nigeria and thus emphasis is placed on protecting their rights and interests.[365] However, due to political and socio-economic peculiarities in Nigeria, the Nigerian corporate governance system has traditionally been slow in evolving. For instance, corruption in Nigeria is considered as an impediment to the overall development and growth of the country including, its corporate sector. [366] In addition, the country is also characterised by poor leadership and political instability. [367] Since this thesis focuses on the regulation of corporate governance, it is not the agenda of this study to address these issues. Further studies and reform agendas in Nigeria are however necessary in order to tackle these socio-economic problems.

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[361] For more detail on the development of company law in Nigeria see A. Emiola, *Corporate Law,* (Emiola Publisher Ltd, Ogbosomo, Nigeria 2005) 11.
[362] B.J. Inyang, 'Nurturing Corporate Governance System: The Emerging Trends in Nigeria' [2009] 4 Journal of Business Systems, Governance and Ethics 1.
[363] U. Aniemena 'Good Corporate Governance in the Banking System' (November 2005): paper delivered at the 3rd Pan African Forum on Corporate Governance 8.
[364] E. Adegbite 'Corporate Governance Regulation in Nigeria' [2012] 12 International Journal of Business Society 257 – 276.
[365] ibid.
[366] I. Wilson, 'Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation' (2006) 12 Economic Indicators Nigerian Economic Summit Group 1-4.
[367] E. N. M. Okike 'Management of Crisis: The Response of the Accounting Profession in Nigeria to the Challenge to its Legitimacy' (2004) 17 Accounting Auditing and Accountability Journal 705–730.

The African Development Bank ("AfDB") earlier devised ways to tackle some of the challenges facing the Nigerian corporate governance system. The AfDB is highly influential and prominent in corporate governance development and monitoring in Africa, including Nigeria.[368] In an attempt to improve the corporate governance framework in Africa, the AfDB suggested that regulatory measures and reforms in the region should also focus on and promote the stakeholder brand of corporate governance, by highlighting the respective rights and responsibilities of key corporate stakeholders such as employees and by calling for full partnership with actors operating in the field.[369] The research undertaken by AfDB also reveals that corporate governance problems in Africa stem from poor political and economic governance, such as corruption, institutional instability, lack of accountability and transparency, and weak rule of law.[370] These findings mean that dealing with the challenges in Africa, and arguably in Nigeria might require the corporate governance regime to mirror the wider environment by creating value for shareholders, not from a financial standpoint alone, but also from an environmental and societal perspective.

Given that Nigeria adopts the Anglo-American model, the abovementioned problems highlighted in the UK/US are said to also affect Nigeria. For instance, among other things, there is the fact that management is not sufficiently monitored by shareholders in Nigerian public companies due to their dispersed ownership structures; there is also the problem of short-termism which as explained above forces management to take risky decisions to satisfy shareholders' financial expectations at the expense of the company's long term interest; opportunistic tendencies by management is also very probable.[371] In contrast, it is noted that the wider participation of stakeholders in German companies has been useful in relatively lowering the level of collapses in big corporations and preventing market failures.[372] The key specific feature of the German corporate

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[368] E. Adegbite and K. Amaeshi, 'Multiple Influences on Corporate Governance In Sub-Sahara Africa: Actors, Strategies and Implications' (2010) Centre for the Study of Globalisation and Regionalisation - Working Paper 21.
[369] ibid 22-23.
[370] ibid.
[371] A. Ogunfolu 'Corporate Governance in Nigeria' (2008) The International Journal of Law, Faculty of Law, Obafemi Awolowo University.
[372] D. Wojcik, 'Change in the German Model of Corporate Governance: Evidence from Blockholdings 1997-2001' (2001),

governance system, as previously illustrated, is its strong labour co-determination, which allows employees to influence decision-making and to participate in the supervision of the company's management. This approach is usually considered ideal for internal control because it offers an extra layer of monitoring and control on management by expanding the oversight mechanisms of corporate governance.

Understandably, the Nigerian Anglo-American style of governance adheres to its distinct circumstances, which resembles the UK/US. As argued in the previous section, no model is perfect as they all have their individual weaknesses and strengths. However, the German's wider participation of stakeholders could provide greater level of monitoring and accountability on management: something, which Nigeria and most Anglo-American model countries seem to lack. Advocates of the shareholder-centric model have however argued that in pursuance of a wider, more inclusive scope, shareholders' immediate interests may be disregarded, thereby defeating the traditional essence and objective of corporation, which is to maximise shareholders' wealth.[373] However, there is no evidence to support the notion that the inclusion of non-shareholder constituencies in company law in countries falling within both models of corporate governance, has led to the disregard of the interests of shareholders. Certainly, the stakeholders' doctrine does not theorise that a company should sacrifice the interests of its shareholders for the benefit of other stakeholders; rather, the interests of stakeholders should also be promoted and protected by their mutual status as stakeholders of the company.[374] Moreover, it would not be unreasonable if Nigeria and other Anglo-American countries (e.g. UK/US) adopt more stakeholder friendly mechanisms as a means to foster greater accountability and monitoring of management. In this thesis, the author proposes in chapter 4 a stronger stakeholders' protection regime under the CAMA, and later considers in chapter 6 ways in which to foster stakeholders' participation in Nigeria.

Working Paper.

[373] A. Gamble and G. Kelly, G. 'Shareholder Value and the Stakeholder Debate in the UK' (2001) 9 Corporate Governance: An International Review 110-17.
[374] J. A. McCahery et al., *Corporate Governance Regimes Convergence and Diversity* (Oxford University Press 2006) 1-4.

2.7 Conclusion

In this chapter, the definitions, theories and models of corporate governance were critically analysed in order to shed more light on its exact nature, parameters, concept and development. It was shown that the lack of a universal definition of corporate governance and its various interpretations by different scholars has made it difficult to identify a suitable definition. This has also led to the adoption of narrow definitions, which focus mainly on the protection of interests of shareholders, and broader definitions, which suggest that governance should aim to protect the interests of all stakeholders. In line with the broad definitions, the author posited that corporate governance should foster better relationships between key constituencies such as shareholders, board of directors and other stakeholders, and ensure their involvement in the company. As was shown above, although the OECD definition highlights a wide range of actors (e.g. shareholders, board of directors and stakeholders) as key actors of corporate governance, the approaches under its principles do not seem to provide adequate activism of non-shareholders constituencies within the company, other than employees.

The chapter also revealed that corporate governance as an interdisciplinary topic is driven by various theories. These theories were thoroughly examined in order to further appreciate the scope of corporate governance and to interpret the structural parameters of corporation. In so doing, three main theories were examined namely, the contractual theory, stakeholder theory and concession theory. It was demonstrated that the contractual theory, which articulates the principal-agency theory, where ownership and control of firm are separated, has been at the forefront of corporate governance since the seminal work of Berle and Means in 1932. [375] The theory treats shareholders as the principals who delegate duties to the agents - who are managers - to run the company. However, as a result of the autonomy of the managers, conflicts of interest normally exist between the principal and the agent, where managers sometimes expropriate shareholders' wealth for their own interest - this is what is described as the agency problem. Proponents of contractual theory have formulated solutions to this problem, such as the oversight and control of management performance and the

[375] See Berle and Means (1932).

creation of proper remuneration schemes for executives, but such solutions inevitably lead to significant cost on the part of shareholders and investors. Particularly, the theory has been criticised for being too myopic as it is solely concerned with the relationship between the managers and the shareholders, hence ignoring other corporate stakeholders. [376]

The stakeholder theory on the other hand extends its array to accommodate all stakeholders in the company and emphasises that corporations must not only discharge their duties towards its shareholders, but also to other interested parties such as employees, suppliers, creditors and society as a whole. The principal problem relating to such a theory is that it overstretches the ambit of corporate accountability beyond the traditional scope, thereby distracting the firm from achieving its primary objective: the maximisation of shareholders value. In addition, it is argued that such a theory is impractical, since it does not really provide a precise formula for specifying the exact individuals who may fall under the broad definition of stakeholders.

The analysis of the concession theory demonstrated that, under this theory, the nature and origin of a corporation and its corporate governance regime is prescribed by the state. Accordingly, it articulates that the relationship between various constituencies in the firm must be prescribed and regulated by law. The major criticism raised against the theory is that it tends to hinder private contracting and impedes freedom of contract, a feature that is highly promoted by contractual theory as the cornerstone of modern corporations. Nonetheless, it is accepted that regardless of the type of theory, the structure of corporate governance is fundamentally influenced and shaped by rules and regulation promulgated by the state.

The analysis of the models of corporate governance shows that the Anglo-American model and the German model both present distinct fortes and shortcomings in terms of ensuring managerial accountability and monitoring, capital generation, equality, efficiency, growth and many other factors. While the former is based upon the neoliberal capitalism, which emphasises free-market, the

[376] See Donaldson (2008) 299-311.

latter is built upon social foundation, fostering relationships between the corporation, its stakeholders and the society. The implication of this is that the Anglo-American model promotes shareholder supremacy, and pronounces the interests of shareholders as paramount, while the German model adopts a stakeholder-centric model by granting parties other than shareholders a formal role within the internal structure of corporations. In this regard, the Anglo-American model is criticised for fostering inequality in the company and to some degree within the wider society, meanwhile the inclusion of a wider range of actors under the German model, while fostering greater accountability, is considered to slow down decision-making processes and also lead to low profitability. The author argues in this light that the plurality of the models is justified because they each adhere to their various local circumstances, which are shaped by diverse social norms, regulation and economic factors. Against this backdrop, it is established that the Nigerian Anglo-American style model, which also emphasises shareholders' supremacy can be justified on the basis of the separation of ownership and control of public companies and the potential conflict of interest between management and shareholders that is said to plague several Nigerian firms. However, it is suggested that in order to ensure greater level of monitoring and supervision on management, Nigeria and other Anglo-American model countries such as the UK/US could adopt a more stakeholder-oriented approach.

Chapter 3: The State of Corporate Governance in Nigeria: Historical, Social and Economic Background

3.1 Introduction

The previous chapter, which examined the theoretical and conceptual framework of corporate governance, has been unequivocal in demonstrating that corporate governance systems differ from jurisdiction to jurisdiction and its regulatory structure is influenced by the country's economic, social and historical background. Accordingly, this chapter examines the unique state of Nigeria's corporate governance system from a historical, social and economic perspective. This examination is necessary in order to appreciate the distinct regulatory framework, institutions and mechanisms in Nigeria; it is also necessary to understand the peculiar challenges and obstacles Nigeria faces as a developing country and how these peculiarities affect the implementation of an effective governance system in the country.

In regulating corporations, Nigeria relies both on legal and non-legal mechanisms (a combination of voluntary and non-voluntary mechanisms) aimed at protecting the interest of investors, shareholders and other stakeholders.[377] In order to ensure proper disclosure, transparency and accountability of public corporations, Nigeria has a legal framework derived from English company law and common law, which deals with the protection of shareholders.[378] The rationale for this is because Nigeria, which was a colony of Britain from the period of 1866 to 1960, has historically been influenced by the English legal system.[379] According to Dine and Koutsias, the UK is a jurisdiction with vast legal principles, norms and regulations, whose legislative standards are widely adopted by several nations around the world, particularly countries that share some link with its former colonial power.[380] Therefore, it is no surprise that the regulatory framework of corporate

[377] Akinpelu, (2011) 204.
[378] Akinpelu articulated that historically, during the colonial era in Nigeria, British companies subjected to British laws dominated the greater part of the Nigerian economy and even now provisions of the company legislations in Nigeria have their roots in the English common law system. Thus, a greater part of the Nigerian legal framework of corporate governance is still influenced by the English legal system. See Akinpelu (2011) 203-204.
[379] ibid, 203.
[380] Dine and Koutsias (2013) 155.

institutions in Nigeria shares similarities with the UK's company law and regulations.[381]

As will be discussed later in this chapter, during the late 1860s a significant number of companies in Nigeria were British companies and these corporations were subjected to British legislation such as the Companies Act 1862.[382] The Act contained specific corporate governance provisions regarding members' voting rights,[383] the powers of directors[384] and the disqualification of directors.[385] At that time, many Nigerians were less inclined to play a role in the participation and operation of public firms, since the country was underdeveloped and most commercial trades were carried out in the form of sole proprietorships and family-owned businesses.[386] As will be discussed, it was not possible to incorporate companies locally until the enactment of the Companies Ordinance Act 1912.

It has been noted that prior to Nigeria's political independence in 1960, domestic businesses were not subjected to too much regulation by company law or legislation.[387] However, following the enactment of corporate statutes such as the Companies Act 1968 ("CA 1968") this was no longer the case. The CA 1968 was replaced by the CAMA 1990 and is now complemented by the 2011 SEC Code. Particularly, the increase in regulation of public corporations in Nigeria is said to have emerged with the need to protect shareholders and investors following the crisis in the Nigerian banking sector in 1990, the collapse of corporate giants such as Lever Brothers Nigeria Plc in 1997[388]and the demise of Enron and WorldCom[389] in other developed economies. These events ultimately triggered the development of the Code of Corporate Governance in 2003[390] and later the 2011 SEC Code, with the particular aim of modernising the corporate governance system in Nigeria

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381 O. W Duru, 'Review of Some Articles on Company Law in Nigeria' [2011] available online at SSRN: <http://ssrn.com/abstract=2137971> accessed 28 December 2014.
382 Akinpelu (2011) 204.
383 See sections 29- 52 of the Companies Act 1862.
384 See sections 55-56 of the Companies Act 1862.
385 See section 57 of the Companies Act 1862.
386 A. Sanda and A Mikailu and T Garba, 'Corporate governance Mechanisms and Firm Financial Performance in Nigeria' (2005) African Economic Research Consortium Research Paper 149: 1-47.
387 E.N.M. Okike, 'Corporate Governance in Nigeria: The Status Quo' (2007) 15(2) Corporate Governance: An International Review 173-193.
388 Akinpelu (2011) 342.
389 For more details, see Cato Handbook for Congress: Enron, Worldcom and Other Disasters, Policy Recommendation for the 108th, [2003] Cato institute, Washington DC 215-221 available online at <http://object.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2003/9/hb108-22.pdf> accessed 22August 2013.
390 The 2003 SEC Code is the predecessor to the 2011 SEC Code.

and to also prevent similar corporate collapses. In view of this, it is noted that corporate governance in developing countries, and especially in Nigeria, is becoming an increasingly important subject with opinion and discourses stemming from academics, practitioners and regulators.[391] However, whilst there have been major developments on the topic in developed countries, the literature in Nigeria is still considered to be relatively scarce.[392]

In addition to the issue of relatively limited literature, viable institutional and regulatory mechanisms for corporate governance are still evolving in Nigeria. For instance, Okike noted that the Nigerian Stock Exchange[393] was traditionally a non-stock based financial system until 2004 when the government embarked on a reform agenda to revive the NSE, thereby increasing the market value of securities listed on the stock exchange.[394] This chapter aims to contribute to filling the scholarly vacuum through an extensive review of the development, nature and practices of corporate governance in Nigeria. In this regard, this thesis addresses an important yet commonly neglected question: *what is the state of corporate governance in Nigeria and within what framework has corporate governance regulation emerged in Nigeria?* An historical examination is very important in order to provide a lucid picture of the antecedents to corporate governance regulations in Nigeria, and this is particularly the case since the country has a pre-independence colonial history, which provided its legal and regulatory framework.

The structure of this chapter is as follows. The first section explores the development and evolution of corporate governance regulation in light of Nigeria's company law. The rationale behind this is to provide a chronological review of the rules applicable to corporate governance in Nigeria and to explore how they have been adapted over the years to tackle corporate governance issues. More importantly, such a review will enable this research to investigate the antecedents of

[391] F. N. Ngwu, 'Anglo-American Model and Corporate Governance Failures in Nigeria: Beyond Neo-Liberal Explanation with a Focus on the Banking Sector' [2014] International Journal of Company and Commercial Law Review 343.
[392] N. Ofo, 'Corporate Governance in Nigeria: Prospects and Problems' [May 31 2010] Igbinedion University-College of Law, available at SSRN: < http://ssrn.com/abstract=1618600> accessed 21 December 2014.
[393] Hereinafter referred to as NSE.
[394] Okike (2007) 173-193; For instance, the market value rose from N2.9 trillion (£13.2 billion) at the end of 2005 to 9.956 trillion (approximately £43.5 billion) at the end of 2008. For more information, see the Nigerian Stock Exchange Fact Book 2011 available online at <http://www.nse.com.ng/MarketNews/Downloads/Exchange%20Annual%20Reports/Stock%20Exchange%20Annual%20Reports%202011.pdf> accessed 17 December 2013.

contemporary corporate governance regulation in Nigeria and to provide a framework to further analyse the fundamental regulatory mechanisms in chapters 4, 5 and 6. As demonstrated above, the regulatory framework of corporate governance in Nigeria also includes a non-statutory framework, the governance code, which was implemented to enhance corporate governance practices in Nigeria. In essence, the history and rationale behind the development of this code is also provided in order to buttress the discussion on the evolution of corporate governance regulation in Nigeria.

Notwithstanding the influence of the English legal system in Nigeria, it is worth noting that Nigeria has its own peculiar institutions and mechanisms for regulating and facilitating corporate governance. For instance, there are internal institutions such as the board of directors and shareholders, alongside audit and external factors such as company laws, regulations and regulatory agencies. These institutions have a direct relevance and relationship to corporate governance in that whilst the internal company institution is bestowed with the powers to control the affairs of the corporation, the imposition of constraints by the external institutions on these powers is vital in order to prevent abuse of powers.[395] Therefore, this chapter provides a brief overview of these institutions, as they comprise the drivers and determinants of good corporate governance in Nigeria. These institutions will then be extensively analysed in chapters 4, 5 and 6.

The next section examines the economic state of Nigeria's corporate governance, by exploring the implications of Nigeria's corporate culture on the objective of companies and regulations. In actuality, Nigerian corporations enjoy a number of specific features, such as the proliferation of dispersed ownership structures of public corporations, which affects the corporate governance goals and also sets limits and boundaries to corporate governance in the country.[396] However, history reveals that the framework and structure upon which corporations have developed in Nigeria has its roots in the country's colonial past. As will be discussed later, during the colonial era, British and other foreign investors, in the form of institutions and individuals, were the primary owners of most

[395] Akinpelu [2011] 217.

[396] J. O. Okpara, 'Corporate Governance in a Developing Economy: Barriers, Issues, and Implications for Firms, (2011) 11(2) Corporate Governance: the International Journal of Business in Society184 -199.

of the large corporations operating within the Nigerian economic environment.[397] Nonetheless, over the decades, Nigerian corporations have witnessed dramatic changes in ownership structures through reforms, which have led to the reduction in majority shareholding by foreigners and given rise to a dispersed ownership structure.[398] The implication of this for corporate governance in Nigeria is that the agency problem is heightened in several companies. The agency problem, as discussed in detail in the previous chapter, involves a situation where there is a conflict of interest between management and shareholders due to the separation of ownership from control in a corporation with dispersed ownership.[399] In basic terms, this examination presents the economic factors that affect the content of corporate governance in Nigeria.

This chapter concludes by examining the peculiar social issues and challenges affecting corporate governance in Nigeria and also the rationale behind their emergence. Nigeria as a developing country is greatly affected by corruption, a fundamental issue, which is also at the heart of corporate governance and management in Nigeria.[400] In truth, the country has witnessed several corporate collapses and instances of fraud, often perpetuated by managers and directors of listed companies.[401] This has resulted in the decline of the value of equity capitalisation within the Nigerian Stock Exchange, followed by the eventual withdrawal of foreign and even local investors from the stock market due to lack of confidence.[402] Since early 2000, the Nigerian government has introduced some measures to address these issues by adopting and introducing corporate governance codes in order to restore and repair the broken economy, but this has not yielded real positive results.[403] It is demonstrated here that corporate corruption and agency problems are real dilemmas faced by the Nigerian corporate sector. Accordingly, the final section of this chapter evaluates the corporate

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397 A. Emmanuel and N. Chizu, 'Corporate Governance and Responsibility in Nigeria' [2011] 8(3) International Journal of Disclosure and Governance 252 – 271.
398 ibid.
399 S. Fung and H. Jo and S. Tsai, 'Agency Problems in Stock Market-Driven Acquisitions'(2009) 8 Review of Accounting and Finance 388 – 430.
400 A. Adekoya,'Corporate Governance Reforms in Nigeria: Challenges and Suggested Solutions' [2011] 6 Journal of Business Systems, Governance and Ethics 38 -46.
401 Classic examples include the collapse of Lever Brothers Plc. in 1997, Cadbury Plc. in 2006 and the failure of Oceanic Bank Plc in 2009 due to mismanagement of funds and falsification of account statements. See Akinpelu (2011) 339 – 342.
402 J. O Okpara and P. Wynn, 'Human Resource Management Practices in Transition Economy: Challenges and Prospects' (2008) 31 Management Research News 57-76.
403 J.O. Otusanya and S. Lauwo and G.B Adeyeye, 'A Critical Examination of the Multinational Companies' Anti-Corruption Policy in Nigeria' (2012) Accountancy Business and the Public Interest 1-49.

collapses and scandals in companies such as Cadbury Nigeria Plc and Unilever Nigeria Plc as a way to further demonstrate the agency problem in Nigeria and to provide a philosophical account of corporate failings in the country.

3.2 The Evolution of Corporate Governance Regulation under the Nigerian Company Law: the Predominance of English Company Law

Historically, it has been argued that the practice and emergence of corporate governance regulation in common law countries (especially countries that rely on external regulation, as is the case in Nigeria) is dependent upon the nature and characteristics of its company law.[404] According to Reisberg, the control structure in a company is a construct of the relationships and powers between different corporate actors normally prescribed by companies' legislation.[405] Therefore, company law plays a vital role in allocating powers amongst the different constituencies in the company and the extent of their influence over its direction. Particularly, in Nigeria, the companies' legislation largely determines the nature of shareholders' voting rights and protection and directors' accountability, which is very important from a corporate governance perspective. For instance, even before the expression 'corporate governance' became popular in Nigeria, company law recognised and still recognises two organs of company as a corporate governance mechanism: the board of directors and the shareholders at general meeting.[406]

As illustrated above, corporate governance is not identical in all countries and the circumstances in each country is shaped by the country's historical background. This is equally the case in Nigeria, which follows its own particular historical trajectory. However, the history of corporate governance regulation in Nigeria is complex and has been subjected to different reforms

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[404] K. Lannoo, 'European Perspective on Corporate Governance' (1999) 37(2) Journal of Common Market Studies 269-278.
[405] A. Reisberg, 'Shadow of the Past and Back to the Future: Part 11 of the Companies Act 2006 (in) Action' (2009) ECFR 219.
[406] N. Ofo, 'The Historical Development of Corporate Governance in Nigeria' (January 2013) The Corporate Prof <http://thecorporateprof.com/historical-development-of-corporate-governance-in-nigeria/#> accessed 31 December 2013.

over the years, which reflect the local economic and corporate ownership structures.[407] As previously mentioned, Nigeria has a pre-independence colonial history from Britain, which provided Nigeria with its regulatory framework.[408] The Nigerian company law, which provides the statutory structure for corporation, is based on English common law and statute.[409] Moreover, the laws in the UK further operate as a persuasive authority to complement the Nigerian law where there are lacunas and discrepancies.[410]

It is envisaged in this study that in order to appreciate the current framework and state of corporate governance regulation in Nigeria, it is necessary to trace the trend in the development of its companies act as the main legislation for the regulation of corporate governance practices. The historical development of company legislation in Nigeria is somewhat contorted, however the periodic contexts can be clearly defined: namely the pre 1960-era before independence, and the post-1960 era after independence. Particularly, it is an undisputed fact that Nigeria was a colony of Britain for almost a century from the period of 1866 until the attainment of political independence in 1960.[411]

One interesting historical detail is that, even before the advent of the colonial administrations in Nigeria, small businesses and trade had existed within the ethnic communities in Nigeria.[412] However, as previously noted, there was no indigenous company act or legal framework under which such businesses operated. Consequently, domestic businesses in Nigeria were not subjected to any company legislations as they operated on a small scale, were family owned or took the form of sole proprietorship.[413] Public corporations operating during the colonial era were incorporated in the UK under the Companies Act 1862[414] and enjoyed foreign rights, privileges and regulations, which were

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407 G.C. Nnona, 'The Requirements of Company Incorporation in Nigeria Law: An Analysis of Underlying Philosophies', (1995) 7 AJICC, 568.
408 A. O. Obilade, *The Nigerian Legal System*, (Spectrum Books Limited, 2005), 30-47.
409 ibid.
410 C. O Adeoya, 'Lifting the Veil of Incorporation in Nigeria' (2000) 2 NJPCL 7.
411 A. Abdullahi, 'The Company in a Changing Environment' (1990) Nigeria Business Law and Practice Journal. 29-30.
412 ibid.
413 C. Olebune, 'Social Entrepreneurship, the Nigeria Perspective' (2006) Social Entrepreneurship African Events available online at <http://www.nelm.org/october2006_social%20entrepreneurship_the%20nigerian%20perspective.htm> accessed December 31 2013
414 Hereinafter referred to as the 1862 Act.

prescribed by the UK's company legislation.[415] The 1862 Act provided a legal basis for establishing a new corporate structure through registration, as initially introduced by the Joint Stock Companies Act 1856. Furthermore, the doctrine of limited liability and separate corporate personality, which emanated from the Limited Liability Act 1855, also formed a substantive part of the 1862 Act as it applies to companies in Nigeria.[416] Nevertheless, although these firms were seen to possess an element of legal entity, they varied slightly from modern corporate entities, as the courts' approach to businesses was similar to that of a partnership, which is based on contract and agency law.[417] The implication of this on governance was that the relationships between shareholders and directors and the overall decision-making process of companies were a matter for shareholders at general meeting.[418]

In effect, directors were seen as mere agents of the company and subjected to the absolute control of the shareholders at general meetings.[419] This appears to run contrary to the modern experience brought about by the separate legal personality and separation of ownership and control in public corporations in Nigeria, whereby decision-making powers are bestowed upon managers and boards of directors. Nevertheless, the dominance of British corporations and legislation in Nigeria continued through the late 1870s and was even the case after 1874 when the principles of English company law were imported into Nigeria by the British colonial administration. This was made possible with the promulgation of the Supreme Court Ordinance 1874, which extended the application of distinct English statutes, principles of the common law and doctrine of equity to Nigeria.[420] The provisions applied were subject to any existing or future ordinance.[421] The implication of this on the legal system in Nigeria was that the provision of all companies' statutes

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[415] Akinpelu (2011) 204 -205.
[416] ibid 204.
[417] J.S. Shephard, *The Law of Fiduciaries* (Toronto Canada: The Caswell Co.Ltd. 1981) 350.
[418] E. Ferran 'The Role of the Shareholder in Internal Corporate Governance: Enabling Shareholders to Make Better-Informed Decision' [2003] 4 European Business Organization Law Review 491-516.
[419] Akinpelu (2011) 204-205.
[420] A. Emiola, *Corporation Law,* (Emiola Publishing Ltd, 2005, Ogbomoso Nigeria) 11-18.
[421] See Section 14 of the Supreme Court Ordinance, 1874: 'the common law, the doctrine of equity and the statute of general application which were in force in England on the 24th day of July, 1874 shall be in force within the jurisdiction of the Courts in Nigeria.'

enacted following the English Companies Act 1862 automatically became applicable to the Nigerian economy and particularly to companies.[422]

It is important to note however that, despite the efforts made in 1874 to import the doctrines and practices of the English law into Nigeria, the first indigenous company statute was only enacted in 1912: this was the Companies Ordinance Act 1912, enacted in respect to domestic businesses in Nigeria. Explanation for this phenomenon has been provided based on the notion that, prior to the outbreak of the First World War, there was essentially no significant local processing or manufacturing industry in Nigeria, as the country was mostly underdeveloped.[423] Hence, companies and businesses which operated in Nigeria at that time were registered overseas and only sourced their raw materials in Nigeria for manufacturing of goods in their factories, which were located in developed countries such as the United Kingdom.[424] Moreover, at this particular stage in the country's history, the indigenous populations in Nigeria were not familiar with trading by means of joint stock organisation, since businesses and trading in Nigeria were predominantly family-based and they often took the form of sole proprietorships.[425] These businesses were not established under the framework of company legislation and thus were not regulated enterprises.[426]

A major breakthrough in Nigeria was therefore made in 1912 following the enactment of the Companies Ordinance 1912 as the first indigenous Act. The Act was equally a derivation of the English Companies Act 1908, but it permitted the formation of companies by registration in Nigeria.[427] However, the statute was limited in its area of application and was only applicable to the Colony of Lagos (now Lagos State).[428] The implication of this on corporations was that companies operating outside the jurisdiction of Lagos were not subjected and regulated by the Act. Moreover, the enactment of the Act and its restrictive nature had been used to explain the attitudes of English

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[422] M.O. Sofowora *Modern Nigeria Company Law* (2nd edn, Soft Associates Ltd., Lagos, 2002) 53-57.
[423] A. Ogunfolu 'Corporate Governance in Nigeria' [2008] The Advocate, International Journal of Law, Faculty of Law, Obafemi Awolowo University Nigeria, 23-37.
[424] ibid.
[425] ibid.
[426] ibid.
[427] Akinpelu (2011) 205-206.
[428] ibid 205.

businessmen who carried with them the English system wherever they went to transact their business (initially, the companies were incorporated and carried out business within the territory of Lagos).[429] However, amendments were later introduced to the 1912 Act in 1917 by enlarging the territorial application of the Act and extending its scope to the rest of the country.[430] The introduction of the Companies Ordinance 1922 then followed; this repealed the 1912 and 1917 ordinance. The same enactment was later renamed the Companies Act 1922, which was also modelled after the UK's Companies Act 1908. The Act witnessed a series of revisions in 1929 and 1954 respectively, which were eventually incorporated into the 1958 edition of the laws of the Federation.[431] The 1922 Act, with its minor revisions, was in force for a period of forty years, and this was the primary reason why it was described as "ancient" in the Nigerian House of Representatives in 1964.[432] The Act governed corporate business in Nigeria, but its sclerotic nature was unable to cope with the surging economic activities after independence in 1960, particularly after the discovery of oil in Nigeria in 1958 by Shell Darcy (now Shell Petroleum Development Company).

The new economic situation following independence in Nigeria, and the criticisms of the then 1922 Companies Act, necessitated its repeal and the enactment of the Companies Act 1968. However, the resulting Act was eventually tailored after the English Companies Act 1948 and incorporated most of the modifications that had been recommended in the *Jenkins Committee Report*.[433] From a corporate governance perspective, the 1968 Act was considered an enormous development based on the fact that it eliminated substantive gaps in Nigerian company law and introduced specific corporate governance provisions. Just like the English 1948 Act, the Act also contained relevant corporate governance provisions for director's accountability and protection of

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[429] In addition, the existing literature also reveals that in 1912 only 29 companies were registered under the Act and foreigners - particularly the British - owned and promoted most of the companies. See J. A. Dada *Principles of Nigerian Company Law* (2nd edn, Wusen Publishing, 2001) 57-60.
[430] ibid 58 (See amendment: As Cap 37 Companies Ordinance Act 1917).
[431] G.A. Olawoyin, *Status and Duties of Company Directors* (University of Ife Press, Ile-Ife, Nigeria, 1972) 8.
[432] See the Federation of Nigeria, National Development Plan 1962-1968, Lagos 1968, page 18. A quote from the paragraph contains an illustration of one of the criticisms levelled against the Act, which states that: 'the Legislation in relation to Companies in Nigeria remains a related practice of a bygone era'. (Emphasis added).
[433] See the Jenkins Committee Report Cmnd 1749 (1962) and Tables 1 and 2 of the Act 1968.

shareholder and investors' interest.[434] For instance, in terms of disclosure, the Act required corporate directors under sections 140-145 to supply to their shareholders, creditors and general public, specific information in their balance sheet and profit and loss accounts of the firm. The Act also made elaborate provisions under section 172 - 197 for the purpose of regulating the duties and responsibilities of the board of directors. More importantly, provisions for the protection of minority shareholders were also introduced under section 201, which mirrored the English section 210[435] provision regarding oppression remedy.

The 1968 Act particularly contributed to the development and restructuring of the corporate sector in Nigeria. For instance, it required all foreign and local companies operating within Nigeria to be registered and incorporated locally.[436] This singular act impacted positively on the Nigerian economy in that foreign firms registered in Nigeria at that time became more assessable to tax, as opposed to when they retained their foreign identities.[437] More importantly, as a way of ensuring good corporate governance, it granted the government with the privilege to regulate and supervise corporate activities to ensure that they comply with the regulations and legislation of the country.

One major shortcoming associated with the 1968 Act was that it was inadequate in dealing with the issues that emanated from Nigeria's economic activities due to the rapid growth and development of modern companies after political independence in 1960.[438] Particularly, the Act was not in line with the government's overriding need to promote the indigenisation of enterprise in Nigeria following the introduction of the Nigerian Enterprises Promotion Decree 1972.[439] These various issues regarding the state of Nigerian company law accentuated the need to repeal the 1968 Act, in order to respond to the rapid economic needs emerging in Nigeria and especially to protect

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[434] See Sections 140-151, Companies Act 1968 and Section 117-121, Companies Act 1968.
[435] Section 210 UK's Companies Act 1948.
[436] See Part X of the Companies Act 1968.
[437] A.I Ayua, *Nigeria Company Law* (Graham Burn, UK, 1984) 23.
[438] For instance, see the situation described by Ayua: 'The Act is little more than putting together some of the sections of the Companies Act cap 37 and some of the sections of the United Kingdom Companies Act 1948 instead of taking bold steps to codify both statutory and case laws on companies which would have provided the opportunity of reviewing some of the inconsistencies of the common law principles'. See Ayua (1984)
[439] Hereinafter referred to as NEPD 1972)

the interests of both foreign and local investors. Accordingly, the federal Government, through the Attorney General, mandated the Law Reform Commission to carry out an immediate review and reform of the company law.[440] The CAMA 1990 was the result of the reform. The CAMA is currently the primary statute applicable to corporations in Nigeria. It is significant in that it also prescribes the legal framework of corporate governance in Nigeria. The Act applies to all companies formed and registered under it and all companies formed and registered under other enactments.[441] The Act contains some substantive corporate governance provision, which relate to directors' duties, financial disclosure, audit and shareholders' protection.[442]

Given that English company law has historically influenced Nigerian company law, Nigerian shareholders are perceived to also enjoy many of the same rights as shareholders within English companies. However, as will be demonstrated in the following chapters, the CAMA is not as contemporary as the current English Companies' Act and it is also considered to be inadequate in terms of regulating corporate affairs. Since its enactment in 1990 almost three decades ago, the CAMA has not undergone any extensive reform. As a result, the capability of the CAMA in tackling the current challenges and specific corporate governance issues that have risen after its enactment is seriously doubted. Evidence of the outmoded nature of the CAMA is succinctly encapsulated within its deterrent and penalty capacity for corporate wrongdoers. In imposing penalties, a mere fine of N50 (2 British Pence) to N500 (£2) is prescribed under section 312 of the CAMA for violation regarding minority shareholders' rights and N25 (approximately 1 British penny) to N500 fine is placed on directors who breach their duties as directors.[443] Evidently, these penalties are insufficient; it shows that the CAMA is long overdue for reform. Similarly, it is demonstrated in subsequent chapters that most of the important provisions contained under the CAMA are tailored for an era when corporate governance issues were not yet anticipated by the government and public

[440] See working Papers on the Reform of Nigerian Company Law [1987] Vol 1, Para 9. For the purpose of ensuring effective regulation of corporate governance, the reform included an establishment of a Corporate Affairs Commission to administer the Company Act as well as being charged with the responsibility of registration and regulation of companies in Nigeria. In carrying out its obligation, the Corporate Affairs Commission is meant to prevent corporate irregularities, mismanagement, fraud and oppression of minority shareholders.
[441] See Part 1 and 2 of the CAMA 1990.
[442] See parts 8, 9 and 10 of the CAMA.
[443] See sections 277-278 of the CAMA 1990.

corporations in Nigeria. Although, certain initiatives have recently been adopted by regulatory agencies (such as the development of governance codes) to tackle some of the statutory impediments in Nigeria, the question which arises in this thesis is *how effective are these initiatives considering the fact that they are non-legally binding on corporations?*

In conjunction with an analysis of the CAMA, this thesis will investigate the effectiveness of the Code in chapter 6 by analysing its regulatory framework. However, before embarking on that task, the next section of this chapter provides a brief overview of the development of the corporate governance codes as means to strengthen the discussion on the regulatory antecedents of corporate governance in Nigeria. The consideration of the development of these codes will provide a framework for analysing the regulatory system of corporate governance in the subsequent chapter and also shed more light on the nature and state of corporate governance in Nigeria.

3.3 The Development of the Code of Corporate Governance in Nigeria: Rationale and Reform Strategies

As illustrated above, corporate governance regulation in Nigeria relies both on legal and non-legal mechanisms. In particular, as previously stated, the Nigerian legal system for corporate governance mirrors that of the English legal system with its shareholder-oriented approach. The consequences of such a corporate governance system for Nigeria is that governance ultimately relies on external and state regulation, just like the UK's system, in order to protect the interest of investors and shareholders of firms within a dispersed ownership structure.[444] Whilst the CAMA 1990 provides the primary statutory framework for corporate governance in Nigeria, the Code has no doubt become the most popular governance mechanism. This is mostly due to its contemporary and comprehensive nature. The current 2011 SEC Code which was issued by the Securities and Exchange Commission, has been commended and praised as being capable of enhancing corporate governance practices in

[444] D. Graham and N. Woods, 'Making Corporate Self-Regulation Effective in Developing Countries' (2006) 34 World Development 868.

Nigeria and is deemed a worthy replacement to its predecessor, the 2003 SEC Code.[445] However, as will be seen in chapter 6, this assertion is somewhat dubious considering the fact that the 2011 SEC Code is non-statutory and the outcome is similar to that of its predecessor.

Judging from previous literature and in light of the history of the Nigerian corporate governance system, the Codes were no doubt driven by Nigeria's financial scandals in the late 1990s[446] and 2000s[447] and the corporate collapses that took place in the UK and US.[448] The need to avoid similar collapses within the Nigerian economy led to the regulatory initiatives adopted under the Codes. Particularly, the Codes were generally motivated by the need to enhance a firms' transparency and accountability, while increasing investor confidence, both local and foreign. The 2003 SEC Code is undoubtedly one of the first comprehensive corporate governance regulatory initiatives adopted by the Nigerian government. It is submitted that the 2003 Code was intended to address important areas of corporate governance in Nigeria, which were lacking under the CAMA 1990 (i.e. sections relating to the board of directors, shareholders and audit committee).[449] The Code was the result of the work of the Committee of Corporate Governance of Public Companies in Nigeria, which finalised its report in April 2003.[450] The committee made several recommendations aimed at ensuring transparency in firms, proper disclosure and, most importantly, the equitable treatment of shareholders.

The final version of the 2003 SEC Code addressed the responsibilities and functions of the board of directors, the equitable treatment of shareholders and the appointment and functions of the

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[445] KPMG Professional Services, *Corporate Governance and the New SEC Code*, (Lagos: KPMG Professional Services, 2011), 1

[446] A typical example is the financial scandal of Unilever Nigeria Plc in 1997 involving deliberate misstatement of companies' accounts by the managing directors. The scandal at this company will be considered in detail later.

[447] E.g. the corporate scandal at Cadbury Nigeria Plc. in 2007 where the managing director in connivance with auditors overstated the companies account in excess of N15 billion (the scandal at this company is also considered in detail later).

[448] N. Ofo, 'Securities and Exchange Commission of Nigeria's Draft Revised Code of Corporate Governance: An Appraisal' (2011) 55 Journal of African Law 280.

[449] Akinpelu (2011).

[450] The committee constituted 17 members, inaugurated at the instance of the Nigerian Security and Exchange commission (SEC) and Corporate Affairs Commission (CAC) who were selected across all sectors of the Nigeria economy: from professional organisations, private and public sectors and regulatory agencies.

audit committee.[451] In dealing with the functions of the board, the Code listed its purpose as including strategic planning; selection, performance appraisal and compensation of senior executives; succession planning; communication with shareholders; ensuring the integrity of financial control and reports; and ensuring that ethical standards are maintained and that the company complies with the laws of Nigeria.[452] Subsequently the Code also contained recommendations to facilitate the participation of shareholders (especially minority shareholders) in general meetings, and to provide a proper notice of meetings and the adequate dissemination of information to shareholders.[453] Finally, the 2003 Code contained recommendations regarding the audit committee, which were implemented to supplement the provisions of the CAMA 1990.[454] In this regard it required that the appointment of the majority of non-executive directors on the committee board should be independent of management.

Whilst the above recommendations were considered a welcome feature, the 2003 SEC Code was considerably lacking in terms of enforceability and compliance. The Code itself was non-statutory and voluntary, and did not contain proper mechanisms for enforcement, compliance and sanctions. It was for these reasons that the initiative to introduce the 2011 SEC Code was commenced. The making of the 2011 Code, which began in September 2008, was the responsibility of the National Committee established by the SEC and headed by Mr. M.B. Mahmoud. The committee was given the mandate to review and address the weaknesses of the 2003 SEC Code, to improve the mechanisms for enforcement and to suggest recommendations for ensuring greater compliance and to advise on other issues relevant to promoting good corporate governance practices in Nigeria.[455] According to the SEC, the 2011 Code is one of the most comprehensive regulatory initiatives adopted by the regulatory agencies and is consistent with international best practices on corporate governance.[456] The 2011 SEC Code nonetheless mirrors the UK's Combined Code of

[451] See Parts A, B and C of the 2003 SEC Code.
[452] For more details, see Part A, section 1 (c) of the 2003 SEC Code.
[453] Section 9 of the 2003 SEC Code.
[454] Section 11 of the 2003 SEC Code.
[455] For more details, see the introductory section of the 2011 SEC Code.
[456] N. Ofo, 'Code of Corporate Governance in Nigeria 2011 and International Best Practices on Corporate Governance: Chairman-CEO Duality (12, January 2013)' The Corporate Prof <http://thecorporateprof.com/code-of-corporate-

Corporate Governance 2010,[457] which is characterised by the use of mere principles rather than mandatory rules or compliance.

The question to be addressed in chapter 6 is *how effective is the UK's principle-based code in Nigeria, especially in terms of ensuring compliance and enforcement?* While this thesis acknowledges and welcomes most of the provisions under the new 2011 Code, certain shortcomings will be exposed, such as the existence of inadequate enforcement and compliance mechanisms. By undertaking 'an analysis of the Code's regulatory framework' in chapter 6, the aim is to ensure that the next revision of the corporate governance code will be imbued with the requisite and robust features required to tackle the contemporary corporate governance issues confronting Nigerian corporations.

3.4 An Overview of the Institutional Structure and Mechanisms of Corporate Governance in Nigeria

The previous sections of this chapter have demonstrated the trends in the development of Nigerian corporate governance regulations in the context of its company law and codes of corporate governance. In this section, a brief overview of the institutional structure and the mechanics of Nigeria's corporate governance are provided, in order to buttress the discourse on the peculiarities of the Nigerian system. By institutional structure, this thesis refers to the key constituencies involved in decision-making and governance in public firms - the board of directors/managers, shareholders, auditors and also the external institutions that control the relationships between these various constituencies, such as the regulatory agencies. These institutions are extensively analysed in chapters 4, 5 and 6 with particular focus on the statutory and regulatory mechanisms available to ensure their effectiveness. Nonetheless, the rationale behind this examination is that every country or society has its own peculiar institutions and organs established to facilitate effective corporate

governance-in-nigeria-2011-and-international-best-practices-on-corporate-governance-chairman-ceo-duality/#> accessed 22 September 2013.

[457] See The Financial Reporting Council UK Code of Corporate Governance 2010, available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/The-UK-Corporate-Governance-Code.pdf> accessed13 February 2014.

governance; therefore, it is important to examine the ones applicable to the Nigerian system. Although there may be similarities in the institutional structures, a careful examination reveals a few important differences with regards to the power, duties and responsibilities of these institutions in terms of ensuring corporate governance. Particularly, the institutional structure of company decision-making powers has always been a primary aspect of corporate governance. One important feature of a company, as demonstrated in the case of *Salomon v Salomon*,[458] is its legal personality, which upon registration grants the company with the capabilities to enter into contract, own properties and even be subjected to criminal sanctions.[459]

Despite the independent legal status of a company, the organisation nevertheless depends on the actions and thoughts of human beings to steer its business.[460] Directors/managers, shareholders and other company officers are bestowed with the power and the responsibility to make the day-to-day decisions of the company, which are binding on the company. These individuals comprise the organs and institutions of the company, which form the internal institutional structure of corporate governance. However, whilst the internal institutions carry out the functions of the company, external institutions - such as regulatory authorities - also have significant influence on the operation of a company. Principally, through regulatory means, the external institution normally allocates authority and sets limitations on the powers of the internal institution.[461] For example, the legislature and regulatory agencies can specify the responsibilities and powers of the organs of a company and define their rights and privileges by means of legislation. This may include the specification of directors' general duties and shareholders' voting rights, as seen in jurisdictions such as the UK[462] as well as Nigeria.[463] Accordingly, Dine and Koutsias posited that due to the complexity and difficulties associated with the principles of separate personality, the law is necessary to regulate the relationship

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[458][1897] AC 22.
[459] A. Dignam and J. Lowry, *Company law: Core Text Series* (Oxford University Press, 2010) 15-18.
[460] J. Dine and M. Koutsias, *Company Law*, (7th edn Palgrave Macmillan, 2009) 17.
[461] A. Dignam,'Exporting Corporate Governance: UK Regulatory System in a Global Economy' [2000] 21(3) Company Lawyer 70.
[462] See sections 170, 171-177 and Part 13 of the Companies Act 2006.
[463]See sections 279 and 354 of the CAMA.

between the company, its members, and its directors, as well as outsiders.[464]

Whilst the internal institutions must have freedom to exercise their specific duties, it is important that legislative constraint on these powers is imposed in order to prevent abuse of power. This is the juncture at which corporate governance regulation becomes necessary to ensure checks and balances, and to prevent the arbitrary use of internal powers. Although the most important matters of corporate governance have been left to companies' organs, it is said that the degree of regulation imposed on companies differs from jurisdiction to jurisdiction depending on the economic and social structure of that country.[465] In this light, the author observes that the primary internal and external institutions of Nigeria's corporate governance are predominantly dealt with under company law.

Nigerian company law prescribes the internal structure of corporate governance, outlining the division and exercise of powers between different organs of the company. This is very important from a corporate governance perspective, because such an arrangement is useful in ensuring certainty and preventing the over-concentration of powers in the hands of one individual or organ.[466] Particularly, this also ensures sufficient regulation on the affairs of the organs through legislative means in order to prevent abuse of power. For instance, according to the CAMA 1990, it is mandatory for every company to have a board of directors, shareholders, company audit and company secretary, each bestowed with different functions and duties.[467] This structure forms the internal institutional structure of corporate governance in Nigeria and, as would be expected, the CAMA has laid down detailed rules governing the operation of the designated statutory organs in parts 4, 5 and 9. However, there is no dispute when considering the statutory structure of companies that the board of directors occupies a vital position in the company considering the role they play in directing the affairs of the company.

[464]Dine and Koutsias (2009) 17.
[465] V. G. Bruno and S. Claessens, 'Corporate Governance and Regulation: Can there be Too Much of a Good Thing?' [2010] 9 Journal of Financial Intermediation 461-482
[466]Akinpelu (2011) 221.
[467] See section 63 of the CAMA 1990: see also J.O. Irukwu, *The Company, the Shareholders, the Director and the Law* (Enugu: Fourth Dimension Publishing Co. ltd. 1994), 89.

It is commonplace in Nigeria, and equally in other common law jurisdictions like the UK, that directors have an unhindered right to exercise their duties under the corporate constitution without the interference of shareholders, unless the matters are generally referred to at a general meeting, where a director's powers can expressly be limited by shareholders.[468] For instance, the primary and modern principle on this norm is contained in the case of *Shaw and Sons (Salford) Ltd v Salmon*,[469] where Greer LJ emphasised that 'a company is an entity distinct from its shareholders and its directors, some of its powers may according to the articles be exercised by the directors and where powers of management are vested in the directors, they and they alone can exercise these powers'.[470] However, due to the dispersed ownership structure of corporations in Nigeria, the board is normally seen as a potential threat to corporate wellbeing if not properly regulated.[471] This justifies why the board is subjected to strict external regulation, by both statutory means and codes of corporate governance, especially in large corporations where there is managerial domination by directors. For instance, aside from the mandatory duties of directors under section 279 of the CAMA, the board is also subjected to the supervisory functions of the auditor and audit committee under section 359(9) CAMA.[472] The duties and liabilities of auditors and the role of the audit committee will be extensively analysed in chapter 5.

The audit committee constitutes a very important aspect of corporate governance in Nigeria in that it assists the board in effectively discharging its oversight responsibilities and attests the financial information and statements originating from its accounting system.[473] However, in contrast to the UK, where the requirement of an audit committee is not a statutory one, all listed companies in the Nigerian Stock Exchange are required by statutes to have an audit committee which is made up of an equal number of directors and representatives of the shareholders of the company, not exceeding

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[468] B. Hannigan, *Company Law* (3rd edn, Oxford University Press 2009) 105-106.
[469] (1935) 2. K.B 113.
[470] C. Wild and S. Weinstein, *Smith and Keenan's Company* Law (16th edn, Pearson Education 2013) 375.
[471] E. Adegbite, 'Corporate Governance Regulation in Nigeria' [2012] 12(2) Corporate Governance International Journal of Business Studies 257-276.
[472] See G. O Nwankwo, 'Making the Nigerian Board Work' in R. Egouno (ed) *Board Room Management: a Book of Reading* (Ikeja, Lagos: Strides Associates Ltd. 1994) 82-83.
[473] I. Bolodeoku, 'Filling the Gaps in the Legislative Framework for Audit Committees of Listed Companies in Nigeria' [2008] 6(2) Corporate Ownership and Control 166.

six members in total.[474] In the UK, the audit committee, as stipulated by the Code of Corporate Governance Code 2014 is required to comprise of at least three independent non-executive directors.[475] It is widely accepted that the membership structure of the UK's audit committee is more effective, because it provides the committee adequate independence from the board's potentially negative influence.[476] Nonetheless, others argue that the structure in Nigeria is effective in preventing the collapse and abuse of powers by directors, as shareholders' participation provides shareholders' activism.[477] This is not entirely accurate as the recent auditing and accounting scandals in Nigeria have shown.[478] It is observed in this thesis (particularly in chapter 5) that the issues facing Nigeria's audit system is not just that of unscrupulousness, but also the lack of proper regulatory mechanisms to effectively control the functions of audit. As will be seen later, the financial irregularities in corporations such as Unilever Plc in 1997 and Cadbury Plc in 2006 went undetected for years, even with the presence of auditors and an audit committee.

The powers and responsibilities of shareholders in corporations have historically been seen as an important institution of corporate governance in Nigeria. Shareholders as the principal financiers of the corporation, are required to ensure that an appropriate governance structure is put in place in their organisation and to actively participate in decision-making processes within Nigeria firms by promoting good corporate governance through managerial oversight.[479] This may include contributing to the election of the board of directors, delegation of authority, participation as a member of an audit committee and appointment of the committee to scrutinise financial performance.[480] Whilst shareholders' general responsibilities are all essential, there is no denying that shareholders' voting rights at the general meeting are the most crucial.

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[474] See section 359(4) CAMA.
[475] For instance see principle c.3.1 of the UK Code of Corporate Governance 2014.
[476] N. Ofo, 'Composition of Audit Committees in Nigeria: Matters Arising' (2011) International Company and Commercial Law Review, 392-399.
[477] A.O.O. Kingsley, 'Audit Committees: the Journey so Far in Nigeria' [2014] 3 Journal of Economics and Finance 40-43. Available online at <http://www.iosrjournals.org/iosr-jef/papers/vol3-issue1/Version-1/E03114043.pdf> accessed 20 July 2015.
[478] Auditing failings were evident in the collapses of companies such as Unilever Nigeria Plc. 1997, Cadbury Nigeria Plc 2006 and also in the failure of Nigerian banks such as Wema Bank Nigeria Plc. in 2007 and Oceanic Bank Nigeria Plc. in 2009. For more details see Akinpelu [2011] 339-353.
[479] For instance, see the 2007 Code of Conduct for Shareholders' Association in Nigeria, which was introduced to enhance shareholders' activism in firms and increase awareness in terms of shareholder rights and responsibilities.
[480] E. Adegbite and, K. Amaeshi and O. Amao, 'Political Analysis of Shareholder Activisms in Emergent Democracies: a Case Study of Nigeria' [2010] CSGR Working Paper 265.

According to Davies, the annual general meeting is so important that it personifies the forum where the ultimate control of the company lies.[481] It is further submitted that the company's meeting is a major mechanism to ensure the protection of investors and their investment, and it is at the general meeting that members will be able to exercise their statutory power over the board, particularly that of dismissal and the moving of resolutions on their own account.[482] This position explains why it is understood that the primary control of a company rests with the general meeting. From a corporate governance perspective, the meeting, which constitutes an avenue, provides an opportunity where members can exercise their constitutional rights and discharge their corporate governance responsibilities.

Essentially, it is required under the CAMA that every public and private company in Nigeria must have an annual general meeting, whereby the directors are required to forward to every member of the company a copy of the statutory report at least twenty one days before the day on which the statutory meeting is to be held.[483] However, it is noted that many shareholders in Nigerian public companies merely play passive roles and hardly participate in general meetings.[484] In the same vein, it is said that the statutory tools for protecting minority shareholders are also significantly undermined by the slow judicial process in the country.[485] Accordingly, the external institutional structure of corporate governance is viewed as a solution to mitigate minority shareholder abuse and align the relationship between the key constituencies within the company. In promoting sound corporate governance in Nigeria, the CAMA establishes a Corporate Affairs Commission (CAC) that is responsible for the regulation and supervision of the formation, incorporation, registration, management and winding-up of companies established under the Act.[486] The CAC was established as a government monitoring autonomous body responsible for administering the CAMA after the CA

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[481] P.L Davies, *Gower & Davie's Principles of Modern Company Law* (8th edn, Sweet and Maxwell 2008) 649-653.
[482] C. Thomas, *International Corporate Governance, A Comparative Approach* (Routledge, 2007), 65-88.
[483] See Section 211 of the CAMA 1990.
[484] O. Amao and K. Amaeshi 'Galvanising Shareholder Activism: a Prerequisite for Effective Corporate Governance and Accountability in Nigeria' 82 Journal of Business Ethics 119.
[485] In a study conducted by Cocodia on the causes of congestion in Nigerian courts, it was shown that the judicial system in Nigeria is painstakingly slow: the study revealed that out 62 cases that went to the Brass Division High Court in Bayelsa State, only 32 were concluded in the first 3 years and 30 were left pending to be transferred to the following year. See J. Cocodia, 'Identifying the Causes For congestion in Nigeria's Courts Via Non-Participant Observation: A Case Study of Brass High Court, Bayelsa State' (2010) 1 International Journal of Politics and Good Governance 1. See also Adegbite [2012] 257-276.
[486] See Section 7 of the CAMA.

1968 was repealed.

Given that the CAC is bestowed with wide powers for investigating and overseeing the affairs of companies in Nigeria,[487] it means that, in discharging its duties, the Commission is meant to prevent irregularities, mismanagement, fraud and the oppression of minority shareholders.[488] Theoretically, this is very useful in terms of ensuring external oversight over corporate activities in Nigeria. However, the question that arises within this context is '*how effective has the CAC been in discharging its statutory obligation*?' It is argued that, apart from the Commission's achievement in the areas of registration and attending to the filing of corporate documents, the positive impact of the Commission as an effective regulator in the marketplace is yet to be seen, particularly in light of the corporate governance crisis that has rocked the Nigerian economy.[489]

According to the *Report on the Observance of Standards and Codes in Nigeria* ("ROSC 2011")**,** amongst other shortcomings, the CAC lacks an effective mechanism or capacity to monitor and enforce the requirement for accounting and financial reporting, particularly because of inadequate infrastructure, technology and expertise.[490] It was also revealed that of all the 827,700 private companies and 42,500 public companies in the CAC's books, a significant number are believed to be dormant and also do not comply with the accounting deadline.[491] Regrettably, the CAC does not have the mandate under section 7 of the CAMA to delist dormant companies other than to register, investigate and supervise their conducts. It is observed that one of the environmental challenges confronting the CAC is the lack of independence from political influence, which has resulted in the pursuance of interests that could be contradictory to the objectives of its formation.[492] Accordingly, Babatunde and Olaniran have argued that in order for the Commission to effectively discharge its duties in promoting sound corporate governance, the supervisory capacity of the Commission should be reviewed and strengthened with more realistic sanctions for erring companies,

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[487] See sections 7(1)(a) and (c) of the CAMA 1990.
[488] M.N. Umenweke, 'Powers and Duties of The Corporate Affairs Commission as a Regulatory Body in Nigeria' [2011] available online at <http://www.ajol.info/index.php/naujilj/article/download/82382/72538> accessed 26 December 2013
[489] Akinpelu (2011) 210.
[490] Report on the Observance of Standards and Codes in Nigeria, Accounting and Auditing (June 6, 2011) 12.
[491] ibid,12.
[492] O. Olakanmi, *Companies and Allied Matters Act, Synoptic Guide* (Lawlords Publications, Abuja, 2006) 5-6; see also the ROSC 2011,12-14.

with improvements also in its human capital in terms of the knowledge, expertise and multi-disciplinary resourcefulness of its workforce.[493]

In practice, the CAC usually discharges its regulatory functions alongside the Securities and Exchange Commission ("SEC"), which is bestowed with the responsibility of administering the 2011 SEC Code. Fundamentally, the SEC is responsible for monitoring, enforcing and ensuring that firms comply with the corporate governance Code in Nigeria. As a result, the prominence of the SEC as an external institution of corporate governance in Nigeria cannot be overemphasised. The SEC was originally established in 1962 as a non-statutory Capital Issues Committee, an essential arm of the Central Bank of Nigeria.[494] Now it occupies a prominent position as the apex regulator of the Nigerian capital market, mandated with the responsibilities of developing and ensuring a dynamic, fair, transparent and efficient market.[495]

Although the SEC aims to be one of the leading capital regulators in Africa, it is still lacking in some respects. For instance, the SEC is not yet effective in monitoring compliance with financial requirements and enforcing the 2011 SEC Code. This is mostly due to the absence of adequate infrastructure, expertise or manpower to enable it to discharge its functions properly.[496] According to Adegbite, the enforcement mechanisms under the 2011 SEC Code are weak and the administrative sanctions and civil penalties are not adequate to deter non-compliance.[497] Particularly, given that the regulatory approach of the 2011 SEC Code mirrors that of UK's 2010 code, which relies on mere principles, there is concern as to whether this method is robust enough to tackle modern corporate issues in Nigeria. It is recommended in chapter 6 that the 2011 SEC Code needs to be revised to introduce vigorous and enforceable regulatory mechanisms.

[493] A. M. Babatunde. and O. Olaniran, 'The Effects of Internal and External Mechanisms on Governance and Performance of Corporate Firms Nigeria' [2009] Corporate Ownership and Control 25-46.
[494] See Adegbite [2012] 257-276.
[495] See section 13 of the Investment and Securities Act 2007 ("ISA"). See also Akinpelu (2011) 263.
[496] I. Wilson, 'Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation' [June 2006] 12 Nigerian Economic Summit Group 7.
[497] Adegbite [2012] 257-276.

3.5 The Corporate Culture in Nigeria and its Impact on Corporate Governance: A Historical Review

The business organisation and corporate culture in Nigeria reflects different forms of ownership structure depending on the nature and type of firm. This has had the effect of setting different limits and boundaries to the objective of corporate governance in response to the interests and rights of the different corporate stakeholders and constituencies within firms. For instance, for over four decades following the political independence from Britain in 1960, Nigeria has embarked on modernising and improving its economy by focusing strongly on macroeconomic stabilisation and the liberalisation of business aimed at attracting foreign direct investment into the country.[498] To attain this, the country has embarked on the relaxation of most restrictions imposed on current and capital transfers, to the introduction of tax relief for multi-national investors willing to invest in the economy.[499] However it is important to emphasise that the introduction of less restrictive foreign ownership has not completely led to a positive result within the Nigerian corporate governance sphere. In recent times there has been an increase in cases of corporate scandals in multinational firms and joint ventures operating in Nigeria. For instance, the scandals relating to Unilever Plc in 1997 and Cadbury Nigeria Plc in 2006, alongside the Siemens bribery scandals of 2009, do little to prove that foreign majority ownership can lead to a better corporate governance system in Nigeria.[500]

Corporate scandals and failures have been common occurrences in Nigeria but the banking sector has experienced more collapse than any other sector in the economy.[501] Considering the importance and the essential role of the banking sector to the survival and development of the socio-economic system, the good or poor performance of banks invariably affects the economy of the country. According to Ogbuozobe**,** the banking sector in Nigeria accounts for over 40% of the

[498] E.N.M Okike, 'Management of Crisis: the Response of the Accounting Profession in Nigeria to the Challenge of its Legitimacy' [2004] 17 Accounting, Auditing and Accountability Journal 705-730.
[499] K. M Amaeshi et al., 'Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Influences?' (2006) 24 Journal of Corporate Citizenship 83-99.
[500] Due to the importance of these scandals to the issue of corporate governance in Nigeria, extensive discussion of them will be provided in the following section of this chapter.
[501] A classic example entails the mismanagement and misappropriation scandal that took place in Owena Bank Nigeria Plc in 2007 and Oceanic Bank Nigerian Plc in 2009. For more details see A.G Assaf and C.P Barros and A. Ibiwoye, 'Performance Assessment of Nigerian Banks Pre and Post Consolidation: Evidence from a Bayesian Approach' (2012) 32 Service Industries Journal 215-229.

country's Gross Domestic Product and it is a major provider of capital for many businesses operating within the Nigerian economy, including both public and private companies.[502] However, the collapse of such banks and the negative financial impact on shareholders, foreign investors, employees and the community have called the quality of corporate governance in Nigeria into question and led to calls for government interventions. This has resulted in the adoption and implementation of several corporate governance codes, regulations and mechanisms aimed at addressing the issues of poor corporate governance in Nigeria.[503] Nevertheless, recent corporate and market collapses reveal that Nigeria does not have much of a positive result to show for these regulatory efforts. Like any other developing country, Nigeria faces major challenges in implementing an effective corporate governance system. According to Okpara, the Nigerian legal and regulatory framework are weakened and made inefficient by institutionalised corruption, which has been widely accepted as one of the primary obstacles to attaining sound corporate governance in the country.[504] In effect, this has sometimes resulted in the abuse of minority shareholders' rights and a lack of commitment on the part of some directors to carry out their corporate governance functions and responsibilities.

Essentially, prior to colonial administration in 1866, indigenous customary business practices in Nigeria were not synonymous with modern corporate organisational practices.[505] Accordingly, it is noted that domestic business activities were carried out outside the ambit of company law or strict regulations.[506] Moreover, during the pre-colonial era, farming and agriculture was the main industry of the Nigerian economy. Such businesses operated on a very small scale and were family owned businesses, which did not enjoy the essential features of modern corporations such as limited liability and corporate separate entity. Even during the early colonial era, the Nigerian economy was dominated by British firms, which took the form of limited liability companies incorporated in the

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502 F. Obguozobe, 'A Consideration of the Impact of Companies and Allied Matters Act 1990 and the Insurance Act 2003 on the Board of Insurance Companies in Nigeria. Part 1' [2009] 51 International Journal of Law and Management 336-358.
503 Some recent initiatives include the development of the codes of corporate governance for public companies in 2003 and 2011 by the SEC and codes of corporate governance for Banks by the Central Bank of Nigeria in 2006.
504 J. O. Okpara, 'Perspectives on Corporate Governance Challenges in a Sub-Saharan African Economy' [2011] 5 Journal of Business & Policy Research 110 – 122.
505 B. Ahunwan, 'Corporate Governance in Nigeria' (2002) 27 Journal of Business Ethics 269-287.
506 ibid.

UK.[507] Interestingly though, even after the enactment of the Companies Act 1968, closely held family owned business remained the trend in the Nigerian economy as the indigenes of Nigeria at that time were not familiar with trading by means of joint stock organisation. However, this has changed over the years with a sharp increase in publicly held companies as the majority of the family-held corporations seeking to attract more capital for investment decided to go public. This sharp increase in publicly held companies is also attributed to greater market competitiveness amongst companies in Nigeria and the subsequent economic reforms made by the government to relinquish and sell its shares to the Nigerian public following the enactment of the Nigerian Investment Promotion Commission Act in 1995[508] ("NIPCA 1995"). Thus, closely held corporations that decided they wished to compete against the larger corporations that dominated the Nigerian capital market were forced to go public in order to acquire sufficient shares and market size.[509]

Prior to the enactment of the NIPCA 1995, most public corporations in Nigeria were wholly state-owned with few multinational public corporations and publicly listed corporations, which offered indigenous private ownership to a limited degree.[510] Through the enactment of the Foreign Exchange Control Act in 1962 ("FX 1962"), the government imposed absolute control over most public corporations and services resulting in a bar on both foreign and domestic ownership. Such industries included oil and gas, electricity, telecommunications, telegraphic services, shipping and air travel, which were all wholly state-owned corporations. Accordingly, in the 1980s, government-owned corporations contributed to 60% of the overall industrial production and about 35% of the Gross Domestic Product.[511] The implication of this for corporate governance at that time in the country's history was that a concentrated ownership structure was predominant, as the federal

[507] E. C Limbs and T. Fort, 'Nigerian Business Practices and their Interference with Virtue Ethics' (2000) 26 Journal of Business Ethics 169-179.
[508] B. M Adetunji and O Olaniran, 'The Effects of Internal and External Mechanisms on Governance and Performance of Corporate Firms in Nigeria' (2009) 7 Corporate Ownership and Control 23.
[509] ibid.
[510] For instance, a few financial firms (such as United Bank of Nigeria Plc. in 1971) offered only 8.3% of bank shares to Nigerians, while the remaining shares were owned by foreigners.
[511] Industry and Trade in a Global Economy With Special Reference to Sub-Saharan Africa: United Nations Industrial Development Organisation, (Industrial Policy and Research Branch 2000) 13-16.

government had control over the majority of the public corporation and sectors.[512]

The federal government also promoted indigenous ownership in certain private sectors of the economy, which were recognised under the Foreign Exchange Control Act and the Nigerian Enterprises Promotion Decree in 1972 ("NEPD").[513] Accordingly, the FX and NEPD restricted foreign and domestic ownership of major public corporations by providing three schedules of enterprises.[514] Although the NEPD and FX promoted domestic enterprises in certain private sectors in Nigeria, they were criticised for limiting ownership structures, which would have in turn attracted foreign capital and development through foreign investments. For instance, a good case illustration of this phenomenon was deduced in the case of *Kehinde v Registrar of Companies*[515] where the registrar of companies declined to register a joint venture between a Japanese company and a Nigerian company on the basis that the venture conflicted with the intentions of the NEPD and FX Act. The Japanese company was originally contracted to establish an assembly plant in Nigeria and also provide technology to the enterprise.

The criticisms and shortcomings of the NEPD in the promotion of foreign investment led to its replacement by the NIPCA 1995 which now allows foreign and domestic investors to acquire 100% shares in corporations through its privatisation programme.[516] This initiative has now contributed to the current dispersed ownership structure currently predominant in Nigerian public corporations. However, it is obvious that the motive behind the promulgation of such a law was to attract foreign investment to Nigeria, in order to generate more opportunities for domestic employers in the private and public sector, and to benefit from the development and the expertise of foreign investors.[517] Meanwhile, some have argued that the privatisation programme was also originally

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[512] N. Ofo, 'Corporate Governance in Nigeria: Prospects and Problems' (2010) 1(4) Apogee Journal of Business, Property and Constitutional Law 21–22.
[513]The enterprises include advertising, bread and bakery, candle manufacturing, cinemas and entertainment, and commission agents, amongst others.
[514] See Section 10(1)(a), FX 1962 and Sections 4 and 5 of the NEPD 1972; the three categories of ownership included (a) enterprises exclusively for Nigerians (b) enterprises in which foreigners were only allowed to hold 40% of share and (c) Enterprises in which foreigners could not hold more than 60% of shares.
[515](1979) L.R.N. 213 (H.C).
[516] See part 5 of the NIPCA 1995: see also O. Olaniran, *Corporate Governance in Nigeria* (Lambert Academic Publishing, 2012), 46-54.
[517] O. Joshua and S. Joshua and M. Danpome, 'Impact of Nigerian Investment Promotion Commission on Nigeria Trade and Investment Policy' (2013) 3 International Journal of Humanities and Social Science 174.

driven by the need to combat the failure of corporate governance in state-owned enterprises.[518]

Whilst an individual may operate as a sole proprietor or establish a partnership as a means of doing business in Nigeria, the legal framework under the CAMA presently provides three forms of companies for investors. Firstly, an incorporated company having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by the members (a company limited by shares); a company having the liability of its members limited by such amounts as the members may thereby undertake to contribute to the assets of the company in the event of its being wound up (company limited by guarantee); and finally a company not having any limit to the liability of its members (unlimited liability).[519] Of all these forms of companies, the company limited by guarantee is the least attractive for doing business, as it is statutorily not intended for making profit. It can only be incorporated for the purpose of promoting arts, science, religion, sports, culture, education, research, charity, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion is to be paid to its members.[520]

It must be noted however that regardless of the form of company, any of the above companies may either be public or private companies.[521] The private company, by virtue of section 22 of the CAMA, is prohibited from transferring or issuing shares to the public and must have at least 2 but not more than 50 shareholders. In a private company, a minimum share capital of N10,000 is required (equivalent to about £35 at the current exchange rate of 1£ to N285, as at June, 2016).[522] A public company, on the other hand, must have at least 50 members, with a minimum share capital of N500,000 (equivalent to £1,754.40) and can issue or transfer shares to the public.[523] It is important to note that only public corporations can be quoted on the Nigerian Stock Exchange (NSE) and where they are not listed on the Stock Exchange they are not required to comply with the NSE

[518] Akinpelu (2011) 337.
[519] Sections 21(1) (a), (b) and (c) of the CAMA 1990.
[520] See section 26(1) CAMA 1990.
[521] See Section 21(2) CAMA 1990.
[522] <http://www.xe.com/currencyconverter/convert/?Amount=1&From=GBP&To=NGN>
[523] Section 117-124 CAMA 1990.

disclosure requirement of listed corporations.[524] This however has a negative implication for corporate monitoring and regulation in Nigeria, since most public companies in Nigeria are not listed on the NSE.[525] Adversely, those public companies in Nigeria not listed under the NSE will usually operate outside the ambit of NSE's disclosure rules and financial regulations, which were originally implemented to entrench good corporate governance practices within public firms.[526] Traditionally, the provisions of these regulations are expected to quell or minimise the principal-agent problems found within public companies as a result of the separation of ownership and control arising from the dispersed ownership structure of corporation in Nigeria. For instance, the study conducted by Nganga, Jain and Artivor in 2003 revealed that only 13.3% of the firms selected from six random states[527] in Nigeria including Lagos (Lagos being the primary business and commercial city of Nigeria) were listed on the Nigerian stock exchange and 48.5% were limited liability companies.[528] As expected, the Nganga et al. study further revealed that close to 38% of the public companies were not subjected to important capital market regulations.[529] While it is not unreasonable for companies not listed on the NSE to not comply with its listing rules, this statistic seems to suggest that many of the public companies in Nigeria may not be familiar with fundamental corporate governance principles introduced by important regulatory bodies within the capital market. This statement is true when viewed in light of the study conducted by Okpara and Pamela in 2011, which shows that many companies hardly adhered to listing regulations in Nigeria.[530] Surely, non-compliance to governance regulation is not beneficial to the goal of attaining sound corporate governance practices in Nigeria; it only undermines companies' absorbance to ethical practices.

Irrespective of the unattractive statistics cited above, there is no dispute that the NSE has grown dramatically in terms of market capitalisation and numbers of listed companies. For instance,

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[524] See the Nigerian Stock Fact Book 2010.

[525] See S. Nganga and V Jain and M Artivor, 'Corporate Governance in Africa: A Survey of Publicly listed Companies' London Business School (December 2003).

[526] I. Wilson, 'Regulatory and Institutional Challenges of Corporate Governance in Nigerian Post Banking Consolidation' (2006) 12 Nigerian Economic Summit Group Economic Indicators 1-6.

[527] The states included Kano, Bauchi, Lagos, Plateau, Rivers and Abia state.

[528] See Nganga, Jain and Artivor (2003).

[529] ibid.

[530] The data was collected from 194 firms listed on the NSE in the fields of banking, insurance, and manufacturing in order to ascertain the extent of compliance of public companies to corporate governance rules and regulation. It was shown that only about 40% of the firms complied with existing corporate governance codes. See J. Okpara and W Pamela, 'Corporate Governance in Emerging Markets: Barriers to Effective Reform'[2011] 76 Society for the Advancement of Management 6-10.

the NSE is the third largest stock exchange in Africa with a market capitalisation of over 16 trillion Naira and currently has about 246 listed companies[531] as opposed to the 196 listed companies recorded in 2013.[532] However, it is noted that foreign multinational companies, through their subsidiaries, own a significant amount of the shares in some publicly held companies in Nigeria.[533] This is most likely due to the dominance of foreign companies during the colonial era, as some of the companies have continued to operate in Nigeria even after political independence in 1960. Nevertheless, as illustrated above, the government's effort to promote the indigenisation and privatisation of Nigerian enterprises through the enactment of the NEPD 1972 and NIPCA 1995 has to an extent reduced the level of foreign control and domination of shareholding in Nigerian publicly listed firms. Examples of this can be illustrated with reference to the evolution of prominent companies such as the Union Bank of Nigeria Plc (UBN):

In 1925, UBN was initially incorporated under the name of Barclays Bank, but following the enactment of the CA 1968, with the requirement for all overseas subsidiaries to be incorporated locally, its name was changed to Barclays Bank of Nigeria Limited.[534] The ownership structure at that time was 100% owned by foreigners and this remained unchanged until the enactment of the NEPD 1972, with the acquisition of 51.67% shares by the Federal Government of Nigeria, leaving Barclays Bank Plc, London, with 40% shares.[535] In 1979, Barclays Bank further disposed its shares to Nigerians and to reflect the new ownership structure the bank was later named the Union Bank of Nigeria Plc. In order to further the goals and objectives of the privatisation and indigenisation policy, the Federal Government in 1989 sold its shares to the Nigerian public through the Nigerian

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[531] See the Nigerian Stock Exchange FactBook September 2016 available online at <http://www.nigerianstockexchange.com/market_data-site/other-market-information-site/NSE%20Fact%20Sheet/Q3%20Fact%20Sheet%20-%202016.pdf> accessed on November 24 2016.

[532] For more details see <http://www.nse.com.ng/Regulation/ForIssuers/Pages/Listed-Companies.aspx> accessed 24 September 2013. See also The Nigerian Stock Exchange Factbook 2013 para 2.

[533] For instance, in public companies such as Guinness Nigeria Plc and Nigerian Breweries Plc, foreigners command up to 42% of the share ownership in stocks.

[534] ibid.

[535] A. Ogundina, *The Nigerian Banking and Financial Environment* (Immaculate Press, Indiana University 1988), 25.

Stock Exchange, thus resulting in a dispersed shareholding structure with the Nigerian public owning 80% and foreigners 20% of shares.[536]

According to Amao and Amaeshi, shareholding in Nigerian public corporations has grown from a few thousands in the early 70s to an estimated 5 million in 2008.[537] Although these reforms have promoted indigenisation and privatisation, the negative implication of this trend on corporate governance has been that this new type of ownership structure within Nigerian firms has ultimately and inevitably given rise to the agency problem and conflict of interest between management and shareholders/investors, due to the separation of ownership and control.[538] As will be demonstrated in the next section of this chapter, this conflict of interest between management and shareholders has regularly manifested itself in well-known companies. For instance, in the scandals involving corporations such as Cadbury Plc, Unilever Plc and Oceanic Bank, it was submitted that the managing directors who had residual control over corporations were able to expropriate the company's funds or manipulate account statements for their own personal interest for many years.[539]

The collapses and scandals have been attributed firstly to the weakness of the audit committee, under section 359(3) CAMA, to properly investigate and scrutinise firms to ensure proper disclosure and transparency, and secondly to the lack of adequate penalty under the codes of corporate governance to deter and hold directors and managers accountable for their actions.[540] Moreover, the agency problem in Nigeria has been heightened following the sharp increase in the number of financial stakeholders in Nigerian corporations, occurring as a result of the privatisation and indigenisation programme promoted by the federal government in the early 90s. Additionally, Ajogwu has argued that the agency problem is further exacerbated by the endemic culture of

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[536] E.E. Otobo, 'Regulatory Reform in Support of Privatization: Patterns and Progress in Africa' (1997) African Journal of Public Administration and Management 25-50.

[537] O. Amao and K. Amaeshi,'Galvanising Shareholders Activism: A Prerequisite for Effective Corporate Governance and Accountability in Nigeria' [2008] 82 Journal of Business Ethics 119-130.

[538] ibid.

[539] Oghojafor et al., (2010) 243-250.

[540] J. O. Okpara, Perspectives on Corporate Governance Challenges in a Sub-Saharan African Economy' (2009) Proceedings of the Annual American Business Research Conference 29-29 September 2009 Flushing, New York.

corruption, bribery, the poor functioning of the market and inadequate infrastructures.[541] Accordingly, the next section of this thesis will further highlight these issues by examining some of the core economic, social and legal challenges to corporate governance in Nigeria.

3.6 Corporate Governance Issues and Challenges in Nigeria

Corporate failures and market crises in Nigeria have highlighted the need for investors to obtain assurances in their investments. This is because high profile corporate collapses have contributed to public mistrust, which has resulted in the need for improved corporate governance, accountability and transparency. In Nigeria, the issues of corporate governance are often discussed in light of corruption, which is considered by many Nigerian academics as one of the major hindrances to social, economic, and political development in the country.[542] Hence, good corporate governance is progressively being seen by Nigerian corporations and regulatory agencies as one of the primary tools to quell corporate corruption.[543] While acknowledging the relevance of sound corporate governance, it is believed that corporate corruption is mainly prevalent within many corporations in Nigeria due to the lack of adequate regulatory mechanics to monitor and deter against directors' abuse of powers and to ensure adequate accountability and transparency.[544] The author agrees with this view, as it is equally argued in this thesis that better regulatory mechanisms are needed under the CAMA and the Code. As illustrated above, the Nigerian legal system is highly influenced by the UK legal system, and its corporate governance Code equally mimics that of the UK's, which has a principle-based approach. Therefore, this begs the question: to what extent does the UK's principle-based approach work in Nigeria?

Adewale has also considered this issue and in line with this thesis submits that in order to ensure the effectiveness of corporate governance principles, especially in developing countries, governance principles must be prudently strengthened by law and enforced by appropriate regulatory

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[541] F. Ajogwu, 'Corporate Governance in Nigeria: Law and Practice' [2007] Centre for Commercial Development, Lagos Nigeria 5

[542] I. Bolodeoku, 'Corporate Governance: The Law's Response to Agency Costs in Nigeria' (2007) 32(2) Brook J. Int.l L. 467.

[543] M. Al-Faki, 'Transparency and Corporate Governance for Capital Market Development in Africa: the Nigerian Case Study' (2006) Securities Market Journal 9-28.

[544] ibid.

agents where strict penalties are imposed in association with any breach.[545] The US is an epitome of a rule-based system, where compliance and enforcement of corporate governance principles is a matter of law; strict penalties and sanctions are imposed where there is a violation.[546] This type of regulatory approach in the US is currently embodied by the SOX Act, which was originally enacted to ensure proper protection for investors, to enhance companies' boards/management, and improve public accounting by imposing strict criminal penalties on corporate actors who act dishonestly.[547] Accordingly, it has been argued that such systems with a robust regulatory framework are more likely to prevent future corporate collapse and scandal, by promoting accountability and transparency through strict corporate governance rules: especially in developing countries, where corporate governance is still at its developmental stage.[548]

Becher and Frye, however, took a different view by contending that there is the need to encourage more soft laws and rely more on a principle-based system.[549] They argued that such a system would allow firms to voluntarily adhere to or observe corporate governance practices and conducts, hence avoiding over regulation.[550] The rationale behind their argument was that the US version of imposing strict and excessive regulatory burden upon the traditional organisational structure of business relationships negatively affects the notion of traditional private contract and could lead to a box-ticking system, without a correction in the underlying behaviour and attitudes of public corporations.[551]

Undoubtedly, the opinion presented by Becher and Frye provides a plausible and suitable system of corporate governance in developed countries; however, such a system may be incompatible with emerging countries, especially in Nigeria where there is a real issue of low

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[545] A. Adewale, 'An Evaluation of the Limitations of the Corporate Governance Codes in Preventing Corporate Collapse in Nigeria' [2013] 7 Journal of Business Management 110-118.
[546] J. Slaughter "The Impact of Sarbanes-Oxley Act on American Business" 2013, available online at <http://smallbusiness.chron.com/impact-sarbanes-oxley-act-american-businesses-1547.html> accessed on 31 December 2013.
[547] For instance see sections 404, 802 and 902 of the SOX 2002 respectively on the assessment of internal control and criminal penalties on company officers for violation.
[548] J. Keenan, 'Corporate Governance in the UK/US Boardrooms' [2004] 12 Corporate Governance 172-176.
[549] D. A Becher and Melissa B. Frye, 'Does Regulation Substitute or Complement Governance?'[2008] Department of Finance, Drexel University, Philadelphia USA 2-7.
[550] ibid.
[551] ibid.

compliance with voluntary Codes.[552] In contrast with the UK, where compliance with governance codes is considered to be very good,[553] a system of self-regulation and soft law might prove problematic in Nigeria. A self-policing system in Nigeria would most likely present wrongdoing directors with the flexibility and freedom to disregard corporate governance principles. Therefore, although one may argue that excessive regulation in Nigeria may impede private contracting, at least in the short run, a rule based-system would be of significant benefit in order to improve the situation within corporations, before introducing a principle-based system to nurture a long-lasting culture of good governance amongst public companies.

The 'Law Matters' thesis also claims that the law has a central role to play in the development of equity markets, which is essential within the ambit of corporate governance.[554] It further emphasises that the law is important in securing the property rights of shareholders and that strong legal protection has shielded shareholders, especially minority shareholders, from having their investment expropriated by controlling shareholders or even controlling directors[555] (as seen in the case of Nigeria). Moreover, when laws are in place and they are backed up by proper enforcement and sanctions, and the consequences for non-compliance are expressly set out, parties in contractual settings within the ambit of corporation can rely less on personal and family relationships when transacting.[556]

The 'Law Matters' thesis, which emphasises the importance of mandatory regulations and the legal protection of shareholders within modern corporations, witnessed the development of the SOX in the aftermath of the collapse of corporate giants such as Enron and WorldCom in the US.[557] According to La Porta et al., enforceability of rules is the test of its potency, arguing that duties

[552] E.g. in Okpara and Pamela's previously highlighted study, it was established that only about 40% of the listed companies surveyed adopted or complied with the Codes. For more details see Okpara and Pamela, (2011) 6-10.
[553] For instance, a study conducted by Grimaud, Arcot and Bruno during the period 1998 to 2005 revealed that the overall compliance level to corporate governance principles in the UK increased by 87%, with compliance levels for individual companies at 95% in 2005, as opposed to less than 44% in 1998. See A. F. Grimaud and S. Arcot and V. Bruno, 'Corporate Governance in the UK: is the Comply-Explain Approach Working?' [2005] Discussion Paper NO 581, Corporate Governance at LSE, 001, 5-8.
[554] J. C. Coffee, 'The Rise of Dispersed Ownership: The Roles of Law and State in the Separation of Ownership and Control' (2001) 111 Yale Law Journal 1, 16-21.
[555] ibid.
[556] J. Kirkbride and S. Letza and C. Smallman, 'Minority Shareholder and Corporate Governance; Reflections on the Derivative Action in the UK, the USA and in China' [2009] 51 International Journal of Law and Management, 206-214.
[557] A. Pacces, *Rethinking Corporate Governance: The Law and Economics of Control* (Routledge 2012) 6, 19.

without enforceability are hollow.[558] This can be equated to the situation in Nigeria where corporate governance codes are best described as 'empty shells'. The existing SEC code of corporate governance in Nigeria as will be examined later proves this point: despite its comprehensiveness, it lacks proper, compliance, enforcement/sanction mechanisms to penalise erring directors. Nevertheless, it is presumed by certain scholars that there is a market for corporate control to deal with the agency problem in corporations with diffused shareholders.[559] This presumption is however dangerous and undesirable, as weak monitoring and oversight mechanisms (as exemplified in Nigeria) can easily undermine the effectiveness of a corporate governance structure. It is, therefore, the agenda of this study to suggest the logical need for policymakers to provide a regulatory atmosphere that provides a suitable platform to tackle the conflict of interest between management and shareholders. Only then will the corporate sector in Nigeria evolve naturally and concurrently engender fruitful economic gains. In implementing a corporate governance system in Nigeria, the government should also take into account the promotion of fundamental values such as transparency and rule of law. Particularly, factors such as the historical perspective, corporate ownership structure, culture, social, political and economic norms should also be taken into account. As can be gleaned from the current economic situation in Nigeria, one can rightly say that the Nigerian regulatory authority, while adopting the corporate governance codes mainly patterned along the UK code of corporate governance, failed to introduce measures to address the low enforcement and compliance issues associated with the Code.

Closely related to the issue of code enforcement is also the concern that in Nigeria, the enforcement of shareholders' rights is usually impeded by a slow court process, which discourages shareholders from invoking their statutory rights, especially minority shareholders.[560] Studies have shown that in Nigeria, over 60% of minority shareholders are unable to easily enforce their rights because of excessive bureaucracy.[561] In contrast with the UK and US, an index presented by Djankov et al. on the legal protection of minority shareholders against expropriation by corporate insiders in

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[558] R. La Porta et al., 'Investors Protection and Corporate Governance' [2000] 58 Journal of Financial Economics, 144-186.
[559] R. La Porta et al., 'Corporate Ownership Around the World' [1999] 54 Journal of Finance 471-517.
[560] See Bolodeoku (2007) 467.
[561] See Okpara and Pamela (2011) 6-10

Europe and the US, revealed that the UK scored about 80% and the US 83% respectively, as opposed to other countries such as Italy and the Netherlands which scored 57% and 47% respectively.[562] Djankov et al. considered the UK and US as having a strong and robust court system for enforcement of security and corporate governance laws, which serves as a useful tool in preventing self-dealing and insider abuse.[563]

The case of *Owena Bank Nigeria Plc v Securities and Exchange Commission and Anor*[564] is a classic example of how the slow court process and bureaucracy in Nigeria may impede the enforcement of corporate governance provisions to protect shareholders/investors. The case, which lasted for 3 years, resulted in a judgment rejecting the SEC's decision to suspend Owena Bank for failing to register their shares on the Nigerian Stock Exchange. Whilst the case was pending, the 12 month maximum period for suspension bestowed on the SEC by the Investment and Securities Act[565] had expired and could no longer be relied upon. The case of Owena reveals that the issue of delay in corporate dispute cases brought before the court presents negative consequences for regulatory bodies, especially where such delay makes it difficult for regulatory agencies to enforce and execute their governance roles. This case not only demonstrates the statutory limitation of the powers of the SEC, but also the fact that the courts in Nigeria may not be suitable for dealing with certain corporate disputes that require some degree of swiftness. According to Adegbite, the court system in Nigeria remains slow in providing punctual and fast hearings and most importantly they are significantly expensive.[566]

In light of the slow judicial process in Nigeria, it would not be unreasonable if the Securities and Exchange Commission is properly empowered and mandated under appropriate statute to enforce and carry out their corporate governance roles without any limitations. It is noted that in countries with a slow judicial system, enforcement of regulations by an independent and motivated

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[562] S. Djankov et al. 'The Law and Economics of Self-Dealing' [2008] 88 Journal of Financial Economics 430-465.
[563] ibid.
[564] Appeal No: CA/L/326/96.
[565] See section 22 of the ISA 2007.
[566] E. Adegbite, 'Corporate Governance Regulation in Nigeria' [2012] 12(2) CGIJBS 257-276.

securities commission could be more effective than judicial enforcement.[567] However, given the novelty of self-regulatory requirements and the voluntary nature of the corporate governance code in Nigeria, it is less likely that the SEC would be empowered with such mandates and powers any time soon.

3.7 Corporate Governance Failures in Nigerian Public Corporations: Evidence from the Case of Cadbury Nigeria Plc and Unilever Nigeria Plc

After the discovery of oil in Nigeria in 1956, and in the aftermath of political independence in the 1960s, Nigeria witnessed a surge in economic growth and development within its commercial realms.[568] In light of this, Nigeria adopted several policies and economic strategies in order to seize business control and to maintain economic autonomy as a means of promoting its political independence.[569] Such strategies and policies included the privatisation drive of the Federal Government in 1972 following the enactment of the NEPD 1972. As previously illustrated, the consequence of such governmental action was that the Decree provided for the privatisation of many enterprises in which the Federal Government had significant equity holding.[570] However, the subsequent enactment of the NIPCA 1995 essentially diluted the strong equity holding by the government, and encouraged domestic and foreign investment. Consequently, the NIPCA promoted the establishment of more public companies as a vehicle for doing business and encouraged portfolio investment (dispersed shareholding) in Nigeria. However, as these firms expanded in terms of capital and shareholding, and as management inevitably became separated from ownership, the corporate landscape began to suffer from fundamental problems of insider-dealings and conflicts of interest between management and shareholders.[571]

Cases of insider dealings in Nigerian firms are not uncommon; even until recently this has been the case, as investors and shareholders of Nigerian public corporations have often experienced

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[567] See the OECD Development Centre Working Paper N0. 180 (Formerly Technical Paper N0. 180) by C.P. Oman, 'Corporate Governance and National Development, Research Programme on: Corporate Governance in Developing Countries and Emerging Economies' (October 2001) 10-15.
[568] N. Onwuka, *Economic History of Nigeria 19th and 20th Centuries* (Enugu, Magnet Business Enterprises, 2001) 2-33.
[569] ibid.
[570] M.O. Kayode and Y.B. Usman, *Nigeria Since Independence: the First Twenty Five Years* (1989, Lagos, Heinemann Educational Books Nigeria) 129-145.
[571] K. Amaeshi and O. Amao, 'Corporate Social Responsibility in Transnational Spaces: An Institutional Deconstruction of MNCCSR Practices in Nigeria Oil and Gas Sector' [2008] CSR working Paper 248/08.

scandalous loss of business due to corporate collapses in Nigeria.[572] As will be discussed in the next section of this chapter, these collapses not only expose weaknesses in the corporate governance system in Nigeria, but also specifically showcase the inadequacy of the SEC 2011 Code and the CAMA 1990 as the apex of corporate governance regulations in Nigeria, as well as the ineffectiveness of existing regulatory mechanics. Furthermore, it equally exposes how the peculiarity of the social and economic situation in Nigeria affects the corporate governance system in the country. The discussion makes reference to specific case studies such as Unilever Plc and Cadbury Plc, with the sole purpose of providing a more contextual basis for analysis and before embarking on the examination of the regulatory framework in the subsequent chapters.

3.7.1 The Collapse of Unilever Nigeria Plc

The agency problem as it arises in the Nigerian context is best illustrated with reference to the case of Unilever, Nigeria Plc (previously Lever Brothers Nigeria Plc). Unilever Plc is a subsidiary to the parent company Unilever Group UK, which currently commands 51% of the company's shares (at the time of writing of this thesis), leaving Nigerians with 49%. Incorporated in 1923 by Lord Leverhulme as Lever Brothers (West Africa) Ltd, Unilever is one of the oldest companies in Nigeria and has come to occupy a prominent place in the Nigerian economy as a manufacturing company.[573] It was not until 1997 - just two years after the enactment of the NIPCA 1995 - that evidence of corporate abuse and poor corporate governance began to unfold. It is considered here that the effect of the NIPCA 1995 may have played a part in the scandal that took place in Unilever. This is because as shareholding became more dispersed following its enactment, control was separated from ownership leaving management with the opportunity to easily expropriate shareholders' wealth in light of the inadequate corporate governance system. In other words, the

[572] For example, in early 2009 more than ten Chief Executives of Banks such as Oceanic Bank Plc were dismissed along with their board of directors, in most cases for granting loans in excess of over N800 billion to relatives and the general public without collateral or security. Their arrests were later carried out, which were reported in newspaper headlines such as The Nations, 'Sack of Five CEOs: An Earthquake Foretold' and CBN's: 'Cecilia Ibru, Akingbola, Ebong, two others may face trial' (August, 15, 2009, 1-5).

[573] G. Jones, *Renewing Unilever: Transformation and Tradition* (Oxford University Press, 2005), 185-194.

agency problem, as formulated by Berle and Means,[574] made its way into the organisational structure of Unilever Nigeria Plc.

A shadow was cast on the integrity of the company when Robert Clarke, the Vice Chairman and Chief Executive Officer of what was then Lever Brothers Nigeria Plc (now Unilever Plc), issued a press statement that revealed that the company was underperforming financially. As records show, the statement revealed that during 1997 the company had not been complying with the Unilever prudent accounting standards and internal controls.[575] The reports gathered further highlighted abuse of power by senior management, insider dealing and failure to disclose information on supply of contract in which the senior management had interest.[576] Further audits conducted by the recently appointed financial director also revealed a deliberate financial manipulation, which required an overall adjustment and a loss of approximately N1.2 billion.[577] It was articulated that employment and other management decisions were based on ethnic solidarity rather than efficiency considerations as it was revealed that another company registered in the name of the wife of the managing director handled major contracts of the company.[578]

The case of Unilever undoubtedly showcases the negative impact of managerial dominance in public firms within the Nigerian economic system. In other words, the bestowment of control in the hands of the management made the monitoring of domestic and local management difficult, particularly when shareholding is dispersed and shareholders do not have enough voting rights to effectively control management. This further endorses the relevance of the argument presented by Shleifer and Vishny in their study, which emphasises the effectiveness of large shareholders (concentrated ownership) in controlling management through the use of voting rights.[579] Particularly, it also reveals that foreign majority shareholders generally do not possess the appropriate local knowledge of Nigerian's peculiar corporate governance system, as the Unilever Group in the United

574 Berle and Means (1932).
575 Akinpelu (2011) 339.
576 ibid.
577 ibid.
578 J.O. Otusanya and S. Lauwo and G.B, Adeyeye, 'A Critical Examination of the Multinational Companies' Anti-Corruption Policy in Nigeria' [2012] Accountancy Business and the Public Interest 1-49.
579 A. Shleifer and R. W. Vishny, 'A Survey of Corporate Governance' [1997] 52 Journal of Finance 24.

Kingdom also commanded a significant number of shares in the company. While these challenges and problems are not restricted to the Nigerian economy, the Nigerian corporate governance system is considered to be laden with corruption, which is one of the major factors hindering the implementation of an effective corporate governance system in the country. Specifically, inadequate regulatory mechanisms have also allowed the corporate corruption to thrive and go unchecked in many companies. For instance, the corporate scandal at Unilever Plc tends to highlight the ineffectiveness of the auditors and audit committee established under part 11 of the CAMA 1990 in terms of unmasking financial irregularities perpetrated by directors.

It is submitted that if the auditor's reports were indeed properly scrutinised and probed by the audit committee, it may have been possible to discover the account manipulation on time and report it to the regulatory authorities or annual general meetings.[580] Sources also claim that aside from the dismissal of directors there was no evidence that the company's executives were adequately sanctioned for their misconducts.[581] This is partly due to the meager penalty and deterring capacity of section 277-278 of the CAMA for corporate violators such as directors and managers (for example, a mere penalty of N50 (2 British Pence) to N500 (£2) is levied for breach of their directors' duties).[582] Undoubtedly, such penalties are not adequate or sufficient to deter directors from mismanagement and misappropriation of shareholders' wealth.

Although the scandal came to light in 1997, the CAMA is still the primary legislation regulating corporate governance in Nigeria and without any doubt the inadequacy and shortcomings of the CAMA still prevail, as subsequent corporate scandals in Nigerian public firms reveal. Based on the provisions of the CAMA, one may argue that the legislators did not anticipate the current issues of corporate governance at the time of its enactment, particularly given the major collapses in Nigerian public companies following the date of its enactment. In other words, it can be argued that the CAMA was not initially designed to regulate corporate governance but mainly geared towards

[580] S. B. Adeyemi and T.O Fagbemi, 'The Perception of Ethics in Auditing Profession in Nigeria' [2011] 5(7) Journal of Accounting and Taxation 146-157.
[581] See Akinpelu [2012] 339-341.
[582] See section 277-278 of the CAMA 1990.

corporate management. This is why this thesis argues that the CAMA is long overdue for revision and needs to be extensively reviewed in order to include contemporary and adequate provision to tackle the current issues relating to corporate governance in Nigeria. More specifically, the failure of the board of directors to comply with Unilever Nigeria Plc's prudent accounting standards further highlights the peculiar behaviour of some directors in Nigeria, where they deliberately refuse to adhere to self-regulatory measures or optional codes.

In Nigeria, non-compliance to self-regulation is an issue of concern, as opposed to that in developed countries such as the UK.[583] This articulates the fact that compliance to the Code will not be achieved without statutory backing. In other words (as will be shown in chapter 6), the principle-based system currently prescribed by the codes of corporate governance in Nigeria is inadequate as a mechanism to regulate corporate governance in Nigerian public firms. Although the crisis in Unilever took place over a decade ago, these issues and problems are still present within the Nigerian system, as the crisis in Cadbury Nigeria Plc further demonstrates.

3.7.2 The Collapse of Cadbury Nigeria Plc

Although the Unilever Nigeria Plc scandal occurred a decade before Cadbury, the crisis in Cadbury Nigeria Plc showcases the fact that poor corporate governance practices and unethical conduct by corporate actors still flourishes in Nigeria, while investors often experience scandalous losses of business. The respected conglomerate, Cadbury Nigeria Plc, also experienced an incident of account manipulation like the one that occurred at Unilever Nigeria Plc in 1997, with dreadful consequences for investors and shareholders who lost their investments.[584] As demonstrated by the conceptualisation and theorisation provided in the previous chapter, it is clear that corporate governance entails a relationship between the shareholders and the company, in the exercise of powers by the board of directors, in order to promote equitable treatment of all shareholders and

[583] For more information see the aforementioned study by Grimaud, Arcot and Bruno, which revealed a 60% increase in the overall compliance level to corporate governance regulations in the UK, as opposed to the study conducted by Okpara and Pamela in 2011, which shows that compliance with the Code in Nigeria is inadequate.
[584] Akinpelu (2011) 340.

stakeholders.[585] In the light of previous discussion, it is compelling to examine the case of Cadbury in order to demonstrate the nature and practices of corporate governance within the context of the Nigerian economy. Cadbury Nigeria Plc had carried on business in Nigeria for decades, maintaining a very high reputation until the year 2006 when the chairman of the board of Cadbury notified the world of discrepancies in her account. PricewaterhouseCoopers, an independent accounting firm, was appointed to investigate the overstatement and revealed in their report an account overstatement of around N13 billion (approximately £50 million as of 2015) by the managing directors. [586] This resulted in an underlying operating loss of N2 billion just in 2006.[587] It was also noted that the managing director of the board of Cadbury Nigeria Mr. Bunmi Oni and the finance director Mr Ayo Akadiri were both relieved of their duties and permanently barred by the council of Nigerian Stock Exchange from running any publicly quoted company.[588]

At first glance, one may immediately conclude that the internal and organisational mechanisms of Cadbury Nigeria Plc were weak. However, it is important to note that Cadbury's parent company, Cadbury Schweppes had and still does have an excellent corporate reputation and is a leader in providing and maintaining sound governance within its organisational and groups' structure. According to Solanke**,** Cadbury Schweppes and its subsidiaries have prudent codes of ethics, which frown upon overstatement of account and corporate fraud in general.[589] Therefore it begs the question: how and why did the account manipulation in Cadbury Plc go unnoticed despite its robust organisational system? It is apparent that the incident at Cadbury Plc not only reveals high levels of insider dealings in certain firms in Nigeria but it also proves that there exist weaknesses in the regulatory institutions and apparatuses available within the Nigerian governance framework. For instance, although the Securities and Exchange Commission had been established as the apex regulatory agent for regulating corporations and preventing insider corporate abuse at that time, the

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[585] S. William, *How to Govern Corporations So They Serve the Public Good: A Theory of Corporate Governance Emergence* (Edwin Mellen 2009), 1-6.
[586] S. C Okaro and G. O Okafor, 'Drivers of Audit Failure in Nigeria-Evidence From Cadbury (Nigeria) Plc' [2013] 4 Research Journal of Finance and Accounting, 14-16.
[587] Akinpelu (2011) 340.
[588] ibid.
[589] O.O. Solanke, 'Corporate Governance Issues in Financial Reporting – The Cadbury Challenge' (2007) available at <http://www.nigeriavillagesquare.com/articles/oladele-o-solanke/corporate-governance-issues-in-financial-reporting-the-cadbury- challenge.html> accessed 18 December 2013.

overstatements were only discovered upon internal investigations undertaken by the parent company, Cadbury Schweppes Plc.[590] In this regard, it is evident that the conventional inadequate regulatory system that had allowed the corporate corruption in Unilever Nigeria Plc to go unnoticed had also permitted the corporate maladministration to go unchecked within Cadbury Nigeria Plc.

Nigeria as an emerging economy is widely considered to be underdeveloped, lacking the adequate infrastructure for investigating firms and sometimes timely detecting fraudulent conducts within companies.[591] These factors constantly appear to make the implementation of an effective corporate governance system difficult or unattainable in Nigeria. For instance, one of the limitations revealed following the review of the 2003 SEC Code in 2008 was the weakness in the enforcement and compliance mechanisms of the Code.[592] Although the 2003 code had been revised and replaced by the 2011 SEC Code, there are still concerns as to the latter's effectiveness in that in material respect, it merely mirrors its predecessor. As some academics have rightly said, the 'the problem in Nigeria is that of enforcement which is silent except when there is a public outcry".[593]

The collapse of Cadbury further uncovers the weaknesses in the audit committee, as constituted under section 359 of the CAMA, which should have probed the account to discover discrepancies in time. In this regard, it is argued that a conscientious and rigorous application of section 359 CAMA 1990 would have prevented the crushing scandal in Cadbury. Perhaps the oversight functions of the board of the company were drastically lacking, so as to permit its managing director and financial director to deliberately overstate the account. According to sections 282 and 334 of the CAMA, directors are required to exercise due diligence and care in the preparation of financial statements. It is submitted that the board of directors at Cadbury had relied on questionable management and financial reports, where the account statement provided by managing director and financial director contained a dozen 'red flags' that should have caused the

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[590] A. Muraina and E. Okpara and S. Ahunanya, 'Transparency in Corporate Governance; A Comparative Study of ENRON, USA and Cadbury PLC, Nigeria' (2010) 5(6), Medwell Journals, 471-476.
[591] P. Angaye and D. G. William, 'Corporate Governance in Infancy and Growth-an Interview-Based Study of the Development of Governance and Regulation in Nigeria' in M. Tsamenyi and S. Uddin (eds) *Corporate Governance in Less Developed and Emergence Economics* (Emerald Publishing Ltd, 2008) 359-362.
[592] See Adewale, [2013] 110-118.
[593] S.B. Adeyemi, and K. O. Akinniyi, 'Stakeholders' Perception of the Independence of Statutory Auditors in Nigeria' (2011) 6 (2) Serbian Journal of Management 247-267.

board to investigate.[594] This also reveals the incompetence and laxity of some boards to effectively carry out their functions in Nigerian public companies, a situation which the former Governor of CBN, Sanusi Lamido, described in his report following the audit of banks as 'a culture of deliberate disregard to corporate governance practices by boards of directors'.[595]

In few Nigerian firms, there is also the issue of nepotism and favouritism. For instance, Nigeria has lost some reputable companies in the past because managers, through personal affiliations/relationships use their powers to award special favours to their relatives.[596] Cave and Rowell nonetheless observed that similar issues also affect the UK/US, where they noted that some large corporations such as News Corp[597] use commercial lobbying to influence government, politicians and to get changes to proposed laws for commercial ends.[598] In this regard, corporate lobbyists usually invest in provision of information, expertise and advice to politicians, contributions in amendment to drafting of laws.[599] They asserted that, in return, some politicians also receive special privileges and benefits offered by the corporate lobbyists: 'there are some firms specialised in employing the sons of influential officials.'[600] While personal affiliations and lobbying may facilitate the drafting /passing of laws, they can also constitute channels for partiality in politics and also lead to reduction in corporate transparency, and possible abuse of powers by directors.[601] According to Adekoya, 'some managers and directors of listed corporations have already become used to abusing their powers to reap private benefits'.[602] The analysis in chapter 4 will focus on how to improve the accountability of directors towards its shareholders/stakeholders and the company, and how to

[594] For instance, Solanke submitted that despite the overstatement of Cadbury's account, the auditors and audit committee had failed to take the necessary measures to investigate the company's accounts. See Solanke (2007).

[595] L. S. Sanusi, 'The Nigerian Banking Industry: What Went Wrong and the Way Forward. Being a Convocation Lecture Delivered at the Convocation Square' (2010) Bayero University, Kano, on Friday 26 February, 2010 to mark the Annual Convocation Ceremony of the University.

[596] The scandal at Oceanic Bank in 2009 is a perfect example: as previously stated, it was revealed that the managing director, Ibru Cicilia, loaned out billions of Naira to her relatives without any collateral or security as laid down by the regulations of the bank. For more details see Bcc News Africa, 'Former Nigerian Bank CEO Cecilia Ibru Jailed For Fraud', 9th October 2010 online available at <http://www.bbc.co.uk/news/world-africa-11506421> accessed 21 December 2013.

[597] News Corp is an American multinational mass media company founded in 1979, specialised in newspapers and publishing.

[598] T. Cave and A. Rowell, *A Quiet Word: Lobbying, Crony Capitalism and Broken Politics in Britain* (Vintage Books, 2015) 3-7; See also D. Whyte (ed), *How Corrupt is Britain?* (Pluto Press 2015).

[599] Cave and Rowell (2015) 8.

[600] ibid, 51.

[601] A. Mellahi, 'The Dynamics of Boards of Directors in Failing Organisations, (2005) 38 Long Range Planning 261-279.

[602] A. Adekoya, 'Corporate Governance Reforms in Nigeria: Challenges and Suggested Solutions' [2011] Journal of Business Systems Governance and Ethics 38-46.

minimise this abuse of powers.

3.8 Conclusion

In this chapter, a thorough analysis of the corporate governance situation in Nigeria has been provided from a social, economic and historical perspective. The analysis has examined the evolution of corporate governance regulation in light of Nigeria's company law and governance codes by showing how they have been adapted to regulate companies. In this examination, it was observed that the legal and regulatory framework of corporate governance in Nigeria is greatly influenced by the English legal system. For instance, the provisions of the CAMA are modelled after the UK's CA. Similarly, the Code in Nigeria is also identical to the UK's combined code which is based on principles rather than hard law. While it is not unreasonable to learn from practices of developed countries such as the UK, it is posited that regulatory reforms appropriated from developed countries should be carefully adapted to ensure that they are compatible with the economic and social factors peculiar to Nigeria. The analysis has shown that cultural, social and economic circumstances in Nigeria are quite distinctive when compared with developed countries such as the UK. Therefore, the extent to which regulations and laws represent the actual economic and social needs of Nigeria should be at the forefront of corporate governance reforms in the country.

The peculiar state in Nigeria was further expounded through an examination of the distinct institutional structure of Nigeria's corporate governance, which basically encompasses the unique mechanisms, institutions and organs responsible for regulating and governing companies. While the institutional structure may differ from jurisdiction to jurisdiction, certain organs are widely accepted within the sphere of Nigerian company law, namely, the board of directors, shareholders, auditors and audit committee. This thesis argues, according to the objectives of corporate governance, that company laws and regulations are essential in balancing and distributing powers, functions and responsibilities between the different key organs in the firm. One of the most essential tools in company law is to set limitations on company decision-making powers and limit the excesses of management in order to avoid abuse of power. Hence, whilst the various key constituencies that exist within the company are given the authority to govern the company, external regulations are important in aligning the relationships between the company, its members and its directors, as well as other stakeholders.

The analysis also shows that one fundamental factor, which greatly influences the control and exercise of powers within public companies in Nigeria and the nature of regulationss is the type of shareholding, which in Nigeria is characterised by dispersed ownership. In light of this, the corporate culture in Nigeria was also examined from a historical perspective to show how the objective of corporate governance and regulations relates directly to the ownership structure of firms. It was revealed that within the corporate history of Nigeria, firms have adopted various ownership structures attributed to various privatisation programmes and regulatory reforms implemented by the Federal Government from the early 1970s to mid-1990s. These reforms have contributed in transforming the ownership structure of public corporations in Nigeria from a concentrated ownership to a dispersed ownership structure. However, the negative implication of this fact on corporate governance in Nigeria is that the agency problem is further strengthened, as most directors have become prone to expropriate the wealth of shareholders and investors who seem to play a passive role in public firms. In basic terms, the type of ownership structure in Nigeria has caused a conflict of interest between management shareholders, which is different from the typical conflict of interest between controlling shareholders and minority shareholders in a concentrated ownership structure. Particularly, it has been demonstrated with reference to the scandals in companies such as Cadbury Nigeria Plc and Unilever Nigeria Plc that the current ownership structures in Nigeria encourage directors' misconduct and insider dealing in public firms. Therefore, current laws and regulation must provide a robust framework to protect shareholders against potential directorial abuse of powers in Nigeria.

Chapter 4: Assessing the Corporate Governance Regulatory Framework for Directors under the CAMA: Reforming and Enhancing Directors' Duties and Accountability in Nigeria - Lessons From the UK's CA 2006

4.1 Introduction

The analysis in chapter 3 revealed that as part of an effective corporate governance system, directors must be made accountable to the company through various mechanisms, such as directors' duties and legal proceedings brought by shareholders for breach of duties.[603] This chapter aims to propose reforms of the directors' core duties of loyalty and the statutory shareholder mechanisms for enforcement of directors' breach of duties under the CAMA. The rationale for this proposal is that the relevant provisions of the CAMA are considered to contain defects, which simultaneously limit directors' accountability to the company as a whole and restrict the ability of shareholders to successfully challenge directors for breach of duties. In practice, directors in Nigeria owe a duty of loyalty, under section 279-280 of the CAMA, to act in the best interest of the company as a whole[604] and to avoid conflict of interest.[605] This accentuates directors' accountability because a breach of these duties will result in liability to the company. This accountability is further emphasised by the statutory tools available to shareholders, enabling them to challenge directors for misconduct by initiating a derivative action in section 303 or resorting to the oppression remedy in section 311. The former allows a shareholder to bring an action on behalf of the company against a director for wrongs done to the company. The latter is brought against the directors if they conduct the affairs of the company in a manner that is oppressive to the interest of members.[606] In theory, these mechanisms seem robust enough to deter directors from abusing their powers, but in practice, as I will later

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[603] This view is strongly supported by scholars such as J. Lowry, 'The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure' [2009] 68(3) Cambridge Law Journal; N. Brennan and J. Solomon, 'Corporate Governance, Accountability and Mechanisms of Accountability: an Overview' (2008) 21 Accounting Auditing and Accountability Journal 885; J. Solomon, *Corporate governance and Accountability,* (3rd edn, John Wiley 2010); A. Keay, 'Accountability and the Corporate Governance Framework: From Cadbury to the UK Corporate Governance Code' [August 31, 2012] Working Paper Series, University of Leeds, School of law available at <http://ssrn.com/abstract=2143171> accessed 20 June 2015.

[604] See section 279(3)-(4) of the CAMA.

[605] See section 280 of the CAMA.

[606] F. Ajogwu, *Corporate Governance in Nigeria: Law and Practice* (Nigeria: Lagos, 2007) Centre for Commercial Law Development 23-26.

demonstrate, they contain statutory shortcomings which act as obstacles to achieving good corporate governance in Nigeria.

According to section 279(4) of the CAMA, a director must only have regard to the interests of shareholders and employees when acting in the interest of the company as a whole. This thesis argues that the complete exclusion from directors' duties of the need to consider/act in the interests of other important actors, such as creditors, suppliers, consumers and the community, not only undermines directorial and corporate accountability towards stakeholders in Nigeria but it also weakens their role and protection under the Nigerian corporate governance system. In contrast, the UK's CA and the regulatory framework adopted by several other common law countries,[607] have provisions requiring directors to act in the interests of creditors, or to take their interests into consideration, during insolvency.[608] Furthermore, section 172(1)(a)-(f) of the UK CA also provide that when a director is acting to promote the success of the company, they must also have regards to the interests of the employees and foster good relationships with suppliers, consumers, the community and the environment. Nonetheless, the approach in section 172 is occasionally criticised on the basis that considering such a wide range of interests could slow down directors' decision-making processes.[609] While this concern is recognised later in this thesis, it is however contended that the benefits of the approach outweigh the demerits. For instance, it is considered (as argued in chapter 2) that the competiveness and ultimate success of companies require contributions from a range of multiple stakeholders.[610] Thus, it is submitted here that directors' duties to consider/act in the interests of the abovementioned stakeholders should not only ensure a greater level of corporate accountability, but it could also be useful in promoting the growth and profitability of companies in Nigeria. In view of this, it will later be proposed that section 279 of the CAMA should be reformed

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[607] In Australia: *Kinsela* v. *Russell Kinsela Pty Ltd.* (1986) 4 A.C.L.C. 215; (1986) 10 A.C.L.R. 395; in Republic of Ireland: *Jones* v. *Gunn* [1997] 3 I.R. 1.
[608] See section 172 (3) of the CA 2006 which caters for creditors' interests during and near insolvency which is also supported by numerous cases: *Brady* v. *Brady* (1988) 3 B.C.C. 535; *Liquidator of West Mercia Safetywear* v. *Dodd* (1988) 4 B.C.C. 30; *Facia Footwear Ltd. (in administration)* v. *Hinchliffe* [1998] 1 B.C.L.C. 218;
[609] C. Malin, M. Geogeon, E. Mitleton-Kelly et al., 'The Interpretation of Directors Duty under Section 172 Companies Act 2006: Insights from Complexity Theory' [2013] Journal of Business Law 417.
[610] See principle IV of the G20/OECD principles (2015).

to include provisions that encompass the interests of other aforementioned stakeholders as matters which the directors must also take into account when acting in the best interest of the company.

In relation to the derivative action, the problem is predicated upon the statutory grounds and conditions for bringing an action, which - as will be demonstrated - is narrowly formulated and interpreted. According to the case of *Yalaju v A.R.E.C.*,[611] in order for a shareholder to bring an action, he/she must convince the courts that the directors have been fraudulent towards minority shareholders. This thesis argues that this requirement is an impediment and does not provide shareholders with sufficient grounds to challenge mismanagement because, according to existing Nigerian case law,[612] the term "fraud" excludes directors' breach of duty, disregarding negligent conducts by directors unless the directors benefit from their negligence. In practice, in the absence of a self-serving element, shareholders in Nigeria would be barred from bringing an action to address a wrong done by the director.[613] This requirement mirrors the old common law approach under the exceptions to the rules in the English case of *Foss v Harbottle,*[614] which was vehemently criticised for not affording shareholders with adequate grounds to confront directors' insider abuse.[615] It was these deprecations that led the UK to introduce a new derivative claim in part 11 of the Companies Act 2006,[616] which is considered by many to be a broader, more encompassing and flexible piece of legislation in terms of providing shareholders with the means to challenge directors' wrongdoings.[617] The recommendation of this thesis is that the statutory derivative action in Nigeria, which now mirrors the common law approach, should also be reformed and replaced with provisions similar to

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[611] (1990) 1 NILR 29 SC.
[612] For instance in the Nigerian case of *Yalaju v AREC (1990) 1 NILR 29 SC*, it was held that negligent conduct by a director was not sufficient as fraud. This was an affirmation of the English case of *Pavlides v Jensen* [1956] Ch 565 (now abolished by the UK's Companies Act 2006) where it was also held that fraud does not include directors' gross negligence unless they benefit from their negligence.
[613] See Yalaju v A.R.E.C. (*Supra).*
[614] (1843) 67 ER 189.
[615] See The Law Commission *Shareholder Remedies* (Consultation Paper No 142, 1996) Para 14.1 (hereinafter referred to as Consultation Paper 1996); Criticism was also provided by Reisberg: A. Reisberg, *Derivative Claim and Corporate governance* (Oxford University Press, 2007) p.125-135; For further details on the intricacies associated with the UK's CA 1948 on minority shareholders' protection, see A. Dignam and J. Lowry, *Company Law* (7th edn, Oxford University Press, 2012) 195-200.
[616] Hereinafter referred to as CA 2006.
[617] M. Almadani, 'Derivative Actions: does the Companies Act 2006 Offer a Way Forward?' (2009) 30 Company Lawyer 131, 138.

the UK's derivative claim in part 11 of the CA 2006,[618] because in the UK an action can be brought in respect of directors' negligence, breach of duty and trust without the need to establish fraud or show that the directors have fraudulently benefited financially from their negligent conduct.[619] However, the UK's derivative claim is not without problems, as will be explored later. For example, as previously highlighted in chapter 1, there is a non-exhaustive list of factors, which the court must take into account in s. 263 before allowing a claim, and these have been known to impede shareholders' ability to effectively bring a derivative claim in the UK. However, it is considered in this thesis that these factors are necessary in order to deter against frivolous claims.

The oppression remedy in s. 311 suffers from similar setbacks as the derivative action. The main problem with this provision lies within the interpretation of the term "oppression" which, according to the case of *Ogunade v Mobil Films (WA) Ltd*,[620] only accommodates conduct that is harsh, burdensome and unlawful; according to the courts it does not include conducts that are unfair.[621] This thesis argues that this acts as an unnecessary barrier to a shareholders' ability to challenge the conduct of directors which may be lawful, but unfair to the interest of the members or detrimental to the company as a whole. For instance, such difficulties were illustrated in *Ogunade*,[622] where the courts dismissed a claim brought by a shareholder to challenge the director for an excessive award of remuneration because it was considered that such conduct, although unfair, was not unlawful, harsh or illegal, nor could it be considered as oppressive to shareholders. In view of this, I will suggest that the term "oppressive conduct" should be deleted in s. 311 of the CAMA and replaced with provisions similar to the UK's equivalent remedy on "unfair prejudice" in s. 996 of the CA 2006, which by judicial interpretation is considered more encompassing than the term

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[618] See section 260 of the UK's CA 2006.
[619] See *Kiani v Cooper and others* [2010] EWHC 577 (Ch).
[620] (1976) 2 FRCR 10.
[621] Similarly, see the English case of *Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324* where Lord Simond stated that oppression in the context of corporate conduct means burdensome, harsh and "wrongful' conducts against other members of the company or some and lacks the degree of probity which they are entitled to expect in the conduct of the affairs of the company. In other words, it does not include unfair conduct or directors' mismanagement. See V. Joffe et al., *Minority Shareholders: Law, Practice and Procedure,* (4th edn, Oxford University Press 2011) 238.
[622] (Supra).

oppression. For instance, in the case of *Re Tobian Properties Ltd*, [623] the English courts stated that unfair prejudicial conduct is wider than unlawful or illegal conducts; unfairness should be interpreted flexibly and broadly to accommodate any conduct which equity would regard as contrary to good faith,[624] or as impeding the legitimate expectation of shareholders. [625]

As the preceding paragraphs reveal, the intended reforms will reflect the comparable provisions under the UK's Companies Act 2006.[626] The rationale for these recommendations being that, as explained above, the comparable provisions under the UK's CA 2006 are more comprehensive, practical and effective in terms of ensuring directors' accountability as opposed to the CAMA. However, the author also acknowledges that the UK's provisions are not perfect in their current state. In view of this, a comparative law approach is adopted when necessary to highlight the differences between the two systems and the imperfections within the UK's provisions. This will ensure that the recommended reforms in Nigeria are introduced appropriately.

In light of the above, the rest of this chapter is organised as follows: section 4.2 briefly presents the issues impeding directors' accountability under the Nigerian corporate governance system. Section 4.3 analyses the fundamental directors' duties outlined under the CAMA with the view to highlight their shortcomings and possible areas for reform. Following this section 4.4 provides an examination of the statutory shareholder remedies for the enforcement of directors' breaches of duties, with the aim of improving the derivative action and oppression remedy in Nigeria. Finally, section 4.5 concludes with a review of the analysis and recommendations made in this chapter.

[623] [2012] EWCA Civ 998.
[624] This view was originally enunciated by Lord Hoffman in *O'Neil v Philips* [1999] UKHL 24.
[625] Protection of members' legitimate expectation was initially articulated in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 (per Hoffman LJ)
[626] Hereinafter called CA 2006.

4.2 Issues on Directors' Accountability and Efficiency in Nigeria: The Agency Problem

The problems surrounding directorial accountability, efficiency and corporate governance in Nigeria are closely linked to the difficulties created by the separation of ownership and control, which basically implies that absolute management responsibilities are bestowed with directors.[627] Predominantly, shareholders in Nigeria are considered as owners of firms whereby property rights, voting powers and decision-making rights are accorded to them at the general meeting.[628] However, in the actual management of companies, company law allows shareholders to delegate overall the firm's decision-making responsibility and control to the board of directors to manage and increase the value of the firm.[629] This arrangement allows for separation of ownership from control: thus shareholders own the company, but managers control it. Bruno and Ruggiero have generally posited that the separation of ownership is beneficial because the managers use their expertise to operate the company for the benefit of the shareholder and to increase the value of the firm.[630] However, this view is not strictly true because in Nigeria this separation tends to foster an environment for the agency problem, as analysed in chapter 2. The agency problem can be basically described as the conflict of interest between management and shareholders: directors/managers are normally induced to self-deal, act at the detriment of the shareholders and pursue their own selfish desires. Several corporate scandals in Nigeria have drawn attention to this problem. One example is the scandal at Oceanic Bank Nigeria Plc in 2009 where Cecilia Ibru, the former managing director, was indicted for recklessly granting loans worth over N500 billion to friends, families and privately owned companies without adequate securities as laid down by s. 15(1) of the Failed Banks and Financial Malpractices in Banks Act 2004.[631] Particularly, she was also indicted for embezzling over N160 billion while in office.[632] Similarly, in Cadbury Nigeria Plc, Bunmi Oni, the managing director, was indicted in 2006

[627] Ajogwu (2007).
[628] Akinpelu, (2011) 217.
[629] ibid 217; Section 63(3) of the CAMA 1990 provides inter alia that the business of the company shall be managed by the board of directors who may exercise all such powers of the company.
[630] S. Bruno and E. Ruggiero (eds), *Public Companies and the Roles of Shareholders: National Models Towards Global Integration* [Kluwer Law International, 2011] 20.
[631] Y. Makanjuola, *Banking Reforms in Nigeria: the Aftermath of the 2009 Financial Crisis* (Palgrave Macmillan 2015) 77-78.
[632] ibid 77.

for concealing debt of over N13 billion and embezzling over N2 billion in 2002.[633] These widespread corporate scandals instigated by managerial incompetence clearly pinpoint the need for regulatory reforms in Nigeria to focus more on addressing directorial abuse and reinforcing managerial accountability. It is suggested that this incompetence also led to the widespread corporate scandals experienced within the Nigerian banking sector from the period of 2002- 2009.[634] In this regard, Akinpelu noted that the operating licenses for Savannah Bank, Peak Merchant Bank (Nig) Ltd and many others were revoked by the Central Bank of Nigeria due to ineffectiveness of the board; persistent liquidity problems; poor asset quality; poor track records of profitability and reckless granting of credit.[635] He submitted that managers/directors were normally dishonest by deliberately covering up fraudulent and illicit activities.[636] In light of these scandals and issues, it is clear that while the separation of ownership is an essential feature of Nigerian corporations, it seems to also encourage some directors to believe they can act with impunity and consequently jeopardise the interests of shareholders and stakeholders. The scandals in Enron, Barings Bank and Parmalat, which showcased managerial unscrupulousness, seem to also suggest that the same problem is faced by developed economies around the world.

In light of the above problem, Eric and Sykuta have suggested that adequate measures to monitor directorial behaviour and hold directors accountable are imperative in order to curb directors' excesses.[637] This view is reasonable, considering the fact that the separation of ownership and control, as analysed above, seems to put in peril the interest of the company at the behest of directors in Nigeria. However, the issue is that there is no absolute consensus on how accountability should be administered within the corporate governance sphere. The rationale for this is probably because the term accountability, as described by Professor Andrew Keay, is elusive and vaguely defined.[638] Some consider accountability as a system for addressing the abuse of authority and power

[633] Akinpelu (2011) 340-341.
[634] ibid 342.
[635] ibid 342-343.
[636] ibid 342.
[637] H. Eric and M Sykuta, 'Regulation and the Evolution of Corporate Boards: Monitoring, Advising, or Window Dressing?' [2004] 47 Journal of Law and Economics 167-193.
[638] Keay (August 31 2012) - Working Paper Series, University of Leads.

by directors.[639] Others view it as a system which gives legitimacy to the actions of directors.[640] However, under corporate law, most have conceded that accountability is fostered by imposing on directors' standards of behaviours in the form of duties towards the company and its members,[641] and at times towards its creditors.[642] Therefore, even though the ambit of directors' accountability is imprecise, it is an undeniable fact that since directors are responsible for the company they manage, they must also be subjected to strict duties and liabilities. It would be right to infer therefore that directors' respective duties, and the statutory tools available for shareholders to enforce breaches of the former's duties, thus stand as the primary mechanisms for directors' accountability within corporate governance.

In Nigeria, attempts to address directors' abuse of powers and to strengthen their accountability have been made possible by the CAMA which provides shareholder statutory remedies in ss. 303-311 in respect of a director's breach of duties. As already explained in the introduction, shareholders may seek redress against directors for breach of duties or for wrong done to the company, under a derivative action or relief if the affairs are being conducted in an oppressive manner. Nonetheless, these remedies are only available in limited circumstances because of the general principle in the case *Foss v Harbottle,*[643] which stipulates that only the company as an artificial person can seek redress for wrong done to the company. Arguably, this principle is merely theoretical because a company cannot in practice act on its own; it acts through its organs, which are usually the directors. The problem is that the strict application of the principle in *Foss* is not always desirable, because the directors who would decide to sue on behalf of the company are normally the offending directors and they would rather use their directorial powers to frustrate legal proceedings.

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[639] S. Sheik, W.M. Rees, 'Corporate Governance and Corporate Control: Self Regulation or Statutory Codification?' [1992] ICCLR 370; B. Hannigan 'Board Failures in the Financial Crisis: Tinkering with Code and the Need for Wider Corporate Governance Reform: Part 2' [2012] Company Lawyer 35; see also Andrian Cadbury, 'Report of the Committee on the Financial Aspects of Corporate Governance', (1992) Para 6.1.

[640] E.g. see E.N.M. Okike, 'Corporate governance in Nigeria: The Status Quo' (2007) 15 (2) Corporate Governance: An International Review 173-193; R. Adams, B. Hermalin and M. Weisbach, 'The Role of Directors in Corporate Governance: A Conceptual Framework and Survey' [November 2008] Working Paper National Bureau of Economic Research available online at <http://www.nber.org/papers/w14486.pdf >accessed on 2 July 2015.

[641] E.g. see D. Kershaw, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012); L. Sealy and S. Worthington, *Sealy and Worthington's Cases and Material in Company Law* (10th edn, Oxford University Press 2013).

[642] E.g. see A. Keay and P. Walton, *Insolvency Law: Corporate and Personal,* (Jordan Publishing Ltd 2012).

[643] Supra.

This automatically stands to impede against the shareholders' ability to immediately challenge directors in practice. In view of this, Abugu proposed that rather than resorting to remedies for breach, shareholders should invoke their voting rights to remove the offending director.[644] However, this right is only partially useful because the statutory rights to remove directors in s.262 of the CAMA require a simple majority vote (at least 51%), which means that minority shareholders with less than 51% vote are incapacitated from exercising such rights. Concurrently, shareholders' statutory rights under the CAMA are also quite limited in terms of creating management incentive or ensuring management allegiance. For instance, shareholders cannot set the dividend paid to them, make any decision involving investment, neither can they appoint managers nor determine their remuneration.[645] In fact, by virtue of section 268 of the CAMA, only the board can determine the remuneration of managers. Clearly, such statutory provision tramples on shareholders' rights and diminishes their supposed supremacy as principals over their agents (managers/directors). There is also the view that the separation of ownership from control weakens shareholder activism because, since directors make most decisions about the company, the shareholder's ability to control the company is consequentially diminished.[646] Thus, it is more accurate to describe the corporate situation in Nigeria as management-dominated, whereby shareholders are passive and merely seeking gains from the increase in value of their company.

Ajogwu's opinion on the situation in Nigeria is that the inability of shareholders to determine managers' remuneration under the CAMA is an outright abnormality in the country's corporate governance system: a system which espouses shareholder primacy.[647] Notably, this issue is not peculiar to Nigeria, as shareholders in the UK also suffer from a similar setback. In the UK, for instance, the board of directors is responsible for establishing a remuneration committee, which in

[644] J. E. O Abugu, 'Directors Duties and Frontier of Corporate Governance' [2011] International Company and Commercial Law Review 322.
[645] Akinpelu (2011) 228-229.
[646] E. Adegbite, K. Amaeshi, O. Amao, 'Political Analysis of Shareholder Activism in Emergent Democracies: a Case Study of Nigeria" [2010] CSGR Working Paper 265/10, University of Warwick, Available online at <http://www2.warwick.ac.uk/fac/soc/csgr/research/workingpapers/2010/26510.pdf> accessed on 20 August 2015.
[647] F. Ajogwu, Corporate Governance in Nigeria: Law & Practice (2007) Centre for Commercial Law Development, Nigeria 22.

turn determines their salary.[648] In particular, the committee also comprises of only independent non-executive directors.[649] The effect of this in practice is that, not only are shareholders excluded from the selection and remuneration fixing process, but they are also not allowed to sit on the committee. Certainly, shareholders' participation in the remuneration process would facilitate greater transparency, accountability and also provide extra checks and monitoring on management activities. As Dine and Koutsias rightly said, the inability for shareholders to have a determining say in fixing the salary of executives is inconsistent with the system in the UK, which is predominantly shareholder-orientated – rather, it leans towards managerial dominance and undermines managerial accountability.[650] It appears that although the Nigerian and the UK governance systems accord shareholders with property rights, they deprive them of the means to effect management remuneration, which could have acted as an incentive to motivate managers/directors and ensure their allegiance. Surprisingly, some have endorsed the statutory provision in s. 268 of the CAMA and the limited rights of shareholders on what can only be described as a simple misconception: it is argued that robust protection from management is unnecessary in Nigeria because shareholders may easily sell their shares and invest in other companies.[651] This argument is undoubtedly flawed because, in practice, it is not always the case that shareholders in Nigeria wish to sell their shares, especially for those who have a vested stake and a long-term economic goal in the company. Emiola also noted that the long-term sustainability of a corporation would not be guaranteed if shareholders, who are supposed to be the financiers of companies, constantly shuffle their investments by migrating from one company to another.[652] In view of this, it is envisaged that the recommendation in this thesis will be to create a robust legal framework that would attract shareholders and investors to consider long-term investment goals rather than short-term plans. It is considered that directors'

[648] See provisions D.2.1 and D.2.2 of the UK Code of Corporate Governance 2014: available online at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf> accessed 5th January 2016.
[649] ibid.
[650] See Dine and Koutsias (2013) 233.
[651] Akinpelu (2011) 228-229.
[652] A. Emiola, *Nigerian Company law,* (Emiola Publishers, Nigeria, 2001) 76-78.

loyalty and allegiance can only be guaranteed if directors are aware that their misconducts or abuse of powers will give rise to strict liabilities.[653]

4.3 Analysing Directors' Accountability through the Duty of Loyalty to the Company

4.3.1 Basis for Directors' Duty of Loyalty in Nigeria

It is an unequivocal fact that the abovementioned duties of directors - to act in the interest of the company in s. 279(3) and the duty to avoid conflict of interest in s. 280 of the CAMA - emphasise directors' absolute loyalty and accountability towards the company.[654] The controversies surrounding these duties are centred on the framework in which they have emerged, which seems to lack consensus amongst Nigerian scholars. It is said that the CAMA's codification of these duties in Nigeria is based on the foundation that directors under Nigerian company law are seen as trustees;[655] a trustee can be defined as a person vested with powers to hold and administer certain properties under a trust for the benefit of beneficiaries.[656] Olawoyin initially disputed the status of directors as trustees by arguing that unlike trustees, who have strict duties towards the beneficiaries, directors have some discretion in managing a company's properties.[657] Olawoyin's view seems to contradict the position of the Supreme Court in *Yaluje v AREC*,[658] where it is made clear that directors in Nigeria have a dual status as agents and trustees.[659] This is particularly evident in section 283(1) of the CAMA, which states 'directors are trustees of the company's moneys, properties and their powers and as such must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away.' It can be inferred that directors in Nigeria are not only trustees in common law but that they are also endorsed as such by statute. As directors manage corporate property on behalf of shareholder and the company, their treatment as trustees in Nigeria is reasonable. Thus, the CAMA's strict prohibition of directors from jeopardising and exploiting the interest of the company will accentuate their duties to observe utmost good faith towards the

[653] E. Adegbite 'Corporate Governance Regulation in Nigeria' [2012] 12 Corporate Governance: International Journal of Business Studies 257-276.
[654] M.O. Sofowora, *Modern Nigerian Company Law* (2nd edn, Soft Associates, Lagos, 2002).
[655] *Tika Tore Press Ltd v Abina [1973]* 1 All NLR (PT. 1) 401.
[656] Akinpelu (2011) 224.
[657] G.A. Olawoyin, *Status and Duties of Companies Directors* (University of Ife, Ile-Ife, Nigeria 1977)
[658] (1990) 1 NILR 29 SC.
[659] Per Naeemka-Asu J.S.C.

company within a relationship of trust, which they share with their principal (i.e. shareholders). Within the ambit of corporate governance, it is clear that the duties in ss. 279(3) and 280 serve one important purpose: to check and prevent abuse of powers and conflict of interest on the part of directors.

Abugu nonetheless criticised the codification of the duties by contending that the statutory duties on directors would introduce rigidity into company law and impede their discretion and flexibility as corporate officers.[660] The author of this thesis nonetheless supports the opposing view, which advocates for directors' duties.[661] The rationale for this is that under Nigerian company law, directors possess immense discretion and powers in the management of the company and shareholders' wealth.[662] Therefore it is reasonable to impose certain codes of conduct and law to ensure that they act responsibly to promote the interest of the company. This is essential when viewed in light of the corporate culture in Nigeria which, as discussed in the previous chapter, espouses the agency problem. As previously explained, this conflict of interest has been manifested in big Nigerian public companies such as Oceanic Bank in 2009, Cadbury Nigeria Plc in 2007 and Unilever Nigeria Plc in 1997, where the managers were involved in the falsification of financial records, concealment of debts and embezzlement of company funds for their own personal interest.[663] It is widely accepted that conflict of interest between management and the shareholders/company is one of the obstacles to achieving effective corporate governance in Nigeria.[664] In theory, one would argue that the availability of the directors' duty of loyalty should be useful in mitigating such conflict. However, there have been debates centred on the inadequacy of the scope of the duties

[660] J. E. O Abugu, 'Directors Duties and Frontier of Corporate Governance' [2011] International Company and Commercial Law Review 322.

[661] Aina argued that imposing statutory restraint and behavioural standards in the form of director's duties is necessary and one of the most effective ways to control directors' excesses in companies: see K. Aina, 'Board of Directors and Corporate Governance In Nigeria' [2013] International Journal of Business and Finance Management Research 1, 21; Young also promoted similar views: See A. Young, 'Framework in Regulating Company Directors: Rethinking the Philosophical Foundation to Enhance Accountability' [2009] 30(12) Company Lawyer 355-361.

[662] In the Nigerian case of *Longe v First Bank of Nigeria Plc* [2006] 3 NWLR (pt 967) 228 the courts specifically accentuates the immense discretion of directors by pronouncing them as the primary directing mind and will of the company; O. Arowolo, 'Longe v First Bank of Nigeria PLC: is the Court of Appeal Redefining the Status of Executive/Managing Directors under the Companies and Allied Matters Act 1990?' [2007] International Company and Commercial Law Review 216.

[663] A. Emmanuel, and N. Chizu, 'Corporate Governance and Responsibility in Nigeria' [2011] 8(3) International Journal of Disclosure and Governance 252 – 271.

[664] Ajogwu, F. 'Corporate Governance in Nigeria: Law & Practice, (2007) Centre for Commercial Law Development Nigeria 22.

under the CAMA. These debates are considered and evaluated below alongside the respective duties of loyalty owed by directors.

4.3.2 Evaluating Directors' Duty to Act in the Best Interest of the Company

4.3.2.1. Issues on the Scope of Duty: Subjective or Objective Assessment?

S. 279(3)-(4) of the CAMA stipulates an inflexible but narrow duty on directors to act in the interest of the company. It provides that:

> (3) a director shall act at all times in what he believes to be the best interests of the company as a whole and in such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstances. (4) The matters to which the director is to have regard in the performance of his functions include the interests of the company's employees in general as well as the interest of its members.[665]

The strictness of the above provision emanates from the fact that it imposes a subjective and objective standard which, according to the case of *Artra Industries v Nigerian Bank for Commerce*,[666] not only requires a director to act honestly (bona fide) in what he believes to be in the interest of the company, but that he must also ensure that his decisions are indeed reasonably beneficial to the company. This approach implies that a director has a daunting task to demonstrate to the courts that he has taken every reasonable precaution to ensure that his actions have actually benefited the company as a whole and that he has not merely alleged to have acted in such a manner. However, ever since the introduction of this duty, academic opinions have emerged to consider whether or not this approach is reasonable to impose on a director who is supposed to exert some degree of risk and discretion in the management of companies. The question on the minds of many is: what is the most appropriate test to ensure directors' accountability and efficiency (a purely subjective test or both subjective and objective tests)? The view of Amadi is that the objective standard in s. 279(3) impedes

[665] See section 279(3)-(4) of the CAMA 1990.
[666] (1998) 56/57/LRCN 3255.

a directors' discretion to act in the interest of the company, because - since directors will be subjected to a stricter objective assessment - they will be prevented from taking the necessary risky decisions that could be in the best interest of the company. [667] Amadi's argument may be theoretically plausible but it does not readily lead to directors' efficiency in Nigeria; it does not reconcile with the corporate culture in Nigeria, which as analysed above, shows that the conflict of interest between management and shareholders exists as a real problem facing Nigerian firms. Therefore, although the duty is harsh, it is not unreasonable. In fact, it is necessary in order to ensure that directors' excesses in Nigeria are controlled and to ensure that they will be seen to be in breach of their duties if they act recklessly in a manner that does not benefit the company. What a director believes to be in the interest of the company may not be a sufficient marker to assess directors' compliance, as this will only identify the directors' state of mind, irrespective of the quality or behaviour of the director.

Okonmah rejected the test in s. 279(3) by suggesting the removal of the objective standard and the adoption of the purely subjective standard originally imposed by common law.[668] However, the purely subjective test at common law has been known to give rise to difficulties when ascertaining directors' breach of duties and compliance. For example, in the case of *Okeowo v Migliore,*[669] the courts held while applying a purely subjective test that the directors' decisions/views could not be substituted or ascertained objectively by the courts or shareholders.[670] Adversely, this has the effect of preventing directors from being assessed objectively. As Bowen LJ rightly said in *Hutton* v. *West Cork Ry. Co,*[671] 'a subjective test cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational.'[672] One could accurately say that Okeowo's judgment was simply a misapprehension of the Nigerian courts in the case of *Pool House Group (Nigeria) Ltd v.*

[667] F. C. Amadi, *Fundamentals of Company Law and Practice in Nigeria,* (Rodi Printing and Publishing Company, River States 2004) 145.
[668] P.D. Okonmah, 'Directors as Fiduciaries Under Nigerian Company Law' [1997] 6 Tilburg Law Review 181-196.
[669] [1979] NSCC 210 at 263 the decision in Okeowo was inspired by the English case of *Re Smith and Fawcett Ltd* [1942] Ch 304 which states that "directors must exercise their discretion bona fide in what they consider - not what a court may consider is in the interests of the company" per Lord Greene MR.
[670] See the case of *Okeowo v Migliore* [1979] NSCC 210.
[671] (1883) 23 Ch.D. 654, 671 (CA).
[672] Per Bowen LJ in Hutton v West (Supra).

African Continental Bank Ltd,[673] in claiming that directors' decisions were always for the best interest of the company when, in fact, directors in many situations pursue interests that conflict with that of the company and shareholders. The test in *Okeowo* was also vehemently criticised by Asamugha as being too insubstantial a test to effectively assess whether a director has truly acted in the best interest of the company.[674] He argued in favour of an objective test and noted that if purely subjective standards were applied, a director who has acted recklessly would still be excused as long as he alleges to have acted honestly.[675] Without a doubt, Asamugha makes a more compelling argument than Okonmah. The position in the case of *Okeowo* and the view of Okonmah is clearly undesirable because, for the reasons explained above, they seem to encourage directors to abuse their powers with impunity without any accountability towards the shareholders/company. Secondly, it seems to facilitate a system that will deprive shareholders of the statutory means to question directors' poor decisions. This will not facilitate good corporate governance because it jettisons internal control mechanisms designed to discipline and ensure the management's loyalty and directors' accountability to the company.

Akinpelu also rejected Okonmah's opinion by submitting that if directors in Nigeria were given too much discretion and left unsupervised, they would seize the opportunity to exploit shareholders' wealth for their own benefit.[676] He made a rather important point that, unlike trustees, directors are not servants and their loyalty can easily be swayed.[677] Therefore, even though directors are generally considered as trustees because they act on behalf of another,[678] their functions differ slightly from that of trustees. It is said that in practice trustees have a strict duty to avoid any conflict of interest; meanwhile, directors of non-profit corporations may engage in transactions that conflict with the interest of the company, provided they are authorised by the board.[679] There is also the view that directors may not apply as much caution as trustees due to the *business judgment rule*, which

[673] (1969) NMLR 47.
[674] E.M. Asamugha *Company Law in Nigeria Under the Companies and Allied Matters Act* (Lagos, 1994).
[675] D. Ahern 'Directors Duties: Broadening the Focus Beyond Content to Examine the Accountability Spectrum' [2011] 33 Dublin University Law Journal 116-152.
[676] Akinpelu (2011) 217-218.
[677] ibid 2.
[678] See Jessel M.R. in *Re Forest of Dean Coal Mining Co* (1878-79) L.R. 10 Ch. D.
[679] P. Hargreaves and V. Armstrong, 'Corporate or Individual Directors and Trustees?' [2005] Private Client Business 274.

presumes that the decisions of directors are correct.[680] Although this presumption can be rebutted if the claimant proves that the director is in breach of his duty, cases such as *Poolhouse Ltd v African Continental Bank*[681] have demonstrated that this is very difficult in practice, since a claimant might not have concrete evidence to prove otherwise. In light of this, the argument in favour of granting directors absolute discretion is not in it self an act of commonsense in my opinion; the bestowal of absolute powers on directors will definitely corrupt good behaviour within a corporate board structure. This has often been demonstrated within the various corporate scandals in Nigeria, where managers/directors compromised their positions to misappropriate corporate funds.[682] Accordingly, the decision to introduce a dual subjective and objective standard in s. 279(3) is definitely a welcome development to facilitate directors' accountability within the Nigerian corporate governance system.

There is also the concern that if the objective criterion in s. 279(3) is deleted, Nigeria might suffer a peculiar problem of legal uncertainty, which is present within the comparable provisions in s. 172 [683] of the UK's CA 2006. In the UK, the test applied in s. 172 is not clear, as the courts have not been consistent. Even though s. 172 did not expressly stipulate an objective standard,[684] the section has been interpreted by the courts in cases such as *Madoff Securities International Ltd v Raven*[685] so as to include an element of reasonableness; an objective criteria.[686] Meanwhile in other cases, such as *Cobden Investments Ltd v RWM Langport* [687] the English courts have leaned towards a solely subjective assessment of directors' duty in s. 172 of the CA 2006. This not only creates conflict between statute and judicial opinion but it also leads to profound inconsistencies and

[680] *Pool House Group (Nigeria) Ltd v. African Continental Bank Ltd* (1969) NMLR 47; Dodge v Ford Motor Company, (Mich. 1919) 170 NW 668; see also Z. Cavitch, 'The Directors' Discretion and Its Limits' [2015] BOTP 10-127.
[681] Supra.
[682] The financial scandal in Cadbury Nigeria Plc in 2007 is a typical example where the managing director Bunmi Oni in conjunction with the auditors' falsified account statement resulting in loss of over N2 billion; For more details see, M. Abdullahi et al., 'Transparency in Corporate Governance: a Comparative Study of Enron, USA and Cadbury PLC Nigeria' [2010] 5 The Social Science 471-476.
[683] Section 172 of the CA provides that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.
[684] In the UK, Jonathan Parker J held in *Roberts (Liquidation of Onslow Ditching Ltd) v Frohlich* [2011] EWHC 257 (Ch) that the test in section 172 of the Companies Act 2006, which contains duty of director to promote the success of the company remains essentially subjective and not objective. For more discussion on the case of *Roberts,* see L. Sealy and S. Worthington [2013] p. 344-345.
[685] [2013] EWHC 3147; other cases with objective consideration include *Primlake Ltd (In Liquidation) v Matthews Associates* [2007] 1 B.C.L.C. 666, *Simtel v Rebak* [2006] EWHC 572 (QB), *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 B.C.L.C. 598.
[686] Dignam and Lowry (2014) 347.
[687] [2008] EWHC 2810 (Ch).

uncertainty. Copp has also argued that, due to the inconsistent judgment, it is difficult to predict the outcome of cases, as one cannot tell if and when the courts will apply a subjective, objective or even both tests.[688] It goes without saying that in order to eliminate this uncertainty and create uniformity between statutes and judicial opinions, s. 172 CA should be amended to clearly include an objective standard so as to reflect the recent approaches adopted by the English courts. Given that Nigerian company law, as explained in chapter 3, is highly influenced by the UK's company law, it is very probable that if Nigeria decides to apply a purely subjective standard, then conflicting cases will emerge similar to those in the UK where they will eventually apply an objective test, thereby creating a similar legal uncertainty as found in the UK. Arguably that concern is currently averted in Nigeria, as the test stipulated in s. 279(3) of the CAMA is consistent with subsequent case law[689] regarding the duty.

4.3.2.2 Directors' Lack of Duties to Consider the Interests of Stakeholders Under the CAMA: an Impediment to Good Corporate Governance in Nigeria

The dual objective/subjective test in s. 279(3) certainly appears to impose an extra level of accountability on directors, but sadly the provision is only shareholder and employee friendly. With directors only required to have regards to the interests of members and employees, the interests of other important stakeholders, such as creditors, consumers, suppliers and the community, are consequently not included in the matters which directors must take into account while acting in the best interest of the company. It is argued in the subsequent sections that this omission is not only inconsistent with international corporate governance objectives to protect the interests of stakeholders, but it also undermines corporate and directorial accountability.

[688] S. F. Copp, 'S.172 of the Companies Act 2006 Fails People and Planet?' [2010] 31(12) Company Lawyer 406-408.
[689] See *Artra Industries v Nigerian Bank for Commerce* (1998) 56/57/LRCN 3255.

4.3.2.2.1 Lack of Directors' Duties to Consider Creditors' Interests

As highlighted above, section 279(4) simply requires that the directors must have regards to the interests of members and employees of the company alone. In this regard, Orojo has submitted that, since directors in Nigeria are not required to consider creditors' interests, the interests of directors would not be aligned with that of creditors.[690] The empirical study conducted by Professor Lyn Lo Pucki and Williams Whitford further proves this point: they highlighted that directors in large companies in the United States never align their interests with creditors when the company is solvent, and directors will only align their interests during insolvency if legislation requires.[691] In view of this, Professor Andrew Keay recommended that in order for directors to take account of creditors' interests, there should be legislative means or laws to encourage or facilitate such practice.[692] However, the problem in Nigeria is that the existing insolvency acts, such as the Asset Management Corporation of Nigeria Act 2010 ("AMCOM") and the CAMA, are mainly focused on winding up, liquidation and administration matters.[693] In effect, there are no provisions which prescribe directors' duties to consider creditors' interests, not even at times of insolvency. The concern here is that directors in Nigeria are consequently at liberty to disregard creditors' interests, even during insolvency when creditors are more vulnerable to losing their investments. Some Nigerian scholars have argued that this failure is not advantageous in enabling creditors' protection in Nigeria, as unsecured creditors would be left in difficult situations.[694] This statement is particularly true given that the CAMA has not witnessed any reforms of its pro-creditor and liquidation-oriented insolvency regime for over 25 years.[695]

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[690] J.O. Orojo, *Company Law and Practice in Nigeria* (3rd edn, Mbeyi & Associations Ltd. 1992) 36-37.
[691] L.M. LoPucki and W.C. Whitford, 'Corporate Governance in the Bankruptcy Reorganization of Large Publicly Held Companies' (1993) 14 1 U. Pa. L. Rev. 669.
[692] A. Keay, 'Formulating a Framework for Directors Duties to Creditors: an Entity Maximisation Approach' [2005] Cambridge Law Journal 614.
[693] See part 2 of the AMCOM and part 15 of the CAMA.
[694] O. Fatula and B. Alloah and A. Akinbuwa, 'Critique of the Framework of Corporate Insolvency Proceedings in Nigeria' [2011] International and Commercial Law Review 205.
[695] A. Idigbe and O. Kalu, 'Nigeria: Recent Strides in Nigerian Insolvency Law – Banking Insolvency and AMCON Act' [October 2015]. Available online at <http://www.mondaq.com/Nigeria/x/431946/Insolvency+Bankruptcy/Recent+Strides+In+Nigerian+Insolvency+Law+Banking+Insolvency+AMCON+Act> accessed 20 August 2016.

The Nigerian position is in contrast with the UK, where section 172(3) of the CA 2006 provides for directors' duties to consider the interests of creditors, which is strongly promoted by case law[696] and the UK's Insolvency Act 1986 (IA 1986).[697] The problem in the UK, however, is that there is no way of ascertaining precisely when the duty will arise. Cases such as *Brady v Brady*[698] and *Re City Span Ltd*[699] have stated that it arises during insolvency;[700] meanwhile other cases[701] have suggested that the duty arises when the company is in doubtful solvency. To add to this conundrum, Keay also explained that the duty of directors to have regard to the interests of creditors might also arise when the company is in financial distress.[702] These various interpretations mean that the duty could arise at virtually any point, provided the company is ailing financially. However, the extent of the financial distress capable of triggering the duty is not specified, which means that ascertaining financial distress would be determined on a case-by-case basis. This renders the UK's provision very broad and uncertain. However, the benefit of its broad nature is that it provides the needed flexibility to protect creditors' interests during all ailing stages of the company, both when the company is insolvent and near insolvency. As Morgan has rightly said, if the duty applies strictly to when the company is actually insolvent, creditors' interests may not be protected at an earlier stage when the company is simply in financial distress but has not yet formally declared insolvency.[703]

Within the context of corporate governance, it could be argued that the situation in Nigeria is not consistent with international best practices because the general consensus amongst many other jurisdictions[704] is that creditors' interests should also be adequately protected. The OECD, for

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[696] Cases include, *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 25*0; Kinsela v Russell Pty Ltd (in Liq) (1986) 4NSWLR 722; Re MDA Investment Management Limited Whalley v Doney* [2003] EWHC 2277.

[697] For example, sections 214 and 213 of the IA 1986 deals with directors' wrongful and fraudulent trading to ensure that the interest of creditors are not jeopardised.

[698] [1988] BCLC 20.

[699] [2007] All ER (D) 61; *Bilta(UK) Ltd v Nazir* [2012] WWHC 2163 (Ch*)*.

[700] *West Mercia Safetywear (in Liquidator)* v. *Dodd* (1988) 4 B.C.C. 30.

[701] The deputy High Court judge in *Colin Gwyer and Association Ltd v London Wharf Ltd* [2002] EWHC 2748 Ch) also observed that the interest of the creditors are paramount when a company is insolvent or near insolvency and directors should take into consideration their interest when exercising their discretion.

[702] A. Keay, 'Formulating a Framework for Directors Duties to Creditors: an Entity Maximisation Approach' [2005] Cambridge Law Journal 614; see also *Re MDA Investment Management Ltd Whalley v Doney* [2003] EWHC 2277.

[703] J. Morgan, 'Directors Duties in the Insolvency Context' [2015] 28(1) Insolvency Intelligence1-5.

[704] Aside from the UK, other common law countries include: Australia; *Ring* v. *Sutton* (1980) 5 A.C.L.R. 546; *Grove* v. *Flavel* (1986) 4 A.C.L.C. 654; 11 A.C.L.R. 161; *Kinsela* v. *Russell Kinsela Pty Ltd.* (1986) 4 A.C.L.C. 215; Republic of Ireland, J*ones* v. *Gunn* [1997] 3 I.R. 1; (*Re Frederick Inns Ltd.* [1991] I.L.R.M. 582 (Irish H.C.).

instance, specifically recommended that, as a way to enhance the role of stakeholders, the interests of creditors should be protected.[705] Lam and Goo nonetheless argued that creditors' protection is not really achieved by merely having regards to their interests, as directors are more focused on maximising shareholders' profit.[706] However, it is noted that creditors' interests are reflectively or indirectly protected, provided there is an appropriate legislation or law requiring directors to consider their interests.[707] Thus, when the company is in financial distress, the effect of the duty will mean that the directors will focus on advancing the interests of the said creditors alongside other stakeholders.

Stakeholder proponents such as Yan rightly captured the rationale for strict creditors' protection when he submitted that stakeholders such as creditors provide credits to the company, but when the company is insolvent or in financial distress, directors may choose excessively risky decisions which favour shareholders but are detrimental to creditors.[708] In this regard, Orojo noted that while shareholders and creditors in Nigeria may both be exposed to financial risks in times of financial distress, shareholders on the other hand are shielded by limited liability and the doctrine of corporate separate personality, which minimises members' liabilities, and protects them against the debt of the company.[709] This further puts creditors (particularly unsecured creditors) in a perilous position, because the limitation of shareholders' risk invariably transfers to other constituencies - such as companies' creditors - he risk of bearing the financial burden of the company. This problem was originally encapsulated in *Salomon v Salomon*[710] where unsecured creditors were barred from recovering their loans directly from Mr. Salomon (the defendant shareholder), even though he had originally transacted the business as a sole trader; the business was later incorporated thereby granting the business a separate legal personality and Salomon with a limited liability.[711] The House of Lords held that once the business was incorporated, Mr. Salomon's liability transferred from

[705] See Principle IV of the G20/OECD principles (2015) 36.
[706] C. Lam and S. Goo 'Confucianism and the Duty to Promote the Success of the Company' [2014] ICCLR 418.
[707] S. Lotz, 'Directors Duties with Regards to Creditors in German and UK (Core) Company Law' [2011] ICCLR 264.
[708] M. Yan, 'Why not Stakeholder Theory?' [2013] 34(5) Company Lawyer 148-158.
[709] Orojo (1992) 47.
[710] [1897] AC 22.
[711] See excerpt from Sealy for full facts: Sealy and Worthington (2013) 34-35.

unlimited to limited liability; he was no longer liable for the debts of the company, even though he had as a managing director granted himself a secured charge over the company's entire assets. [712]

Creditors in Nigeria should be afforded statutory tools under CAMA to protect their interests against the unscrupulous behaviour of management during insolvency. The unavailability of such provisions under the CAMA simply undermines creditors' protection and directors' accountability in Nigeria. The author proposes that similar provisions in s. 172(3) of the CA 2006 should be introduced in s. 279(4) of the CAMA. This will ensure that when the company is in financial difficulty, directors will also consider the interests of creditors thereby enhancing directors' overall accountability towards the company as a whole.

4.3.2.2.2 Lack of Directors' Duties to Have Regards to Consumers, Suppliers and the Community

Aside from the exclusion of creditors in s. 279 of the CAMA, the provision also fails to accommodate the interests of other stakeholders, such as consumers, suppliers and the community/environment, as matters in which a director must take into account when promoting the interests of the company. This further sets Nigeria apart from the UK, which in addition to protecting the interests of creditors during insolvency, also requires directors to have regards to other stakeholders, such as employees, consumers and suppliers, and the impact of their actions on the community and environment.[713] The justification for the consideration and inclusion of a wide range of stakeholders' actors, as illustrated in chapter 2, is that it has the potential to improve corporate accountability and directorial monitoring while fostering long-term growth. Moreover, it is noted that the competitiveness and ultimate success of companies is the result of teamwork that encompasses contributions from a range of different resource providers, such as investors,

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[712] Per Lord Macnaghten's in *Salomon v Salomon* (supra); see excerpt from Kershaw; D. Kershaw, *Company Law in Context:* Text and Materials (2nd edn, Oxford University Press 2012) 36-37.
[713] See s. 172 (1) (a) – (f) of the UK's CA 2006.

employees, creditors and suppliers and the wider society.[714] Nevertheless, this approach has been criticised on the basis that considering too many interests beyond those of the shareholders' could be counterproductive, time-consuming and potentially slow down the decision-making process.[715] For instance, it is contended that when directors are in a position to consider potentially diverging interests, the duty bifurcates and fragments to the extent that it becomes a vague obligation, thus, potentially overshadowing shareholders' interests.[716] Understandably, balancing the interests of other non-shareholders' constituencies with that of shareholders will be a cumbersome task for directors to attain due to the competing interests.[717] However, this is not an impossible task if the shareholders' interests are easily ascertainable and distinguishable from other stakeholders. Given that shareholders and other stakeholders all have their respective interests tied to specific stakes or investments in the company, it should be easier to ascertain the individual interests when deciding whether to embark upon some speculative undertaking. For example, employees' interests are tied to their jobs and wages, shareholders to their investments and shares, suppliers to their products, creditors to their credits/loans. Moreover, during insolvency, creditors' interests are easily ascertainable – directors are aware that the primary interest of their creditors is to recover as much of their loans as possible, which is what the directors have to focus on.[718] The author submits that the benefits of wider stakeholder consideration and social inclusion outweigh the aforementioned demerits, as it is understood that companies' good relationships with other stakeholders and the community constitute a valuable resource for building a competitive and a profitable business.[719] This point can be verified with reference to General Electric (GE), an American multinational conglomerate established in 1892, which was able to survive the American Great Depression in 1929 because it focused more on the retention of its labour force in the face of rising unemployment; through social projects it

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[714] See G20/OECD principles (2015) 9.
[715] C. Malin, M. Geogeon, E. Mitleton-Kelly et al., 'The Interpretation of Directors Duty under Section 172 Companies Act 2006: Insights from Complexity Theory' [2013] Journal of Business Law 417.
[716] L. Sealy, 'Director's Wider Responsibilities-Problems Conceptual Practical and Procedural' (1987) 13 Monash University Law Review 164, 175.
[717] E. Lynch, 'Section 172: a Ground-Breaking Reform of Directors Duties, or the Emperor's New Clothes?' [2012] Company Lawyer 196.
[718] A. Keay, 'Directors Duties and Creditors Interests' [2014] Law Quarterly Review 443.
[719] J. Zhao and J. Tribe, 'Corporate Social Responsibility in an Insolvent Environment: Directors Continuing Obligations in English Law' [2010] ICCLR 305.

provided electricity infrastructure and constructed dams to largely poor and rural areas.[720] The capital GE generated from these social projects prevented it from meeting its demise, laying the groundwork for its long-term success.[721] Aside from the potential benefits of long-term business success, it is also considered that companies' consideration of stakeholders' interests also tend to foster a greater level of corporate responsibility, as companies are legally and socially compelled to also consider the impact of their actions on other non-shareholder groups.[722] Against this background, the author suggests that in addition to the employees and shareholders already stipulated in s. 279 of the CAMA, other stakeholders such as consumers, suppliers, investors, and the consideration of companies' impact on the environment and community should also be included as matters which the directors should take into account when acting to promote the interests of the company. It is envisioned that this would not only increase corporate accountability in Nigeria and create a platform for attaining potential long-term corporate success, but it should also enable companies to be more socially responsible.

4.3.3 Assessing Directors' Duty to Avoid Conflict of Interest: Strict or Flexible Duty?

The issues and debates surrounding directors' accountability in light of the duty to avoid conflict of interest in Nigeria are anchored on the notion that directors have a very demanding duty. As will be later explained, this notion has been both rejected and approved by many commentators. According to s. 280 of the CAMA:

> The personal interest of a director shall not conflict with any of his duties as directors under the Act. (2) a director shall not in the course of management of affairs of the company or in the utilisation of the company's property, make any secret profit or achieve other unnecessary benefits. (3) A director shall be accountable to the company for any secret profit made by him or any unnecessary benefit derived by him contrary to the provisions of subsection (2); (4) the inability or unwillingness of the company to perform any function or duties under its articles shall not constitute a defense to any breach of duty.

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[720] R. W. Schatz, *The Electrical Workers: a History of Labor at General Electric and Westinghouse 1923-60* (University of Illinois Press 1983) 60-61.
[721] ibid.
[722] See Zhao and Tribe [2010] 305.

The strict nature of s. 280 of the CAMA was captured in the case of *Iwuchukwu v Nwizu* [723] where the courts cited an excerpt from Lord Herchell's judgment in the English case of *Bray v Ford*:[724] 'it is an inflexible rule of equity that a person in a fiduciary position is not unless otherwise expressly provided entitled to make a profit; he is not allowed to put himself in any position where his interest and duty conflict.' It is clear on this basis that the duty not only stringently precludes directors from making unauthorised secret profit, but they are also strictly prohibited from exploiting or utilising corporate property such as opportunity and information without the company's approval. Thus, a director's liability is immediately initiated once his duty conflicts with his duties to the company, regardless of whether he was acting in good faith. An interesting observation made by Orojo is that the reason why the courts were strict was because of the difficulties experienced by the eighteenth and nineteenth-century courts in deciding whether directors' actions were fair, true or whether their capabilities were in fact reliable.[725] It is not surprising therefore that pre-CAMA cases such as *Nasar v Beirut-Riyad Nigeria*[726] also took a very strict approach: 'directors as fiduciary must not make secret profit or negotiate a contract in such a manner that would conflict with the interest of the company or put him in a position to profit at the expense of the company.' The knotty outcome of this is that a director will still be liable to account for profit regardless of his good faith or honesty.[727] Some commentators consider this approach to be inexorable.[728] However, this is not unreasonable considering the fact that directors are prone to abuse their powers. Kershaw noted that directors have personal interest, aspiration and ambitions, and in certain circumstances those personal interests may be in conflict with the interest of the company.[729] In Nigeria this conflict is of great concern because of the separation of ownership and control which basically bestows on directors absolute powers to manage the company on behalf of the shareholders:[730] this is a fundamental

[723] (1994) 7 N.W.L.R Pt 357.
[724] [1896] AC 44.
[725] Orojo noted that in the 18th and 19th centuries, the fact-finding procedures of courts were futile and civil procedures were laden with inherent defects: see Orojo (1992) 23.
[726] [1968] 5 NSCC 218 this was an affirmation of the English trust law case of *Keech v* Sanford [1726] EWHC Ch J76: that 'a fiduciary cannot make a profit by any reason in the course of his office.'
[727] Orojo (1992) 56-57.
[728] S. Scott, 'The Corporate Opportunity Doctrine and Impossibility Arguments' (2003) 66 MLR 852; D.D. Prentice and J. Payne, 'The Corporate Opportunity Doctrine' (2004) 120 LQR 198.
[729] Kershaw (2012) 535; D. Kershaw, 'Does it Matter How the Law Thinks About Corporate Opportunities?' (2005) 25 L.S. 533.
[730] Akinpelu (2011) 62.

feature, which as previously examined, emanates from the dispersed shareholding nature of public firms in Nigeria. It is conceded that conflict of interest is said to be more probable where directors/managers have absolute power to run the company; this creates an incentive for the former to act opportunistically to exploit the latter.[731] In fact, within the corporate governance debates this potential conflict of interest is widely considered by some commentators as the genesis of the managerial agency problem, which drives managers to pursue their own interest over that of the company.[732] Therefore, it is logical that corporate directors in Nigeria are required to exhibit a high duty of loyalty and transparency to the company.

It must be noted however that the duty in Nigeria is dissected between two views. One view supports the strict approach, which is considered to have the benefit of preventing fraudulent directors from circumventing the law and arguing that their breach of duty was in the best interest the company.[733] However, the other view has concerns that the strict approach does not always lead to a desirable outcome as it may have a negative impact on directors' willingness to serve on the board.[734] This raises important questions: should the provision be applied strictly or flexibly? Does the strict approach maintain a clear balance between ensuring directors' accountability and directors' efficiency and their willingness to serve on the board? To what extent does the strict approach provide directors with prospects to secure corporate opportunities for the company? It is argued later that assessing conflict is not a question of applying a flexible or strict approach, but rather the fundamental challenge is applying adequate knowledge to truly decipher situations where directors' conflict has arisen.

Ola's initial impression on s. 280 favoured the strict approach as he opined that the phrase "any secret profit and unnecessary benefit" in s. 280, which entails a very broad scope to

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[731] B. Cheffins and S. Bank 'Corporate Ownership and Control in the UK: the Tax Dimension' [2007] 70(5) Modern Law Review 778-811; L. H. Thomas, 'Silencing the Shareholders Voice, U.S' [2002] North Carolina Law Review.
[732] Some of these commentators include: Kershaw (2012) 476; B. Hannigan, 'Reconfiguring the No Conflict Rule: Judicial Strictures, A Statutory Restatement and the Opportunistic Director' (2011) 23 S.Ac.L.J. 714.
[733] I. Akomolede, *Fundamentals of Nigerian Company* Law (Niyak Print and Publications, Lagos 2008) 25-27.
[734] P.D. Okonmah, 'Directors as Fiduciaries Under Nigerian Company Law' [1997] 6 Tilburg Law Review 181-196.

accommodate any directors' conflict, will be emasculated if the provision is applied less strictly.[735] A counter argument by Asada nonetheless proposes that a broad scope might create difficulty in categorising what actions would be treated as likely to give rise to directors' conflict.[736] While Asada's views are well founded, the broad scope is fundamentally advantageous to the company. One benefit of having a broad scope is that it will be useful in prohibiting unanticipated possible directors' conflicts, such as directors' contracts with the company, which are currently not prohibited by s. 280.[737] Hence, even if a director's contract with the company is not prohibited, the effect of the duty would be that any contract entered by a director and any benefits accruing afterwards without proper authorisation by the company is automatically voidable at the option of the company and a director would be required to account for profit. This rule is reasonable and fair for the reasons provided by Lord Cranworth LC in *Aberdeen Ry Co v Blaike*[738] where he explained 'a director of a railway company is a trustee and as such is precluded from dealing on behalf of the company with himself or with a firm of which he is a partner.'

Orojo's views on the case of *Aberdeen* is that, in terms of prohibiting secret profit, the principle is just because if the courts do otherwise then directors would be able to escape liability where no specific secret profit can be traced to the director.[739] In contrast, others have argued that that the duty is too strict and unfair to directors as trustees in that, by applying the duty in its purest form, a talented director's willingness to serve on the board would be diminished.[740] It is true that the duty is strict; however, a strict approach is arguably necessary in order to truly tackle and prohibit against the level of directors' conflict of interest that seems to be prevalent in several Nigerian companies. Making the provisions less strict would create more scope for agency problems; an environment for directors to "chance their hands" and exploit corporate opportunity to make secret profit, even if they are fully aware that the company is capable of exploiting it.

[735] C.S. Ola, *Company law in Nigeria,* (Heinemann Educational Books Ibadan: Nigeria 2002)13-14.
[736] D. Asada, 'Civil Liabilities of Company Directors for Corporate Misgovernance in Nigeria' (2009) 8(1) Unijos LJ 34.
[737] Orojo (1992) 47.
[738] (1854) 1 Macq 46.1.
[739] Orojo (1992).
[740] P.D. Okonmah, 'Directors as Fiduciaries Under Nigerian Company Law' [1997] 6 Tilburg Law Review 181-196.

The Nigerian courts in *Tika-tore Press(Nig) Ltd v. Ajibade Abina*[741] have clearly stated that the objective of the duty is to deter directors from indulging in any transaction that would conflict with the interest of the company. Nonetheless, the difficult question is, when does a director put himself in a situation of conflict? The courts in *Tika-tore*, while referring to the English case of *Boardman v Phipps*,[742] articulated that there must be a possible conflict of interest. The phrase "possible conflict of interest" was interpreted strictly by the majority of their Lordships in *Boardman*, who held that if a fiduciary is placed in a position where his personal interest conflicts, or at least possibly conflicts, with the interest of the trust then he is liable to account to the trust.[743] The effect of this statement is that a director's liability will automatically be triggered once he engages in a transaction where his interest may possibly conflict with the company, regardless of his intention or good motives. This approach is clearly inflexible; it differs from Lord Upjohn's dissenting judgment in *Boardman*,[744] which supports a more relaxed approach. Lord Upjohn said that the phrase "possibly may conflict" requires further consideration, which in his view means that a reasonable man looking at the fact of the case could conclude that there is a "real sensible possibility of conflict" between a director's duty and his interest, and not simply a theoretical conflict of interest.[745] Lord Upjohn's dictum seems more perceptive compared to the other Lordships in that it entails a reasonability test, which looks at the motive of the director, assesses the facts and then determines if there is indeed a real conflict of interest.

Diverging scholarly opinions have emerged to consider which approach in Boardman is more appropriate. While some scholars argued that the courts should apply flexibility by weighing the facts to determine possible conflict[746] others have argued that the duty should be applied strictly to avoid giving directors room to manoeuvre. [747] However, the author suggests that there is no "hard or fast" rule in assessing possible conflict of interest; the courts in Nigeria should be free to decide to

[741] (1973)1 All NLR Pt.1 Pg.40.
[742] (1967) 2 AC 46.
[743] Per Lord Cohen.
[744] Supra.
[745] Dignam and Lowry (2014) 365.
[746] J. Lowry and R. Edmund, 'The No-Conflict-No-Profit Rule and Fiduciary: Challenging the Orthodoxy of Absolutism' (2000) Journal of Business Law 122.
[747] M. Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 LQR. 452.

apply either a strict or flexible approach depending on the particular circumstance and merit of the case. In essence, if upon assessment, the situation is not reasonably likely to give rise to conflict of interest then the duty should not be infringed; a reasonability test or flexible approach can determine this point. This does not in any way dilute the strictness of the duty to deter against directors' possible conflict; it only provides the courts with a choice to "isolate" those actions, which truly give rise to directors' real conflict from transactions, which may appear to conflict but in reality benefit the company's interest. In other common law countries such as the UK, a hint of flexibility and a reasonability test is applied: section 175(4)(a) of the CA 2006 states that the 'duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest'.[748] The judicial benefit of applying a reasonability test/flexible approach was highlighted by Alotaibi who said that since the courts have the option to apply a strict or relaxed approach, they are equipped with the means to create a balance between ensuring directors' accountability without jeopardising directors' willingness to serve on the board.[749]

In Nigeria, there is currently no provision in s. 280 of the CAMA or case law which requires the courts to apply a flexible approach; as explained above, the duty is very strict. This is particularly evident in s. 280(4), which provides that even if the company is unable or unwilling to exploit the opportunity, it will not constitute defense for breach of the duty. The author does not make the assertion that this strict approach makes s. 280 any less effective, but it is proposed that in order for Nigeria to benefit from the judicial flexibility highlighted above by Alotaibi, provisions similar to the UK's s. 175(4)(a) should be introduced into s. 280 of the CAMA. It is also said that applying a flexible approach creates economic benefits for a country. Such economic benefits were highlighted by David Kershaw: 'if the approach strictly prevented directors from exploiting opportunity and yet the company decides not to utilise the opportunity, this could mean that an economy misses out on the economic benefit of exploiting business opportunity altogether because of its company law.'[750] In essence, it is possible from the above that a viable opportunity may not be exploited at all because

[748] A recent case where the reasonability test was applied in the UK is the case of *Towers v Premier Waste Management* [2011] EWCA Civ 923; [2012] B.C.C. 72.
[749] M. Alotaibi, 'Regulating conflict of Interest in the Post-CA 2006 Era: Part 1: a Triumph of Disclosure Over Honesty and Good Faith' [2013] 24(1) ICCLR 1-8.
[750] Kershaw (2012) 518.

the company does not have the financial capability and on the other hand the director is strictly prohibited from exploiting such opportunity. This was the situation in *Industrial Development Consultants v Cooley*[751] where the courts held that, despite the company's inability to secure the proposed transaction, the director could not be allowed to secure such a transaction for himself (even in a private capacity) because it was his duty as a managing director to pass to the company the information within a fiduciary relationship. Ola submitted that the situation in *Cooley* could be avoided if a director attempting to acquire corporate opportunity seeks approval from the company.[752] This argument is not exclusively valid because there is also the view that a director might not always get the approval they seek from the company.[753] Therefore, any director who is unable to secure the company's approval will still be prevented from exploiting that proposed opportunity, even if the company does not have the capacity or is not interested in the proposed transaction.

Oji's disapproval of the provision in s. 280(4) of the CAMA is that the harsh legislative approach restricts directors' freedom to compete commercially; even if the opportunity is acquired without any dishonesty or the company is unable to procure the opportunity, a director may still be liable.[754] Essien rejected Oji's views by noting that applying a less strict duty than the one in s. 280 will allow directors to deploy weak counter-arguments to persuade the claimant company that the opportunity was not within the company's prospective business area or capacity.[755] While Essien's views are plausible, it seems unfair to completely prevent directors from taking up business or contracts which the company might consider unviable or where the company is financially incapacitated to secure them; as long as it does not intervene with his directorial responsibilities and duties to the company, it is perfectly logical for a director to exploit such opportunities.

Conversely, the strict approach of s. 280 also extends to the situation where a director has resigned from office. In this regard, s. 280(5) of the CAMA provides that the duty shall not cease by

[751] [1972] 2 All ER 162; for more analysis on the case see Sealy and Worthington (2013) 388.
[752] Ola (2002) 44.
[753] J Lowry and R. Edmunds, 'Judicial Pragmatism: Directors' Duties and Post-Resignation Conflicts of Duty' [2008] JBL 83.
[754] S. Oji 'Directors Duties in Modern Corporate Practice: an Overview' (2002) 1(1) ABUJCL 104.
[755] E. Essien, 'The Duties, Responsibilities and Liability of Directors under the CAMA' (2005) 6 UULJ 1.

a director or an officer having resigned from the company, and he shall still be accountable. The rigid effect of s. 280(5) was highlighted in *Okolo and Anor v Union Bank of Nigeria Ltd*[756] where it was held that 'it is immaterial if the profit or opportunity was acquired while the director is away from office or presented to the director personally or where the company lacks interest in the proposed transaction; he is within a fiduciary duty to pass to the company the information.' This indicates a complete bar on directors' utilisation of corporate opportunity in post-resignation cases in Nigeria. It is argued that this would impede unnecessarily a director's ability to utilise knowledge and skills he acquired while in office in subsequent establishments or impede his personal freedom to compete.[757] This assertion is true; against the background of the above statutory formulation in s. 280(5) and the above statement in the case of Okolo,[758] it is clear that a director will be more cautious in applying knowledge they acquired in previous employment in subsequent roles in order to avoid incurring liability.

When compared with the UK, it can be said that the Nigerian situation provides directors with less flexibility in terms of utilising corporate opportunity. Although similar provisions to s. 280(5) of the CAMA are contained in s. 170(2)[759] of the CA 2006, the courts in the UK, albeit inconsistently,[760] have indicated a hint of compassion and leniency towards directors. For instance, Hutchinson J held in the case of *Island Export Finance Ltd v Umunna*[761] that 'directors no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit it in a new position.'[762] Meanwhile in the post-2006 judgment of *Foster Bryant Survey Ltd v Bryan*,[763] Rix LJ stated that 'the extent of director's liability will depend on the particular circumstance of the cases; where the resignation of

[756] [2004] All FWLR (pt. 197) 981.
[757] Akomolede (2008) 34-35.
[758] Supra.
[759] A person who ceases to be a director continues to be subjected to the duty in s. 175 as regard exploitation of any information or opportunity which he became aware of at a time when he was a director.
[760] Kershaw noted that while it was held in the case of *IDC v Cooley*(supra) that the duty extends beyond directors resignation, recent authority in *Ultrafame v Fielding [2005] All ER (D) 397* specifically highlighted that the duty does not go beyond resignation; see Kershaw, (2012) 562.
[761] [1986] B.C.L.C 460.
[762] Dignam and Lowry (2014) 374; See also the case of *Balston Ltd v Headlines Filters Ltd[1990] FSR 385* where Falconer J said that a director's intention to set up business in competition with the company after his directorship ceases to be regarded as a conflicting interest within the context of the no non conflict rule .
[763] [2007] EWCA Civ 200.

office is not accompanied by disloyalty such as trading corporate opportunities or secrets then there will be no liability.' [764] The above pronouncement by Rix LJ in *Fosters* and the *Island Export* case provide an indication that the current approach in the UK, albeit stringent, would consider if a director has been dishonest and if has not then he will not be deemed liable. Clearly one advantage of the UK approach is that it does not impinge unnecessarily on a director's ability to utilise knowledge and skills he acquired while in office in subsequent establishments or impede his personal freedom to compete.

The above analysis has indicated that the strict duty in Nigeria is not ineffective in deterring directors' conflict of interest; however, it is so overbearing that it arguably impedes their freedom to procure opportunity and utilise the knowledge they acquire in subsequent employment. This could have a negative impact on directors' willingness to serve on the board or their efficacy. The author suggests in this thesis that legislative flexibility should be applied to cases involving directors' utilisation of corporate opportunity in situations where the company is not interested or unable to procure. This can be attained by introducing into s. 280 of the CAMA provisions similar to the UK's s. 175(4)(a) which applies a reasonability test: the benefit, as highlighted above, is that the courts will be bestowed with judicial flexibility to ascertain a director's real conflict of interest rather than the mere possibility or theoretical conflict of interest. As illustrated above, renowned academics such as Kershaw have highlighted the benefit of applying a flexible approach on a country's economy: it will limit the possibility of missing out on corporate opportunity which a company cannot procure and where a director is strictly prohibited by company law.[765] In the absence of these above reforms, it would seem that the current position of the law in Nigeria is and would remain very strict, and arguably uncompassionate towards directors.

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[764] S. Mayson, D. French and C. Ryan. *Mayson, French & Ryan on Company Law* (31st edn, Oxford University Press, Oxford 2014) 498.
[765] Kershaw (2012) 518; B. Hearnden and S. Howley, 'Directors Conflict under the Companies Act 2006 Considered' [2008] Company Law Newsletter 239.

4.4 Directors' Accountability for Corporate Misconduct and Shareholders' Remedies: Reforming the Scope of the Derivative Action and Oppression Remedy in Nigeria

In light of the agency problem in Nigeria, the shareholders' statutory remedies for addressing directorial misconduct under the CAMA are widely considered to be essential tools in deterring against managerial abuse of powers.[766] As previously highlighted in the introductory section, shareholders in Nigeria may invoke a derivative action in s. 303 or an oppression remedy in s. 311 of the CAMA to enforce directors' breaches of duties and consequently hold them accountable for their misconducts. In the context of corporate governance, these tools are invaluable because they offer shareholders the means to exercise effective control over the powers of management and to prevent directorial misappropriation.[767] However, the effectiveness of these tools has also been questioned on the premise that the conditions necessary for initiating the remedies contain procedural defects which impede a claimant's prospect of success.[768] Oshio noted that these defects occur mainly because the conditions imposed by the CAMA have a direct correlation with defunct common law principles on derivative action, which are considered to be very rigid, obscure and impractical.[769] The subsequent analysis in this chapter highlights the deficiencies associated with the remedies and the difficulties created by the common law conditions. It then recommends the reforms necessary to render the remedies more effective in addressing directorial misconducts.

4.4.1. The Statutory Mechanics of the Derivative Action in Nigeria: A Brief Overview

A shareholder's ability to hold directors accountable for wrong done to the company via a derivative action in Nigeria is only possible after fulfilling the conditions imposed by section 303 of the CAMA. According to section 303(1), a shareholder must firstly apply to the courts for leave to bring the action and following that he must prove under s. 303(2) that; the wrongdoers are the directors who are in control and will not themselves take the necessary actions;[770] that he has given reasonable notice to the directors;[771] that he is acting in good faith[772] and finally, that it is in the best

[766] Akinpelu (2011) 230.
[767] Amadi (2004) 120.
[768] E. Oshio, *Modern Company Law in Nigeria,* (Lulupath Press, Nigeria 1995) 204.
[769] ibid 204.
[770] See section 303(2)(a) of the CAMA 1990.
[771] See section 303(2)(b) of the CAMA 1990.

interest of the company to bring the action.[773] The courts in *Adenuga v Odumeru*[774] stressed that all four of the conditions in s. 303(2) must be satisfied. What can be discerned from this is that if a claimant is unable to meet any one of the conditions, their claim will automatically be dismissed, even if they meet all other conditions. While these conditions are necessary, they nonetheless impose a daunting task on shareholders, as meeting the requirements will require a great deal of legal skill and effort which undoubtedly necessitates funding: a litigation cost. However, funding derivative action is a major problem in Nigeria since it is submitted that many minority shareholders in Nigeria do not have the financial capability to pursue an action or indeed have the incentive to do so, due to the insignificant size of their investments.[775]

4.4.1.1 Grounds for Bringing a Derivative Action: Structural Issues and Statutory Ambiguity

The first real procedural defect presented by the statutory derivative action in Nigeria lies in the fact that the provision lacks clear grounds for bringing an action or rules regarding the potential defendants. Section 303(1) simply states that the action must be brought on behalf of the company by a shareholder, but fails to stipulate who an action may be brought against or what directorial conducts may constitute wrongful acts capable of triggering a derivative action. The supreme court of Nigeria in *Agip(Nigeria) Ltd v Agip Petroli International*[776] recently attempted to define the potential defendant but this was only limited to executive directors and officers. Olufunlola Adekeye J.S.C in *Agip(Nig)* stated that a derivative action is brought on behalf of the company against corporate insiders, such as executive directors or officers.[777] By interpretation, this means that the court's definition in *Agip(Nigeria)* does not accommodate former directors, shadow directors or non-executive directors. This inadvertence is an impediment to the shareholder's ability to address managerial wrongdoing because it is noted that, in practice, a shareholder would be barred from

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[772] See section 303(2)(c) of the CAMA 1990.
[773] See section 303(2)(d) of the CAMA 1990.
[774] [2002] 8 NWLR 163; See also *Gombe v P.W(Nigeria) Ltd* (1992) 6WLR(pt.402) 403.
[775] O.A Nwafor, 'Shareholder Derivative Action - Nigerian Statutory Innovation - Not Yet a Victory for the Minority Shareholder' (2010) 7 Macquarie Journal of Business Law 214.
[776] [2010] 5 NWLR 348.
[777] Agip(Nigeria) Ltd (supra)- Per Adekeye J.S.C; (P.30, Paras F-G).

initiating an action against a former or shadow director who might have wronged the company.[778] Certainly, a more practical approach regarding the potential defendants in s. 303 would be to clearly stipulate whom an action can be brought against: it should also be extended to include both former, shadow directors and non-executive directors. This would ensure that all wrongdoings perpetrated by all forms of directors, including former directors, can be effectively addressed by means of derivative action. In other common law countries this approach is stipulated, for example in s. 260(5) of the UK's CA 2006, which states that a derivative claim can be brought against an executive director, a former director and a shadow director.[779] Surely, the UK's approach is more desirable and pragmatic.

The lack of clear grounds also means that a shareholder in Nigeria is not presented with clear rules in terms of what actions may fall under the ambit of derivative action. This is in contrast to the UK, where the equivalent remedy in section 260 of the CA 2006 clearly states the grounds for bringing an action which includes any act or proposed act relating to directors' breach of duty, negligence, breach of trust and default.[780] One of the benefits of the UK's approach is that not only does it ensure clarity with regards to the actionable grounds under a derivative suit, but it also provides a clear picture of whom a claim can be brought against. In this regards, it goes without saying that similar provisions to those provided in s. 260(5) and 260(3) of the CA 2006 should be introduced in s. 303 of the CAMA in order to clarify the scope and basis of the action in Nigeria. Sadly, the lack of clear rules has in practice compelled the Nigerian courts to rely on archaic principles of common law, such as the exceptions to the rules in *Foss v Harbottle*[781] which, as will be demonstrated in the subsequent section, are very narrow and ineffective in tackling corporate misconducts.

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[778] Oshio (1995) 213.
[779] See L. Sealy and S. Worthington, *Cases and Materials in Company Law* (10th edn, Oxford University Press 2013) 645.
[780] See section 260(3) of the CA 2006.
[781] (1843) 2 Hare 462.

4.4.1.2 The Problematic Link between Common law and the Derivative Action in Nigeria

The basis of the Nigerian derivative action, which is predicated upon common law principles, is widely considered as an inherent problem under the framework of directors' accountability. Traditionally, the foundation of the action in Nigeria mirrors the intricate common law exceptions formulated by the English courts in *Edward v Halliwell*[782] to address the difficulties presented by the rules[783] in *Foss v Harbottle*.[784] Due to this correlation, a brief background to the rules and exceptions in *Foss* is necessary in order to appreciate the basis of the action in Nigeria. The rules in question in *Foss* echo the "proper plaintiff principle," which simply allows only the company (not individual shareholders) to initiate an action in the former's name on the basis that only the company as a separate legal person has standing to sue.[785] This principle gave rise to some intrinsic issues. One significant issue is that the strict application of the rule automatically barred shareholders from suing directors for breach of duties since only the company was in a position to do so.[786] Another fundamental problem is that the wrongdoer directors who were normally in charge of bringing an action on behalf of the company could naturally prevent the company from suing, and since shareholders are equally barred, wrong done to the company was hardly addressed.[787] The court's response to this problem was to formulate exceptions where a minority shareholder could bring an action on behalf of the company for wrong done to the company. One of these exceptions was where the directors have perpetuated fraud against the minority shareholders, and the wrongdoers who are in control of the company will not take the necessary action to redress the

[782] There are four major exceptions formulated in the case of *Edward v Halliwell 1950] 2 All ER 1064,* Fraud on the minority; ultra vires and illegality; actions requiring a special resolution, and infringement of individual rights. However, the judiciary has accepted "fraud on the minority" as the only true exception to the rules in Foss v Harbottle. See B. Hannigan, 'Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions' [2009] *Journal of Business Law* 606, 623-24

[783] The rules in *Foss v Harbottle* (1843) 67 ER 189 stipulate that where a wrong is done to the company, the proper plaintiff is the company and where an alleged wrong is capable of being ratified by the majority then no individual can maintain an action in respect of that wrong; Sealy and Worthington (2013) 640.

[784] Supra.

[785] Kershaw (2012) 601.

[786] M. Almadani, 'Derivative Actions: does the Companies Act 2006 Offer a Way Forward?' (2009) 30 Company Lawyer 131, 138.

[787] K. Raja, 'Majority Shareholders' Control of Minority Shareholder' Use and Abuse of Powers: A judicial Treatment' [2014] Internal Company and Commercial Law Review 162.

wrong.[788] This provided shareholders with the means to address corporate misconduct by directors; however, the requirement to show fraud considerably limited the scope in which claimants may sue directors for breach. Under the category of fraud, a claimant had the burden to show that the breach of duty had both damaged the company and also enriched the director who was in breach.[789] The problem here is that in the absence of directors' personal benefit, a claim could not be brought; directors' negligence where there is no self-serving element was not sufficient to fall within the definition of fraud.[790] Sadly, in Nigeria, this sclerotic common law condition is now incorporated into its derivative action. The courts in *Chief Akintola Williams v Edu*[791] noted that the fraud on the minority requirement is essential and forms the basis of Nigeria's derivative action. Madubuike-Ekwe explained that the rationale for the approach in Nigeria was to address the inadvertence in s. 303(1) of the CAMA, which as analysed above failed to stipulate clear grounds for bringing an action.[792] Hence, in practice, the courts have to rely on predating case law as a guide, by requiring claimants to show common law fraud as the prerequisite for bringing an action.[793]

In view of this, it is noted that both the common law and statutory derivative action operate side by side in Nigeria.[794] This approach has been condemned by Briggs J in the English case of *Re Fort Gilkicker Ltd*[795] who stated that 'the common law principles on derivative action are complicated, obscure and unwieldy and not in itself an exercise of commonsense to have common law regime and statutory derivative rules.'[796] Briggs J's statement is not far-fetched when viewed in light of the Nigerian court's narrow interpretation of fraud, which as will be demonstrated in the subsequent section, also impedes a shareholder's ability to challenge directors for breach of duties just as is found in common law. The author will argue that firstly, the common law derivative action in Nigeria should be abolished. This will eliminate all ties between the statutory action and the

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[788] C.O. Akoje, *The Nigerian Company Law and Practice Under the Companies and Allied Matters Act 1990 at a Glance* (Okija Nigeria Devine Venture, 2003) 45-46.
[789] *Prudential Assurance Co. Ltd v Newman Industries Co (No2) [1980] 2 ALL ER 841* ibid D. Kershaw (2012) 600
[790] *Pavlides v Jensen [1956] Ch 565*; ibid D. Kershaw [2012] 604.
[791] (2002) 3 NWLR 400 (pt 754).
[792] N. Madubuike-Ekwe, 'Wherein lies the "Power House" of Corporate Management and Control under the CAMA?' (1996) ABSU L.J. 39-44.
[793] ibid 40; W. Egbewole, "Management, Control and Administration of Companies in Nigeria" (2003) 7(1-2) MPJFIL 38.
[794] Nwafor (2010) 214.
[795] [2013] EWHC 348 (Ch).
[796] Sealy and Worthington (2013) 648.

common law approach and subsequently remove the requirement to show common law fraud. This will also provide an opportunity to introduce a provision that clearly stipulates in s. 303(1) the grounds for bringing a derivative action, just as is found in the UK; as explained above, such grounds do not exist under the CAMA. The following section explains the inherent problems with the common law fraud requirement in Nigeria, the reason why it should be abolished and why provisions similar to the UK's derivative claim are necessary.

4.4.1.3 Inadequacies with the Fraud on the Minority Requirement: the Basis for Reform of Nigeria's Derivative Action

As analysed above, the requirement for shareholders to show fraud on the minority according to common law initially presented problems and hindered the ability of shareholders to address certain directorial wrongdoing under a derivative action. Unfortunately, this approach is still applicable in Nigeria, as the courts in *Chief Akintola* have unequivocally illustrated that as part of the common law conditions for derivative action, a claimant must prove that the directors have committed fraud on the minority shareholders. In this regard, it was noted in *Yalaju v AREC*[797] that a director's breach of duties in the absence of dishonesty or personal profit does not suffice as fraud. Ultimately, this means that even when such misconduct results in significant financial losses to the company, it will not qualify as fraud, except if it is shown that the directors have benefited personally from their negligent misconduct. Surprisingly, this exact condition is now codified by s. 300[798] of the CAMA. The fact that fraud is still required means that no attempt has been made to remedy the problems presented at common law. Evidently, it is clear that a shareholder who fails to show self-serving elements on the part of the director would be barred from bringing an action to address the wrong. For example, this difficulty was illustrated in the case of *Chief Akintola v Edu*[799] where, due to the negligence of the director, a plaintiff who was both a minority shareholder and a director was wrongfully dismissed at a general meeting without proper notice.[800] Such removal resulted in the loss of a contract originally vested in the company's name and the plaintiff brought a derivative

[797] (1990) 1 NILR 29, SC; an affirmation of the English courts in *Cook v Deek* [1916] 1 AC 554.
[798] Section 300 states inter alia that a shareholder may bring an action where the director is likely to derive profit or benefit or has benefited from their negligence or breach of duty.
[799] Supra.
[800] S.O. Tonwe, *Company Law in Nigeria*, (Amfitop Series in Business law, Nigeria, 1997) 203-206.

action on behalf of the company alleging fraud on the minority.[801] The court dismissed the claim by stating that the removal of the claimant in question was lawful and a matter that can be sanctioned by majority according to the rules in *Foss v Harbottle*.[802] But more importantly, it was held that the director who acted negligently had not benefited from his misconduct; thus, his negligent conduct was not sufficient to disregard the rules in *Foss*.

From the above, it is clear that the interpretation of fraud in Nigeria is still very narrow. By reference to *Chief Akintola* it would seem that even where the claimant brings an action in good faith as required under section 303(2)(c) of the CAMA, directors who have not benefited from their negligent conduct would not be found liable. This not only hinders shareholders' ability to enforce breaches of directors' duties, but it also limits the scope of directors' accountability in Nigeria, as managerial wrongdoing outside the ambit of misappropriation and self-dealing cannot be addressed in court. It is suggested here that the derivative action in Nigeria must be reformed to accommodate modern, pragmatic and encompassing provisions. As already suggested above, eliminating the common law derivative action altogether and deleting the requirement to prove fraud will sever all ties between the statutory derivative action and the common law approach. Particularly, it is recommended that in reforming the action in Nigeria, Parliament should learn from the equivalent remedy under the UK's derivative claim in part 11 of the CA 2006 which, as will be seen below, is more effective, accommodating and practical.

In the UK, the statutory derivative claim under part 11 of the CA 2006 abolishes the common law derivative action. [803] Consequently, it was stressed by the courts in *Stimpson v Southern Private Landlord Association*[804] that it is no longer necessary for a claimant to prove fraud on the minority or

[801] ibid.
[802] Supra.
[803] This is made possible by s. 260(3) of the CA 2006 which clearly states the grounds for bringing a claim to include breach of all directors duties, trust and default: See the Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: Final Report' (July 2001) URN 01/942 (CLR Final Report) at paras 7.46–7.51.
[804] [2009] EWHC 2072 (Ch).

wrongdoer control.[805] Section 260(3) of the CA, which now allows an action on the basis of directors' negligence and breach of duties, implies that a claim may still be brought to address virtually any wrong or breach perpetrated by the director.[806] Reisberg commended the approach in the UK where he submitted that the inclusion of negligent conduct as a ground for initiating an action provides shareholders with a broader and more accessible ground to build a case against a director who has caused financial losses to the company due to negligence.[807] This is very true when compared with the Nigerian remedy, which seems to limit the scope of any directors' wrongdoings that can be challenged by a shareholder. However, concerns from Goo[808] and Gibbs[809] have highlighted that initiating an action on a negligence basis might encourage frivolous litigation by vindictive shareholders; this is precisely what the Law Commission in the UK attempted to avert when they recommended the abolition of the common law fraud requirement.[810] They argued that the court's willingness to interfere with the day-to-day business management of a company, in order to protect minority shareholders on the basis of a negligent act or omission, may create an environment where directors may feel vulnerable to factual or calculated allegations by shareholders.[811] While Gibbs' and Goo's concerns are understandable, their views are only theoretically valid because, in practice, potential frivolous claims are easily averted by the strict requirements a claimant has to satisfy in ss. 261-263 of the CA 2006 in order to bring and continue a derivative claim.[812] However, the way in which sections 261-263 work in practice to avert

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[805] David Kershaw submitted that HHJ Pelling QC in *Stimpson v Southern* (Supra) categorically enunciated that the principle of fraud and wrongdoer control of the company do not appear under the statute and are no longer relevant: see Kershaw (2012) 627.

[806] According to 260(3) of the CA 2006 a derivative claim can comfortably be brought for directors' negligence: see C. Wild and S. Weinstein, *Smith and Keenan's, Company Law* (16th edn, Pearson Education Limited 2013) 310.

[807] He argued with reference to the case of *Pavlides v Jensen [1956] 2 All ER 518*, which is now abolished by the CA 2006, that at common law, it was difficult to establish a claim on the basis of negligence, which was not desirable to minority shareholders' protection. See A. Reisberg 'Derivative Claim Under the Companies Act 2006: Much Ado About Nothing?' [2008] Research Paper No.09-02, University College London, Law; Available online at <http://ssrn.com/abstract=1092629> accessed on 18 August 2014.

[808] S.H. Goo 'Multiple Derivative Action and Common Law Derivative Actions Revisited: A Tale of two Jurisdiction' [2010] Journal of Corporate Law Studies 255.

[809] D. Gibbs, 'Has the Statutory Derivative Claim Fulfilled its Objectives? A Prima Facie Case and the Mandatory Bar: Part 1' (2011) 32 Company Lawyer 41.

[810] Other objectives include providing easy access to corporate form, appropriate investor/shareholder protection and preventing and deterring against floodgates of shareholders' frivolous litigation. See Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: Final Report' (July 2001) URN 01/942 (CLR Final Report) at paras 7.46–7.51.

[811] See Gibbs (2011) 41; Goo (2010) 255.

[812] For example, claimants must satisfy in section 263 of the CA 2006 that a person (i.e. a director) acting under the duty in s. 172 of the CA will not continue the claim; the action has not been authorised or likely to be authorised by the company; the company had not refused to pursue the claim etc. for more details see section 263 of the CA 2006.

unmeritorious claims involve an onerous process, which some argue may impede a member's chances of success.[813]

A claimant's first daunting task is to prove they have a prima facie case under sections 261(2) and 262(3) of the CA by providing supporting evidence that the case is feasible; i.e. showing that the director is in breach of his duty.[814] The prima facie requirement is reasonable because it is understood that without such requirement, frivolous claims from malicious shareholders would be impossible to prevent.[815] However, a rather challenging obstacle faced by claimants attempting to bring an action in the UK is the difficulty in satisfying the list of factors in s. 263 required for the action to proceed.[816] For example, section 263(2)(a) allows the courts to refuse permission if a person acting in accordance with s. 172 (duty to promote the success of the company) would not seek to continue the claim or if a hypothetical director acting under the same duty will not attach importance to continue the claim.[817] This requirement imposes a heavy burden on shareholders to convince the courts that the action will be for the benefit of the company; this is very difficult to attain because, as stated by Mr William Trower QC in *Franbar Holding v Patel,* [818] 'in assessing the importance in continuing a claim, a hypothetical director acting in accordance with 172 would take into account a wide range of considerations' [819] The difficulty with this statement is that a claimant cannot anticipate what factors a hypothetical director might take into consideration in assessing whether to continue the claim. Thus, determining whether a claimant has met the factors in s. 263(2) will be based on judicial discretion; this creates uncertainty. Besides, judicial discretion is not always desirable, as illustrated in *Franbar*, whereby even though the courts were satisfied that the defendant

[813] A.M Gray 'The Statutory Derivative Claim: an Outmoded Superfluousness?' [2012] Company Lawyer 295.
[814] In *Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch), It was held that the allegations made by the claimant were merely vindictive in that the directors had not breached their duty. Hence, there were no grounds for bringing a derivative claim in the first place. Accordingly, Lewison J dismissed the case on the *prima facie* grounds [per Lewison J at 78]; D. Lightman, 'Two Aspect of Derivative Claim' [2011] Lloyds Maritime and Commercial Law Quarterly 142.
[815] P. V Nessen, S. H. Goo and C. K Low, 'The Statutory Derivative Action: Now Showing Near You' [2008] Journal of Business Law 627.
[816] As already highlighted above, the courts will consider multiple factors in s.263 of the CA, to determine if a claim should continue. For more details on the list of factors, see section 263 of the CA 2006. See also J. Lee, 'Shareholders' Derivative Claim under the Companies Act 2006: Market Mechanism or Asymmetric Paternalism?' (2007) International Company and Commercial Law Review 378, 380.
[817] S. 263(3)(b) of the CA 2006.
[818] [2008] EWHC 1534 (Ch) The same conclusion was reached by Floyd J in *Mission Capital Plc v Sinclair* [2008] EWHC 1339 (Ch).
[819] *Franbar v Patel* (supra) - per MR William Trower QC at 36.

directors were in breach of their duties (i.e. prima facie requirements were met), they were not satisfied that the claimant had established a sufficiently cogent case on the merit to lead a hypothetical director acting to promote the success of the company to attach great importance in continuing the claim.[820]

The reaction of learned authors such as Dine and Koutsias to the above requirement in 263(2)(a) relating to the hypothetical director has also been disapproving.[821] They have contended that it is extremely challenging to prove that bringing the action will be for the benefit of the company as a whole considering the fact that the whole of the company would clearly include the majority, which has formed the management to whom an action would be initiated against.[822] Their assertion is well founded when viewed in light of the above judgment in *Franbar*, which as explained creates uncertainty for shareholders.

It is clear from the above analysis, that although the UK's derivatives claim is more pragmatic than the Nigerian model, it is not perfect. Even where a claimant establishes a prima facie case under the first stage, his case may still fail on the basis of the hypothetical director criteria, which is based on discretional interpretation by the courts.[823] However, as illustrated above, this requirement is necessary to eliminate unmeritorious claims. In contrast, the situation in Nigeria is less desirable since the requirement to prove fraud drastically limits the circumstances in which a derivative action may be brought, let alone succeed. Thus, the above recommendation to abolish the fraud on the minority requirement in Nigeria still stands.

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[820] Dignam and Lowry (2014) 205.

[821] J. Dine and M. Koutsias, *The Nature of Corporate Governance: the Significance of National Cultural Identity,* (Edward Elgar Publishing Limited 2013) 197.

[822] Ibid, 197; see also J. Kirkbride, S. Letza and C. Smallman, 'Minority Shareholders and Corporate Governance: Reflection on the derivative Action in the UK, the USA and in China' [2009] International Journal of Law and Management 206.

[823] Lewison J in *Stainer v Leee* [201] EWHC 1539 articulated that section 263(3) CA as regards the hypothetical director does not prescribe a particular standard of proof that has to be satisfied but rather requires consideration of a range of factors which must be done on a case by case basis.

4.4.2. Assessing the Statutory Conditions of Derivative Action in Nigeria

4.4.2.1 Wrongdoer in Control Condition: Evaluation

In addition to proving the problematic common law 'fraud on the minority,' a shareholder seeking to address directors' wrongdoing through a derivative suit must also establish that the 'wrongdoers are in control' and will not take necessary action in s. 303(2) of the CAMA.[824] While there is a scarcity of cases on the interpretation of the term 'wrongdoer control' in Nigeria, judicial opinion in English courts has provided ample interpretation. The collective ground on the issue, however, is that the fraudulent directors must be capable of exercising sufficient control so as to prevent proceedings from being brought in the name of the company.[825] Although control had been equated to control of voting rights by wrongdoers,[826] it is not very clear whether the wrongdoers need to exercise *de facto* or *de jure* control or whether both must be established.[827] Hence this raises the question, *do the wrongdoers need to own a majority of company shares or do they need to exercise sufficient control through directorial powers?*

The above question was considered by Vinelot J in the case of *Prudential Assurance Co Ltd v Newman Co Ltd (No 2)*,[828] where the court was prepared to sanction the action against the directors even though the directors did not command the majority of the shares. The learned judge concluded that the control element is satisfied where directors, by any means of their position in the company, prevent an action from being brought by the minority shareholders.[829] It does appear from Vinelot J's judgment that control is not limited to *de jure* control but that it also encompasses a situation whereby a director attempts to frustrate the company from initiating a proceeding by using his directorial powers. It is said that one obvious advantage of *Prudential's* position is that it expands the

[824] See section 303(2)(a) of the CAMA. See also N. F. Amadi and C. Halliday, 'Shareholders' Rights & Obligations Under the Companies And Allied Matters Act' (2005-2006) 2 IJOTALFIPAS 152.
[825] K.W Wedderburn 'Shareholders Rights and the Rule in Foss v Habottle' [1957].
[826] *Burland v Earle* (1902) AC 83.
[827] Dignam and Lowry (2014) 199 ; see also *Pavlides v Jensen*(Supra).
[828] [1982] 2 Ch. 204.
[829] H. C. Hirt, *The Enforcement of Directors Duties in Britain and German: a Comparative Study with Particular Reference to Large companies* (Peter Lang AG European Academic Publishers, Bern 2004) 185-189. See also P. Mantysaari, *Comparative Corporate Governance: Shareholders as Rule Maker* (Springer Berlin, Heidelberg, 2005) 170.

scope of the wrongdoers in control requirement to accommodate even situations where control is exercised either directly or indirectly through any managerial strategy.[830]

One important issue not addressed by the case of *Prudential*, however, is where the majority of the minority does not support the claimant who has initiated the action. In other words, can an action be brought if those who do not wish to bring the action actually form the majority of the minority shareholders? Knox J, who was not in complete agreement with the principle in *Prudential*, dealt with this issue in *Smith v Croft (No 2)*[831] by providing further interpretation of the control element. He stated that if the majority of the remaining shareholders who were independent of the wrongdoer (that is the majority of the minority shareholders) did not wish to pursue a claim for "disinterested reasons" the single member(s) wishing to sue would be denied *locus standi.*[832] The position in *Smith* was also endorsed by the Nigerian courts in the case of *Central Bank of Nigeria v Kotoye*,[833] where the claimant was denied *locus standi* on the basis that the plaintiff did not receive the support of the majority of the minority.[834] It is interesting to note that the above situation is not only peculiar to Nigeria. One could argue that the UK also shares similar characteristics, since by virtue of section 263(4) of the CA 2006, the courts in deciding to grant permission to continue a derivative claim will also take into consideration the interest of members who have no personal interest in the action.[835] Hence, as illustrated in *Cinematic Finance Ltd v Ryder*[836] a claim would also fail if the majority of the minority opposes the action. It is questionable if this approach is desirable for minority shareholders both in Nigeria and the UK, since it indicates a significant tightening of the *locus standi* requirement to be met by individual shareholders who wish to initiate an action to address a wrong done to the company. It is clear that even if a claimant in Nigeria satisfies the fraud and wrongdoer control requirement, the shareholder will not be permitted to bring

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[830] J. Amour, 'Enforcement Strategies in UK Corporate Governance: a Roadman and Empirical Assessment' in A. M. Pacces (ed), *The Law and Economics of Corporate Governance*, (Edward Elgar Publishing Limited 2010) 223-224.
[831] [1988] Ch 114.
[832] City Law School, *Company Law in Practice* (10th edn, Oxford University Press 2014) 163-164.
[833] (1994) 2 NWRL.
[834] The courts however, granted locus standi to the claimant to initiate a personal action under section 6(6) of the previous 1979 Constitution of Nigeria, which entitled a member of a company to seek redress where they suffer an injury. See T. I. Akomolede, *Fundamentals of Nigerian Company Law* (Lagos, Niyak Prints and Publications, 2008) 23-26.
[835] P. L. Davies(ed), *Gower and Davies' Principles of Modern Company Law* (7th edn, Sweet and Maxwell. 2003) 462-463.
[836] [2010] ALL ER (D) 283, Roth J illustrated that the proper plaintiff principle is the basis of English Company law, and a member will only be able to enforce wrongs done to the company in very limited circumstances. Para 1.9.

an action against the desires and wishes of the majority in the independent minority. Nonetheless, although this approach may be harsh it is reasonable when viewed in light of Knox J's statement: 'the question which has to be answered when determining if a minority shareholder is prevented from seeking relief for the benefit of the company is whether he is improperly prevented from bringing the action'.[837] If an independent corporate organ (i.e. a majority of the minority) prevents him, he is properly prevented and the answer is 'No'.[838]

At this juncture, it is right to say that even though the principle in the above case of *Central Bank* is strict, it is nevertheless just, since the principle does not allow the minority to be unlawfully prevented by fraudulent wrongdoers.

4.4.2.2 Pre-Action Notice Condition: an Unnecessary Hurdle?

Nigerian shareholders relying on a derivative action are further impeded by what some describe as an unnecessary procedural hurdle: i.e. the requirement that a pre-action notice must be sent to the wrongdoer directors. According to section 303(2)(b) of the CAMA, the claimant must also file a reasonable notice to the directors of the company before initiating an action.[839] In *Caribbean Trading Fidelity Corporation v. N.N.P.C*,[840] it was held that the notice must contain sufficient details as to enable the directors to take necessary action.[841] At first glance, this requirement seems easy to attain; however, what constitutes 'reasonable notice' is not defined in s. 303(2)(b) or by the Nigerian courts. The phrase is ambiguous, imprecise and differs from the position in other common law countries. For instance, in Singapore,[842] Australia[843] and Canada,[844] 14 days is prescribed as reasonable notice by the relevant companies acts. Meanwhile, in the UK a requirement to file notice to the director of the company is not required at all under Part 11 of CA 2006 in order to initiate a derivative claim.

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[837] *Smith v Croft* (Supra).
[838] Sealy and Worthington (2013) 666; S. Pickford and R. Mina, 'Derivative Claim in the US and UK: the Story so Far' [2009] 20(3) Practical Law Companies 16-18.
[839] J. T. Agbadu-Fashin, *Principles of Nigerian Company Law* (Akure, Nigeria 1998) 34.
[840] (2002) 14 NWLR.
[841] P. E. Oshio, 'The True Ambit of the Majority Rule under the Companies and Allied Matters Act 1990' [2003] 8 Abia State University Law Journal.
[842] See Section 216A of the Singapore Companies Act (cap 50); originally enacted in 1967 and revised in 1999.
[843] See section 237(2)(e)(i) of the Australia Corporations Act (2001)
[844] See section 239(2)(a) of the Canada Business Corporations Act (1985)

Considering the difficult preconditions a claimant has to satisfy (especially the fraud condition) in order to bring a derivative action in Nigeria, it is apposite to say that the requirement to file a notice to fraudulent directors in control of the company is unnecessary and time consuming, especially if the directors will not normally initiate an action against themselves. In actuality, it only stands to undermine the strength of the case since a pre-action notice will provide delinquent directors with ample opportunity to restructure the company's affairs and conceal any incriminating evidence. A more suitable (liberal) approach in Nigeria would be to allow the courts to waive the condition based on the circumstances of the case. This is also the practice in Australia, where section 237(2)(e)(ii) of the Australia Corporations Act (2001) allows the courts, when appropriate and just, to grant leave even where notice was not given to the company's directors.[845] Sadly, the provision under section 303(2)(b) of the CAMA is law and shareholders will continue to file unnecessary pre-action notices to fraudulent directors until relevant reforms are introduced in the future.

4.4.2.3 Application for Leave Condition: Procedural Issues

One of the essential yet controversial aspects of derivative action in Nigeria is that an action cannot be brought if the shareholder has not obtained leave from the courts.[846] In view of this, section 303(1) of the CAMA provides *inter alia* that an applicant '*may* apply to the court for leave to bring an action in the name or on behalf of a company.' At first glance, the provision in s. 303(1) seems clear, but on a closer inspection it engenders some ambiguity. For instance, given that the provision uses the term 'may' one could hypothetically say that it denotes a voluntary requirement and not a mandatory one. Friday has specifically postulated that by virtue of section 303(1) a claim might still proceed without the need to apply for leave.[847] However, following judicial opinion, Friday's assertion is only theoretically plausible as the Supreme Court in *Agip (Nigeria) Ltd v Agip Petroleum International*[848] have stressed that an action cannot proceed without applying for leave. While the

[845] S. Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Ashgate Publishing Company, 2007) 157.
[846] *Agip (Nigeria) Ltd v Agip Petroleum International* [2010] 5 NWLR (Pt 1187).
[847] P. Friday *A Comparison of Nigerian Company Law for Directors and Corporate Executes and all other Parties Interested in Companies* (ICSAN Publication 2000) 123.
[848] Supra.

case of *Agip* seems to clarify the conundrum in s. 303(1), it would be more logical to amend the phrase *may* to *must* so as to align the CAMA with existing case law.

Traditionally, the rationale for applying for leave in derivative suits is to safeguard against frivolous claims; it provides the courts with the opportunity to initially consider the application and peruse the supported documents provided by the claimant in order to establish *prima facie* case.[849] However, in practice, the Nigerian courts have not really provided clear rules regarding the appropriate procedures to follow when applying for leave.[850] In *Agip,* a minority shareholder obtained a writ from the high court and initiated an ex parte[851] application, seeking a declaration on the grounds of fraud on the minority and illegality. They alleged that their right of first refusal to shares had been prejudiced to the extent that shares sold by the company had not been offered to them first but to a third party.[852] While the Supreme Court acknowledged a *prima facie* case on the ground of fraud on the minority, the court dismissed the claim on the basis that the claimant had not followed the right procedure in obtaining leave.[853] The reason for dismissal is based on the fact that rule 2 of the Companies Proceedings Rules 1992[854] requires every application made under the CAMA to be done by an originating summons; the claimant obtained a writ instead.[855] Furthermore, his claim was also dismissed because the courts held that an *ex parte* application - which the claimant initiated - was inapplicable, as the rule in *Foss v Harbottle*[856] requires proper claimant standing which involves a pre-hearing stage with an appropriate hearing from the delinquent parties.

While the requirement to obtain an originating summons is clear, according to the CPR rules, the circumstances in which the summons must be obtained is not clear. The judgment in *Agip* tends to create conflict between statute and case law because nowhere in the CPR 1992 is it stated that

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[849] D. Lightman, 'The Companies Act 2006: a Nutshell Guide to the Changes to Derivative Claim' [2007] Civil Justice Quarterly 37.

[850] K. Aina "Current Development in the Law on Derivative Action in Nigerian Company Law (2013) available online at <http://www.academia.edu/7175946/CURRENT_DEVELOPMENTS_IN_THE_LAW_ON_DERIVATIVE_ACTION_IN_NIGERIAN_COMPANY_LAW.> accessed 24 September 2015.

[851] A decision made by a judge in favour or against one party without requiring all the parties to the dispute to be present: see B. A. Garner, *Black's Law Dictionary* (9th edn West Publishing Co. 2009).

[852] See the full judgment of the case of *Agip (Nigeria) Ltd v Agip Petroleum* at Legal frame available online at http://legalframes.net/supreme-court/agip-ltd-v-agip-petroli-international-7-ors accessed 1st October 2014.

[853] ibid.

[854] Hereinafter referred to as CPR.

[855] O. J. Bamgbose, *Digest of Judgment of the Supreme Court of Nigeria volume 1$2,* (Safari Books Ltd 2014) 314.

[856] Supra.

applications should be on an ex parte or notice basis. The procedural rule under the CPR merely states that applications under the CAMA must be made by originating summons. It would seem that if the principles in the case of *Agip* were applied, leave could not be obtained on an ex parte basis but would require the presence of the defendant directors. However, if the CPR's procedural rules are applied, one could also argue that a leave may still be obtained without the presence of the offending directors. This conflict clearly creates uncertainty and confusion from the onset for shareholders attempting to bring a derivative action in Nigeria. In light of these issues, clear procedural rules should be introduced both under the CAMA and CPR 1992 where, preferably, leave obtained through originating summons should be possible on an ex parte basis.

In the UK, for instance, a claimant only has to apply to the courts seeking for permission to continue a derivative claim under section 261 of the CA 2006, under which the courts will have to decide whether a *prima facie* case is established based on the evidence provided by the claimant.[857] Thus, the claimant is not under any legal duty to request the presence or hearing from delinquent directors; the courts will decide whether permission should be granted solely based on the evidence presented by the applicant. In comparison, the UK's approach seem more logical because it is rather superfluous and time consuming to require fraudulent directors to be present at the pre-trial hearing given the fact that the application is simply to determine the merit of the claimant's case and it is not a full hearing. While the application for permission in the UK resembles the application for leave in Nigeria, the discrepancies in Nigeria set both jurisdictions apart.

4.4.3 Examining Directorial Accountability under the Oppression Remedy in Nigeria

4.4.3.1 The Overly Restrictive Scope of the Oppression Remedy under the CAMA

Similar to the derivative action in s. 303, the mechanism for ensuring directors' accountability in Nigeria suffers another drawback, which is predicated upon the statutory formulation and judicial interpretation of the meaning of oppression in s. 311 of the CAMA.

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[857] J. Dine and M Koutsias, *Company Law* (7th edn, Palgrave Macmillan, 2009) 208.

According to the CAMA 'a shareholder in s. 311(1) may seek relief where the affairs of the company are being conducted in an "oppressive manner"[858] or in s. 311(2) where the affairs are conducted in a manner that is "unfairly prejudicial" against the interest of a member or members as a whole'.[859] The purpose of this provision, as illustrated by the courts in *Ijale Properties Ltd. v Omololu-Mulele*,[860] is that an aggrieved shareholder in a poorly managed company would be able to seek relief against the director(s) in question for any losses incurred by the firm or harm suffered due to the director's ineffectiveness in discharging his directorial duties. The courts in *Ijale Properties* specifically stated that any directorial conduct which is 'illegal, harsh or lacking in probity' would suffice as an oppressive conduct. Ekwere noted that s. 311 is commendable because it ensures directors' loyalty toward the company by preventing the former from acting in a dishonest manner that would jeopardise the company's interests.[861] However, the subsequent analysis will demonstrate that the interpretation of oppressive conduct to encompass only conducts that are 'illegal, harsh and lacking in probity' is too narrow; it focuses only on acts of a fraudulent nature and as such it has drastically restricted shareholders' ability to challenge directors for losses caused out of negligent and other forms of mismanagement. These issues are analysed in section 4.4.2.2 in order to shed more light on the drawbacks of the provision. However, before embarking on this analysis, the rationale behind the narrow provision deserves some consideration, since the predecessor of the CAMA shapes the dominant judicial approach in s. 311(1).

Oshio observed that the overly restrictive approach to s. 311(1) emerged from the fact the provision reinforces the defunct and defective oppression remedy previously contained in section 201 of the Nigerian Companies Act 1968,[862] which required that members had to suffer oppression in their capacity as a member.[863] The judicial interpretation of s. 201 gave rise to many problems, which hindered the intended protection offered to shareholders. One such problem, as highlighted by

[858] See section 311(1) of the CAMA.
[859] See s.311 (2)(a)(i) of the CAMA 1990.
[860] [2000] FWLR (Pt. 5) 709.
[861] F. N. Ekwere, 'Some Aspect of the Nigerian Company and Allied Matters Decree, 1990 as they Affect Investors' [1993] 37(1) Journal of African Law 52-59.
[862] Hereinafter referred to as CA 1968.
[863] P. Oshio, 'Majority Rule Under the Companies and Allied Matters Act 1990 Revisited' (2003) MPJFIL 7(2), 22M.

Atoki, was that the prerequisite to show conducts that were only carried out in an 'oppressive manner', significantly limited a member's ability to bring a claim. [864] By virtue of s. 201, unfairness and mismanagement by directors were interpreted judicially to be insufficient to fall under the remit of oppressive conduct,[865] as the term oppression was narrowly construed to mean only 'wrongful, burdensome or harsh conduct'.[866] Otuturu noted that this narrow approach failed to safeguard shareholders who wish to challenge directors' unfair conducts, such as the awarding of excessive remuneration because the claimant was unable to prove that such conducts - although unfair - were oppressive or illegal.[867] Sogunle noted that the statutory drafting of section 201 also made the provision inseparably linked to liquidation, which meant that it was only available where the fact of the case justified a winding up order.[868] Particularly, it was required that the oppression must be continuous and could only be brought by members qua members.[869]

The aforementioned issues relating to section 201 simply indicate that the remedy was rather counterproductive in protecting shareholders against mismanagement or unfair conduct. It is therefore surprising that the Nigerian lawmakers have decided to retain such a sclerotic remedy, which does not seem to provide adequate grounds for minority shareholders to protect their interests against directorial mismanagement. This statement is particularly true given that the provision in s. 311(2) already reflect the UK's unfair prejudice remedy in section 459 of the UK's Companies Act 1985,[870] now s. 994 of the CA ,[871] which (as will be seen later) happens to provide a broader remedy; the remedy in the UK can be sought where the company's affairs are being conducted or have been

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[864] A. Atoki, *The Rights of Shareholders* (Lagos: Loladia, 1974) 42.

[865] For example see *Ogunade v Mobil Films (WA) Ltd.* (1976) 2 FRCR 10, and also the English case of *Re Five Minute Car Wash Service Ltd (1966)*; in both cases, mismanagement and excessive award of remuneration by directors were not considered by the courts as falling under oppression. See also Dignam and Lowry (2014) 225.

[866] See *Ogunade v Mobile Films* (supra); This was also Lord Simond's interpretation of oppression in *Scottish Co Operaive Wholesale Society Ltd v Meyer* [1959] AC 324.

[867] G. Otuturu, 'Enforcement of Minority Shareholders' Rights in Modern Companies' (2010) 1(3) NJBCL 92-112; Ekpo, 'Ratification of Directors Breach of Fiduciary Duties under the Companies and Allied Matters Act' (1999) IV(1) C. L.J. 73-96.

[868] B. Sogunle, 'The Rule in Foss v. Harbottle and the Protection of Minority Shareholders of Companies' (2001) 2 NJPCL 139-152.

[869] See *Ogunade v. Mobil Films (WA) Ltd. (supra)* and also the English case of *Ebrahimi v Westbourne Galleries* (1973) AC 360.

[870] Hereinafter referred to as CA 1985.

[871] By virtue of section 994 of the CA 2006, a member may bring an action to seek redress where the affairs of the company are being or have been conducted in a manner, which is unfairly prejudicial to the interest of its members or some parts of its members. For more analysis on the scope of section 994 of the UK's CA 2006, see Dine and Koutsias [2013] 191.

conducted in a manner which is unfairly prejudicial to the interest of its members.[872] Unfair prejudice, as will be analysed later, is broadly interpreted by the courts to include directors' conducts that are unfair, director's mismanagement, or any conduct which is contrary to good faith or affects the legitimate expectation of members; this is broader than the narrow scope of oppressive conduct explained above.[873]

In view of the above issues, the subsequent argument will advocate for the removal of the term oppressive conduct in s. 311 of the CAMA in order to eliminate any correlation between the current provision in s. 311 and the previous provision in s. 201 of Nigeria's CA 1968. It will advocate for the retention of unfairly prejudicial conduct, which as explained above, is a broader measure. The encapsulation of both oppressive and unfairly prejudicial conduct in section 310-311 of the CAMA has led some Nigerian commentators to argue that the restrictive scope in section 201 of the Companies Act 1968 has been addressed.[874] However, this assessment is not strictly true, as the provisions can be invoked disjunctively rather than conjunctively: it is submitted that a claimant may either raise their claim under "oppressive remedy" in section 311(1) or the "unfairly prejudicial conduct" in section 311(2).[875] Therefore, it is clear that the judicial interpretation of the latter over the former would result in different outcomes on a shareholders' claim, especially since the judicial interpretation of "oppression" and "unfairly prejudicial" have been given slightly different meanings.[876] Cases interpreting the scope of section 311 are scarce in Nigeria.[877] However, English

[872] See section 994 of the UK's CA 2006.
[873] D. E. Obozuwa, 'Minority Shareholders Rights in the Case of Oppression: What Those Rights are and what they Should be' [2013] available online at <http://www.academia.edu/5887268/Minorities_Shareholders_Rights_in_the_Case_of_Oppression> accessed on 22 September 2015.
[874] K. Barnes, 'Protection of Minority Shareholders: A Critique of Sections 310-313 of Companies and Allied Matters Decree 1990' (1991) JUS, 2(4) 59, 60-63; A. Raimi, 'Protection Of Investors Under the Companies And Allied Matters Act, 1990' (2000) MPJFIL 4(3) 74.
[875] Although the heading clearly states 'relief on the grounds of unfairly prejudicial and oppressive conduct' they can be brought separately, hence the inclusion of a distinct provision in s. 311(2)(a)(i) for unfairly prejudicial conduct. See O. V. Onwaeze ' Some Recent Changes in Nigerian Company Law' [1993] Journal of Business Law 409-420.
[876] According to the courts in *Re Charnley Davies Ltd [1990] BCLC 760,* oppressive conduct, which normally involves wrongful or illegal conduct, is a separate concept from unfairly prejudicial conduct, each leading to its own remedies and interpretation.
[877] The reason for the paucity of cases is attributed to the notion that shareholders in Nigeria are not provided with adequate grounds under the provisions; see F. Masajuwa: 'Shares and Class Rights in Nigeria's Company Law: A Critical Overview' (2009) 8 IULJ 54.

cases have provided ample interpretation on the distinct terms, which form the actual scope of s. 311 of the CAMA. An analysis of their interpretation is provided below.

4.4.3.2 The Narrow Interpretation and Meaning of Oppressive Conduct in Nigeria: an Impediment to Directors' Accountability

The problem with oppression remedy can immediately be found in the interpretation provided in the case of *Ogunade v Mobile Films (W.A) Ltd*[878] where Karibi-White J described oppression, while affirming Lord Simond's decision in *Scottish Co-Operative Wholesale Society Ltd v Meyer,*[879] as: 'conducts of the majority which are dishonest, fraudulent and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time. Thus, negligence in conducting the affairs of the company, or lack of business ability or inefficiency will not be sufficient'.

From the above interpretation, it is clear that an oppressive act must by virtue of section 311(1) of the CAMA contain the vital element of fraudulent intention to cause financial loss or injury to the claimant, and must display a lack of probity. The fundamental problem about the interpretation in the case of *Ogunade* is that since it is narrowly construed to mean fraudulent conduct, it automatically excludes conducts that are unfair, even if they may cause financial loss to the member.[880] A classic example of such a situation was illustrated in the case of *Ezeonwu v. Onyechi*,[881] where the courts noted by virtue of section 311(1) that directors' negligence or careless mismanagement would not suffice to justify a petition against an oppressive conduct, as it was not unscrupulous or fraudulent towards the oppressed shareholders. In particular, it has been held in

[878] Supra.
[879] [1959] AC 324; According to Lord Simond, oppression in the context of corporate conduct means burdensome, harsh and "wrongful' conducts against other members of the company and lacks the degree of probity which they are entitled to expect in the conduct of the affairs of the company; See V. Joffe et al., *Minority Shareholders: Law, Practice and Procedure* (4th edn Oxford University Press 2011) 238.
[880] O. Duru-Esq, 'Shares and Class Rights in Nigeria's Company Law; an Appraisal' [October 25, 2011] working paper series, University of Uyo Nigeria; available online at SSRN; <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117580> accessed on 25 September 2015.
[881] (1996) 2 SCNJ 250.

another case[882] that a director's authorisation of excessive remuneration was not fraudulent, albeit unfair.[883]

In light of the above, it is accurate to say that the Nigerian courts have taken a rather narrow approach to s. 311(1). However, it is very doubtful if this approach is an effective means to enforce directors' breaches of duties and hold them accountable for poorly managed companies, since it is clear that a claimant seeking relief in section 311(1) on the grounds of oppressive conduct will be barred from challenging directors' negligent conducts even if they result in serious financial losses to the company. In this regard, it goes without saying that reforms to remove the "oppressive conduct" in s. 311(1) should be introduced, because it seems to pose a serious obstacle to minority shareholders' protection. In fact, the contention that the new provision provides more protection to shareholders in comparison to its predecessor in s. 201 of the Nigerian CA 1968 can be jettisoned, since it simply augments the intricate principles originally found in s. 201. It is not surprising why cases are very scarce in this area, as the scope of s. 311(1) simply appears to restrict a shareholder's ability to seek relief for directors' maladministration; this is an issue which was also pertinent to the provision in s. 201.[884]

Nwiedoh has tried to justify the paucity of cases by explaining that it is simply due to the fact that a proposed commencement of the section often caused the oppression to cease.[885] This assertion is only partially valid because it is clear that the extremely restrictive approach adopted in s. 311(1) has also adversely impeded the ability of members to successfully seek relief. Aderibigbe argues that the addition of the term 'unfairly prejudicial' to section 311(2) of the CAMA has diluted

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882 *Penson Enterprise Nig.Ltd v Njigha* (2001) FWLR (pt.61).

883 See also the English case of *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1024I on the application of s.210 CA 1948-oppression remedy, where mismanagement and authorisation of excessive remuneration by directors were unsuccessful: see Dignam and Lowry (2014) 225.

884 Barnes submitted that minority shareholder protection under the Nigerian CA 1968 was the most stagnant area of company law as section 201 was rarely used in its 22 years of operation between 1968 to 1990; Barnes (1991) 60-63.

885 K. Nwiedoh, "The Rights and Status of a Shareholder of a Company Under the Companies and Allied Matters Act 1990' [2011] available online at <displace.unijos.edu.ng/../pd346.pdf.> accessed on 24 September 2015

the restrictive nature of the remedy.[886] However, this statutory development seems to question the usefulness of the term 'oppressive conduct' given that its narrow interpretation simply acts as an unnecessary obstacle to shareholders' protection.[887] This further justifies the recommendation of this thesis to delete the term 'oppressive conduct' in section 311. In the following section, the author argues for the retention of only the term 'unfairly prejudicial conduct' as a more effective and accommodating rule for shareholders to challenge internal directorial misconducts.

4.4.3.3 Judicial Interpretation of Unfairly Prejudicial Conduct: a More Desirable Approach?

The meaning given to the term unfairly prejudicial in s. 311(2) is broader than the term oppression in s. 311(1); it extends beyond dishonest conduct and encompasses any conduct that will infringe upon the legitimate expectation and interests of members.[888] In *Aero Bell Nigeria Ltd. v Fidelity Union Bank Ltd*[889] the courts enunciated that unfairly prejudicial conduct includes any acts that disregard any rights and interest of members. Particularly, in *Spectra Ltd v Stabilini Visioni Ltd*[890] the courts held that even though the term fairness is not boundless, it is wide, flexible, open-textured and has to be interpreted objectively in a manner so as to protect shareholders against conducts that are contrary to good faith or infringe upon their legitimate expectations. The benefit of the above approaches is that the actionable conducts of directors will not be limited to only fraudulent and illegal conducts; even conducts that indirectly threaten the financial interest and the value of the shareholding of the member will suffice as unfairly prejudicial to the interest of the member. The Nigerian approach in *Aero Bell* was an affirmation of the statement by Jonathan Parker J in the English case of *Re Guidezone Ltd*,[891] where he submitted that unfair prejudice goes beyond

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[886] O.I. Aderibigbe, 'Corporate Litigation and Majority Rule: Retreating from the Precipice' [2012] 3 International Journal of Advanced Legal Studies and Governance 35.

[887] Guobadia also questioned the usefulness of s.311 of the CAMA where he argued that since the provisions on oppressive conduct and unfairly prejudicial conduct can be invoked disjunctively, it is irrelevant to include the term oppressive conduct since it might only hinder shareholders who decide to seek relief against oppressive conduct: see A. Guobadia, 'Protecting Minority and Public Interest in Nigerian Company Law: The Corporate Affairs Commission as a Corporation Ombudsman' in F. Macmillan (ed), *International Corporate Law* volume 1 (Harts Publishing 2000) 85-86.

[888] See *Aero Bell Nigeria Ltd. v Fidelity Union Bank Ltd* (supra); J. E. O Abugu, 'Primacy of Shareholder Interests and Relevance of Stakeholders Economics Theories' [2013] 34(7) Company Lawyer 202-214.

[889] [2005] LPELR-11339(CA) this was an affirmation of the English case in *Re Macro Ltd* [1994] 2 BCLC 354.

[890] [1996] 6 NWLR (pt. 44) 239; see also *O'Neil v Philips* [1999] UKHL 24.

[891] [2000] 2 BCLC 321, The principles in *Re Guildezone Ltd* (supra) were also accepted by David Richard J in the recent case of *Re Coroin* [2012] EWHC 2343.

mere financial degradation; a disregard of member's rights without financial consequence may also amount to prejudice. [892] Thus, in interpreting s. 994[893] of the UK's equivalent remedy under the CA 2006, the courts in *O'Donnell v Shanahan*[894] have held that misapplication of a company's asset by the director was considered to be unfairly prejudicial to the interest of members.[895]

From the above analysis, one could assert that the approach of the Nigerian and the English courts in interpreting unfairly prejudicial conduct provides a more effective means for shareholders to challenge directors' misconducts, as opposed to oppressive conduct, because a member could easily petition against any managerial misconduct which results in the recession of their shareholding value or infringes upon their legitimate expectations. Ogbuozobe expressed his concern about this approach by arguing that it might encourage vexatious and frivolous litigation.[896] However, such concerns can be discarded because the Nigerian courts in *Ijale Properties Ltd. v Omololu-Mulele*[897] have subsequently adopted a narrower approach on the meaning of unfair prejudice, similar to the English case of *Re London School of Electronics*,[898] where it was held that the conducts complained of must be both prejudicial and unfair to the interest of the members. In essence, if the managerial conduct in question is prejudicial without being unfair or unfair without being prejudicial then it will not suffice as unfairly prejudicial conduct.[899] It is clear that this will serve as a tool to curb frivolous claims that may be brought by a vindictive claimant in Nigeria. Moreover, not all conducts or omissions in companies are unfairly prejudicial because, as Millman has noted, conducts which are explicitly authorised by the articles of association may appear as unfair dealing but not be prejudicial to the members.[900] It would however seem that the main problem in interpreting unfairly prejudicial conducts in so broad a manner, by the English and the Nigerian courts, is that it renders the remedy

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[892] R. Cheung, 'The Statutory Minority Remedy of Unfair Prejudicial and Just and Equitable Winding Up: the English Law Commission's Recommendation as a Model for Reform in Hong Kong' [2008] International Company and Commercial Law Review 156.
[893] Section 994 of the CA 2006.
[894] [2009] EWCA Civ 751.
[895] See Dignam and Lowry [2014] 243.
[896] F. Ogbuozobe, 'A Consideration of the Impact of the Companies and Allied Matters Act(1990) and the Insurance Act(2003) on the Board of Insurance in Nigeria: Part 1' [2009] International Journal of Law and Management 336.
[897] [2000] FWLR(pt.5) 709.
[898] [1986] Ch 211; see also the case of *Rock Nominee Ltd v RCO* [2004] 1 BCLC 439.
[899] Dignam and Lowry [2014] 230.
[900] D. Millman 'Shareholder Litigation in the UK: the Implications of Recent Authorities and Developments' [2013] Company Law Newsletter 342

somewhat uncertain. From the above cases, it is clear that unfairly prejudicial conduct means a variety of conducts which the courts have not adequately defined. For instance, as explained above in the case of Spectra Ltd, in determining unfairly prejudicial conduct, the conduct will need to be assessed objectively. This means that the outcome of a claim would be on a case-by-case basis, making it difficult for claimants to predict if their case will succeed or fail. In this regard, it appears that the courts in both jurisdictions need to adopt more coherent rules in terms of interpreting unfairly prejudicial conducts.

In spite of the above limitation, it is difficult to deny the fact that the explicitly broad scope in interpreting unfairly prejudicial conducts in s. 311(2) of the CAMA is more effective in protecting the interests of shareholders against misconducts, as opposed to the restrictive approach of the oppressive conduct in s. 311(1). For instance, the desire of the courts to protect shareholders' legitimate expectations means that a breach of terms in any explicit agreement regarding how the affairs of the company should be conducted will amount to unfair prejudice.[901] In contrast, a claim brought on breach of legitimate expectation in s. 311 (1) will be difficult to establish as the claimant will not only be required to prove that the agreement has been broken, but also that they have suffered significant financial loss as a result of directors' fraudulent or illegal conduct. Clearly, the addition of the phrase 'unfairly prejudicial' into the Nigerian remedy has broadened the spectrum for shareholders to seek relief. However, it would appear that deleting the phrase 'oppressive conduct', as recommended in this thesis, will greatly enhance the provision as a shareholders' protection tool against directors' mismanagement.

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[901] In *Re Saul D Harrison and Son Plc* [1995] 1 BCLC 14 it was held that unfairly prejudicial includes any conduct contrary to the provisions of the articles of association. See the extract from Sealy and Worthington [2013] 701; S. Griffin 'Alternative Shareholder Remedies Following Corporate Mismanagement; which Remedy to Pursue? [2010] Company Law News Letter.

4.5 Conclusion

In this chapter the relevant corporate governance provisions designed to ensure directors' accountability under the CAMA have been thoroughly analysed. The outcome of the analysis supports the initial hypothesis of this thesis, which argues that the aforementioned corporate governance mechanisms under the CAMA are inadequate and need to be reformed. It was demonstrated that the failure of section 279(4) of the CAMA to include provisions requiring directors to act/consider the interests of creditors and also have regards to other actors, such as consumers, suppliers, the community and the environment, consequently weakens the role and protection of stakeholders under the Nigerian corporate governance system. Furthermore, this was also considered to undermine corporate/directorial accountability, as the statutory inadvertence in section 279 means that directors could manage the company at the expense of the excluded stakeholders. In this regard, it was suggested that Nigeria should learn from the approach in section 172 of UK's CA, which not only offers provisions for directors to consider the interests of creditors, but also requires directors to have regards to the omitted stakeholders. The problem highlighted with regards to the approach in section 172 is that it has the potential to slow down decision-making, as directors are trying to balance all the diverging stakeholders' interests with that of shareholders. However, it was submitted that this problem is mitigated by the fact that various stakeholders have their respective interests, which are easily distinguishable from shareholders. The English courts, in ascertaining directors' potential breaches of duties in section 172, have not strictly adhered to the subjective test stipulated by the provision. It was shown that, at times, a subjective test is applied and at other times an objective assessment has been applied. This not only demonstrates a clear conflict between the CA and case law but it also creates inconsistencies. It is therefore suggested that the English courts should adopt clearer and more consistent rules in terms of interpreting the duty.

Problems were also highlighted in relation to the provisions concerning shareholder protection against mismanagement and directors' insider abuse. As illustrated above, shareholders in Nigeria may protect their interest against mismanagement by initiating a "derivative action" or "oppressive and unfairly prejudicial conduct" in sections 303 and 311 of the CAMA respectively. However, the analysis also revealed that the potency of these mechanisms in Nigeria are undermined because the provisions are based on common law principles, which are very limiting in terms of the protection they offer shareholders. For instance, the common law requirement for shareholders to prove fraud on the minority in order to bring a derivative action in section 303 is inadequate, as demonstrated above; it is very limiting in its interpretation which, according to the cases of *Yalaju v A.R.E.C.*[902] and *Pavlides v Jensen*,[903] excludes negligent actions. Hence, a shareholder cannot build a claim on the basis of directors' gross negligence, even when the company suffers significant losses, unless they can prove that the directors have benefited from their negligent actions. The recommendation in this thesis proposes firstly that such a requirement should be removed and that the common law derivative action, which has been codified into s. 303 of the CAMA, should also be abolished in Nigeria. It further suggests that the approach in section 260(3) of the UK's derivative claim, which includes cases of negligence and breach of directors' duties/trust, should be adopted in Nigeria. This is argued because the UK's provision is broader, more flexible and provides shareholders with sufficient grounds to challenge directors' mismanagement. However, the conditions a shareholder must meet in s. 263 of the CA before bringing a derivative claim in the UK were highlighted in this thesis as significant obstacles for a claimant to surmount. This shows that the UK's derivative claim, while more encompassing, is not without its own flaws or difficulties.

It was also contended that the requirement for shareholders in section 303(2)(b) of the CAMA to file a pre-action notice to directors before initiating a derivative action is superfluous and disadvantageous to shareholders. This is because a pre-action notice will only allow the perpetrators (i.e. delinquent directors) sufficient time to reorganise their affairs and conceal any incriminating evidence, which may be presented at a pre-hearing stage. It is recommended in this thesis that such a requirement should also be deleted under the CAMA.

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[902] Supra.
[903] Supra.

In respect to the provision of the oppressive and unfairly prejudice remedy, this thesis argues that the legislature's decision to retain the term "oppressive conduct" is an unnecessary statutory hurdle, which only serves to hinder shareholders' petitions. This is because, according to judicial interpretation,[904] oppressive conduct normally includes fraudulent conducts. As explained above, this interpretation does not accommodate directors' mismanagement or unfair conducts, even if such conduct is significantly detrimental to the interests of the members. It is recommended therefore that the term oppressive conduct should be removed from section 311. However, the term "unfairly prejudicial", which mirrors the UK's unfair prejudice remedy in s. 994, should be retained. As demonstrated above, unfair prejudice is more encompassing compared to the term "oppressive conduct" since it includes directors' negligent conduct, breach of directors' duty and any other conduct that is unfair to the members' interest or may result in depreciation of shareholder value. The author nonetheless suggests that the courts in the UK and Nigeria need to be more consistent in terms of interpreting unfairly prejudicial conducts, as it is considered that its broad interpretation to mean multiple things has the potential to render the remedy vague and also create uncertainty in the minds of claimants.

[904] See above the cases of *Ogunade v Mobile Films (W.A) Ltd* (supra) and *Scottish Co-Operative Wholesale Society Ltd v Meyer* (supra).

Chapter 5: Analysing the Corporate Governance Regulatory Framework for Audits under the CAMA: Improving Auditors' and Audit Committees' Functions in Nigeria

5.1 Introduction

This chapter complements the analysis in chapter 4. It aims to propose reforms to improve the existing auditing framework prescribed by the CAMA which, as will be demonstrated, also contains statutory shortcomings and omissions that impede the auditing and financial reporting process in Nigeria. It focuses primarily on companies' audits because the widely accepted opinions and arguments on corporate governance endorse effective auditing as one of the essential ingredients piloting good governance and proficiency within firms.[905] In actuality, an auditing process grants auditors the opportunity to provide independent verification of corporate financial statements and accounting records.[906] This in turn provides members/investors with assurances regarding the validity of important information relating to the financial position of the company, which influences future policy and decisions in the company.[907] In fact, the debates on this area following the collapse of corporate giants such as Enron and Parmalat have highlighted the importance of auditors' independence and performance, which are seen as being synonymous with financial reporting effectiveness.[908] This chapter reinforces the importance of these debates and pronounces auditors' and audit committees' competence, performance and independence as essential elements in achieving effective corporate governance practices in Nigeria. However, much of the contemporary debates in Nigeria on auditing have doubted the adequacy of the existing regulatory framework pertaining to audit, especially following the collapse of many public firms, which were brought about partly by auditors' malpractices and incompetence. This chapter aims to analyse and discuss these debates.

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[905] J. R. Brown and D. Falaschetti and M.J. Orlando, 'Auditors Independence and the Quality of Information in Financial Disclosure: Evidence for Market Discipline Versus Sarbanes-Oxley Proscriptions' (2010) 12(1) ALER 39-68; F. M. Burke, D. M. Guy and K. W. Tatum, *Audit Committees: A Guide for Directors, Management and Consultants* (5th edn, CCH, A Wolters Kluwer Business, Chicago 2008) 1.

[906] C. Stanley 'Corporate Accountability, Cadbury Committee: Part 2' [1993] 11(12) International Banking and Financial Law 138-141.

[907] R. Di Pietra, S. McLeay and J. Ronen, *Accounting and Regulation: New Insights on Governance, Markets and Institution* (Springer New York 2013) 157-58.

[908] C. Svernlov and T. Bostrom, 'Sweden: Auditors -Liability' [2009] International Company and commercial Law Review N11.

The central argument in this chapter is that the powers, duties and liabilities bestowed on auditors and the functions and independence prescribed on audit committees by the CAMA contain statutory defects, which have rendered the auditing framework in Nigeria inadequate. Firstly, this thesis advocates for a redefinition of the scope of auditors' liability in sections 367-368. The rationale for this is because currently the CAMA fails to prescribe criminal liability for auditors in section 368 for deliberately falsifying their reports. It is argued that, although auditors may be held criminally liable under the Nigerian Criminal Code Act 1990, which deals generally with fraud by corporate officers,[909] the failure of the CAMA to stipulate criminal liability for auditors who intentionally falsify their reports renders it weak in terms of adequately deterring against financial malpractices by auditors. It explains that the existing civil liability under section 368, which is based on the common law duty of care, is not sufficient to hold auditors to account who knowingly and maliciously provide false reports. It proposes therefore that reforms should be introduced in section 368 to also include auditors' criminal liability for deliberate falsification of documents. It is envisioned that this will significantly enhance auditors' accountability in Nigeria, because if provisions stipulating criminal liability were introduced, auditors' should be less inclined to act dishonestly for fear of being held both civilly and criminally liable.

The chapter also argues that the independence expected of the audit committee to carry out their oversight role within the auditing process is also lacking in section 359(4) of the CAMA because of the requirement to include executive directors on the membership of audit committees.[910] This chapter establishes that this approach not only deviates from contemporary international practices in other countries, which encourage the use of only independent non-executive board members,[911] but it is also inadequate in ensuring the audit committees' independence from directors.

[909] Under part 6 of the Criminal Code Act, an officer who is found guilty is liable to imprisonment of seven years.
[910] See section 359(4) CAMA 1990; D. C.J. Dakas, and E. Azinge (eds), *Nials Laws of Nigeria: Companies and Allied Matters Act* (Nigerian Institute of Advanced Legal Studies, 2013); Abugu also noted recently that the provisions relating to audit committee under the CAMA are the same as the previous provisions contained under the Nigerian Companies Act 1968 which were impractical. See J. E.O Abugu 'Re-examining the Basis of Auditors Liability in Nigeria and United Kingdom" [2014] 11(3) IJDG 231-254.
[911] For example in the US, s. 301(3)(a) of the United States Sarbanes-Oxley Act 2002 requires independent non-executives to sit on the board of the audit committee: see A. Schneider 'The Role of Internal Audit in Complying with the Sarbanes Oxley Act' [2011] 6(1) International Journal of Disclosure and Governance 69-79. Also in the UK, principle C.3.1 of the

The primary concern with the approach in Nigeria, as will be established later, is that since the audit committee is also comprised of executive members from the board of directors, the former could be subjected to undue influence by the latter thereby undermining the committee's overall independence. It is also feared that this type of arrangement might encourage a culture of favouritism towards the board of directors.[912] In light of this, it is suggested that the audit committee membership composition under the CAMA should be reformed to introduce the use of only non-executive independent directors in order to facilitate greater independence within the committee.

While auditing is considerably important to the governance of companies,[913] it is unfortunate that this area of law in Nigeria is severely affected by a paucity of case law. It is said that the reason for the scarcity of cases is because auditing under Nigerian company law has been slow in evolving.[914] In view of this, this chapter will rely mostly on English cases, which provide a good interpretation of the provisions under the CAMA. It is envisioned that as a result of the proposed reforms in this chapter, this thesis will help towards further developing the law by enhancing auditors' accountability through the scope of the auditors' stringent criminal liability. It will also improve the independence and quality of audit committees by proposing a statutory reformulation of their composition under the CAMA. Against this background, this chapter is organised as follows. The first section will present and analyse the inherent problems and crises facing auditing in Nigeria. This will act as a basis for the recommendation of appropriate reforms in subsequent sections of this chapter. Following that is an analysis of the scope of auditors duties, powers and liability under the CAMA with a view to highlighting the current statutory shortcomings and proposals for future development. It concludes by examining the role of the audit committee in scrutinising the reports of

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United Kingdom's Corporate Governance Code (combined code) 2014 requires independent non-executive directors. More information about the principle is available online at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf.> accessed on 24 October 2015.

912 N. Ofo, 'Composition of Audit Committees in Nigeria: Matters Arising' [2011] International Company and Commercial Law Review 392.

913 See G. Gray and N.V.S Ratzinger, 'Perceptions of Preparers, Users and Auditors Regarding Financial Statement Audits Conducted by Big 4 Accounting Firms' [2010] 7(4) International Journal of Disclosure and Governance 344-363.

914 Abugu noted that the reason for the scarcity of case law is due to the fact that the law on accounting and auditing in Nigeria is still developing. See Abugu [2014] 231-254.

the auditors, with particular focus on the committees' weak membership composition, and why it needs to be reformed.

5.2 Audit Failures in Nigeria: The Importance of Effective Auditing to Corporate Governance

Ever since the economic surge of the 1980s in Nigeria,[915] many companies – including both financial firms[916] and multinational corporations - have experienced a form of collapse and restructuring due to financial malpractices and poor audit practices.[917] The most cited examples are the financial scandals at Lever Brothers Nigeria Plc in 1997 and Cadbury Nigeria Plc in 2006, where the managing directors were involved in the overstatement of the companies' accounts, leading to losses of over N2 billion and N13 billion respectively. Where were the auditors? Muraina et al. noted that the auditors were also involved in unethical accounting practices, which contributed to the distress and subsequent closure of the companies.[918] In the Cadbury case, the auditors were indicted for their inability to uncover the losses of N13 billion; failure to investigate and confirm a material credit of N7.7 billion allegedly credited to the company's account in 2005 and certifying a false profit forecast in rights issues by Cadbury.[919] Some Nigerian authors, such as Akinpelu, have argued that the scandals at Cadbury Plc and Lever Brothers would have been avoided if adequate auditing standards and practices were provided.[920] He noted in respect of Lever Brothers that if the audit committee constituted in s. 359(3) and (4) of the CAMA had provided a thorough review of the auditors' report, there is a greater chance that the manipulation would have been discovered and reported to the annual general meeting and regulatory authority.[921]

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[915] This economic rush was a result of the Nigerian indigenisation programme of enterprises fuelled by the Enterprises Promotion Decree of 1977 which encouraged state and indigenous participation in many areas of the economy: this resulted in a proliferation of public enterprises in Nigeria. See O.A. Akinpelu, *Corporate Governance Framework in Nigeria: An International Review* [Iuniverse inc 2011] 337.

[916] Nwete noted that the failure of banks and other financial institutions in Nigeria in the late 1980s and early 1990s led to the promulgation of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No.18 of 1994: see B. Nwete, 'Auditors Liability for Business Failures in Nigeria: A Comparative Analysis' [2006] International Company and Commercial Law Review 175.

[917] More recent failures include the collapse of the banking sector in 2009 leading to the consolidation of banks; collapse of companies such as Spring Bank Plc in 2007, Wema Bank Nigerian Plc in 2007: see Akinpelu [2011] 350- 353.

[918] A. Muraina, E. Okpara and S. Ahunya 'Transparency in Corporate Governance: A Comparative Study of Enron, USA and Cadbury Plc, Nigeria' [2010] 5(6) Medwell Journals 471-476.

[919] S. C. Okara and G. O Okafor, 'Drivers of Audit Failure in Nigeria-Evidence From Cadbury (Nigeria) Plc' [2013] 4 Research journal of Finance and Accounting available at <http://www.iiste.org/Journals/index.php/RJFA/article/viewFile/5644/5756>accessed 20 July 2015.

[920] Akinpelu [2011] 339.

[921] ibid, 339.

Akinpelu's observation and the scandals in the aforementioned companies paint a perfect picture of the dismal situation in Nigeria, which clearly indicates that weaknesses still exist within the auditing framework in the country. Some academics have anchored this weakness upon the poor behaviour of auditors and the audit committee. Adewale submitted that not only was the audit committee in Cadbury under the influence of the CEO, but also that the auditors appointed to review Cadbury's account still certified that their reports reflected a true and fair view when in fact they contradicted the subsequent audit provided by PricewaterhouseCoopers, an independent audit firm.[922] In view of this, one conclusion can be inferred from the above information: not only is it clear that auditors' and audit committees' independence are thwarted in Nigeria, but several auditors also appear to deliberately ignore their statutory duties. This is undesirable, especially given the fact that it is understood that directors and managers of Nigerian public firms tend to pursue their own personal interests at the expense of the company, due to the separation of ownership from control.[923] Clearly, without a reliable and an independent audit to monitor the stewardship of accounts rendered by the directors in Nigeria, the conflict of interest will be difficult to tackle. Within the ambit of Nigerian corporate governance, it is logical to assert that the benefits of effective auditing in Nigeria are multifaceted: not only will it act as a monitoring device by offering external and objective checks on financial statements in the company, but it should also compel directors to prepare and disclose financial documents in a transparent and honest manner; it therefore offers a mechanism to curtail directors' conflict of interest.

The questions on the minds of many Nigerian researchers are: how important is effective auditing to corporate governance? Do corporations really need auditing systems? The answers to these questions have not been entirely consistent, because while some consider auditing as a corporate necessity,[924] others believe that it is merely a corporate formality with no direct

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[922] Adewale, [2013] 110-118.
[923] E. Adegbite 'Corporate Governance Regulation in Nigeria' [2012] Corporate Governance: International Journal of Business Studies 257-276.
[924] O.O. Oladele 'Should Corporate Governance Disclosure and Controls in Nigeria be Permissive or Mandatory?' [2008] International Company and Commercial law Review 200.

usefulness.[925] Nonetheless, the opinion of this thesis is that effective auditing is imperative: its importance is encapsulated within the role it plays, which is to act as a monitoring device for shareholders to oversee the company's accounting and financial reporting process.[926] How this works in practice is that auditors are appointed by shareholders at the general meeting in order to scrutinise the company's financial statement, as prepared by the directors, and to provide assurance that the financial statement prepared by the management represents the underlying financial transactions of the company.[927] This is crucial to corporations in Nigeria because the agency theory as it relates to corporate behaviour, as analysed in chapter 2, has been unequivocal in highlighting the fact that the conflict of interest between management and shareholders tends to surface where ownership is separated from management.[928] Dickins and Daugherty noted that auditing exists for individual shareholders and stakeholders who seek reassurance about the conduct of management in which they have an acknowledged and legitimate interest.[929] Therefore, it is also apposite to say that it functions as a means of corporate control by ensuring that directors' accountability during financial reporting and disclosure are guaranteed.

Chambers' observation of the impact of auditing on the capital market suggests that companies which fail to adopt basic auditing principles within their organisational structure have a higher propensity for encountering financial difficulties and subsequent collapse.[930] This notion is indeed true when viewed in light of some large corporations, which met their demise following inadequate audit practices. The Enron scandal is a typical example: by means of poor financial reporting, the then chief executive officer of Enron, Jeffrey Skilling, was able to mislead the board of

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[925] S. B. Adeyemi, O.Okpala, and E. L. Dabor, 'Factors Affecting Audit Quality in Nigeria' [2012] International Journal of Business and Social Science available at <http://ijbssnet.com/journals/Vol_3_No_20_Special_Issue_October_2012/22.pdf> Accessed on 22 of July 2015.

[926] A. Schneider, 'The Roles of Internal Audit in Complying with the Sarbanes-Oxley Act' [2009] (6)(1) International Journal of Disclosure and Governance 69-79.

[927] H. Ismail, T. Iskalandar and M. Rahmat 'Corporate Reporting Quality, Audit Committee and Quality of Audit' [2008] 7(1) Malaysian Accounting Review 1-4.

[928] A. Berles and G. Means, *The Modern Corporation and Private Property,* (2nd edn Harcourt, Brace and World 1967); See also G. Means 'The Separation of Ownership and Control in American Industry (1931) 46 Quarterly Journal of Economic 68.

[929] D. Dickins and B. Daugherty, 'Should Those Charged with Corporate Governance Care about Auditor Offshoring?' [2012] 9(1) International Journal of Disclosure and Governance 52-61.

[930] A. D. Chambers, 'Is Auditing Failing the Global Capital Markets?' [2013] 10(3) International Journal of Disclosure and Governance 195-212.

Enron, conceal billions of dollars in debt from failed projects, and also pressured the auditing firm, Arthur Andersen, to ignore obvious financial red flags and irregularities.[931] Edelman and Nicholson observed that it was these questionable accounting practices in Enron and the poor auditing procedures provided by Arthur Andersen, which led to the collapse of Enron.[932] The collapse of Enron was devastating both individually and economically: not only did it result in the loss of over 5,600 jobs, but it also caused severe losses to investors/shareholders and creditors within the capital market.[933]

Bolodeoku's[934] views in ascertaining the benefit of the audit process appear to differ slightly from the above opinions. He argued that even if auditors' reports are correct, audits in general are of little imminent use to average investors or shareholders, except for those who are well instructed and skilled to understand the content of the auditors' reports.[935] While Bolodeoku's view has an element of truth, it is not entirely accurate. The strength of his argument is undermined for two reasons: firstly, those who are less enlightened or skilled to understand the content of an auditor's report could always seek professional assistance in interpreting the report. Secondly, given that auditors' reports are regularly disclosed, information about the company's financial state is readily available to guide investors regarding their investment decisions when necessary. Therefore, the firm view of this thesis is that the use of corporate audit is invaluable to companies' shareholders/investors and should be promoted at all times. For instance, the monitoring and supervisory functions of auditing encapsulated in s. 359 of the CAMA ensure that auditors make reports to the company's members on the accounts examined by them on any balance sheet and profit or loss account, and on all groups' financial statements, of which copies are to be made available to the company in general meeting. One benefit that can be deduced from the provision in s. 359 is that it articulates directors'

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931 D. Edelman and A. Nicolson, 'Arthur Anderson Auditors and Enron: What Happened to their Texas CPA Licenses?' [2010] Journal of Finance and Accounting 1-9.
932 ibid.
933 The Associate Press, 'Enron Sentences Will be Tied to Investor Losses' (26 May, 2006) available online at <http://www.nbcnews.com/id/12993408/ns/business-corporate_scandals/t/enron-sentences-will-be-tied-investor-losses/#.WELHqqKLRZo> accessed on 30th November 2016.
934 I. Bolodeoku 'Filling the Gaps in the Legislative Framework for Audit Committees of Listed Companies in Nigeria' [2008] 6 Corporate Ownership and Control 166.
935 ibid.

accountability and an obligation of disclosure towards the company by ensuring that the statements they produce provide shareholders and investors with reliable information. It is said that this information is capable of influencing shareholders' investment decisions.[936]

While the advent of auditing in corporate law has received warm acceptance from many, it is nonetheless discredited on the basis of factors that affect the quality of audit. Burns and Fogarty argue that effective auditing could only be attained if auditors' independence were guaranteed; their relationship with the company's audit committee and directors must be addressed by legislation, which ensures their independence.[937] Auditors' independence is no doubt essential to ensure that they are not exposed to undue influence while carrying out their functions. However, it is a fallacy to assert that auditors' effectiveness or quality rely solely on their independence. The abovementioned corporate scandals at Enron, Lever Brothers Plc and Cadbury Plc have clearly accentuated that auditors' and audit committees' integrity and honesty are also key to auditing: auditors who are not inclined to carry out their functions with the utmost honesty would be compromised even if their independence from the company were ensured. The truthfulness of this observation can also be found in Nwete's statement, where he noted that despite endemic financial problems many companies in Nigeria remain afloat by means of posting through their auditors' reports huge profits, increased assets and reduced liabilities, just to induce more investors to acquire overvalued shares to their detriment.[938] Nwete's views can be reconciled with the case of City of Glasgow Bank in 1878,[939] where the auditor appointed to audit the City of Glasgow Bank fabricated the reports intended to present the company's true financial state. Therefore, it is clear that even if auditors' independence is ensured, falsification and negligence on the part of auditors is also a problem, which needs to be addressed. Thus, auditors' important roles and responsibility in providing supervision on the

[936] R. Chandler and S. Bartlett, 'The Private Shareholder, Corporate Governance and the Role of the Annual Report' [1991] Journal of Business Law 415; see also S. Davies, 'Transparency and Disclosure' [2009] 6(3) International Corporate Rescue 184-186.

[937] J. Burns and J. Fogarty, 'Approach on Auditing Standards and their Possible Impacts on Auditors Behaviour' [2010] 7(4) International Journal of Disclosure and Governance 310-319.

[938] Nwete [2006] 175.

[939] The auditor in the City of Glasgow Bank case was found criminally liable for falsifying the bank's balance sheet and sentenced to 18 months' imprisonment. For more details, see R. Tyson, 'Failure of the City of Glasgow Bank' in Institute of Chartered Accountants of England and Wales (ICAEW), *Collection of Readings* (1980).

information relating to financial statements must be augmented by their inclination to also provide truthful information.

5.3 Auditing Framework under the CAMA-Brief Overview

Irrespective of the fact that companies such as Cadbury Nigeria Plc have experienced audit problems, one can rightly postulate that the statutory framework governing auditing under the CAMA is fairly broad and robust. The Act stipulates on all companies a mandatory appointment of auditors and audit committees to oversee their financial reporting procedures.[940] The auditors' role is to audit all of the financial statements of the company,[941] which broadly encompass every balance sheet, profit and loss account and all groups' financial statements.[942] To embellish this role and to reinforce reliability, the audit committee must also appraise the reports provided by the auditors and ascertain if the accounting and reporting policies of the company meet legal requirements and ethical practices.[943] Without a doubt, these roles and responsibilities are invaluable to effective corporate governance in Nigeria, because they place emphasis on transparency and integrity in financial reporting by ensuring that a true and fair view of the company's financial state is available to shareholders and investors. In this respect, the CAMA further stipulates that auditors must also verify whether or not the information provided by the directors reflects the company's real accounts.[944] This is a laudable development when compared with its predecessor, the Companies Act 1968,[945] which had a rather restrictive statutory framework. For example, the powers and duties bestowed on auditors by the CA 1968 were confined: auditors could only scrutinise the profit and loss accounts of the companies.[946] It is said that the restrictive nature of auditors' powers under the CA 1968 reflected the traditional role of auditing in the early 1900s, which was strictly intended to detect corporate

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[940] See sections 357(1) and 359(4) of the CAMA respectively.
[941] Section 357 of the CAMA.
[942] See section 359(1) of the CAMA.
[943] See section 359(4) and (6) of the CAMA.
[944] See section 360(1)(4) of the CAMA.
[945] Hereinafter referred to as CA 1968.
[946] See Part 6 of the Nigerian Companies Act 1968. For more details, see D. Barnes, *Cases and Materials on Nigeria Company Law* (Ile-Ife, Nigeria: Obafemi Awolowo University Press, 1994) 45-48.

fraud in particular and errors relating to only profit and loss accounts.[947] The inherent problem, however, was that since the audited items were limited to profit and loss accounts, items such as groups' financial statements, application of funds and a five-year financial summary were excluded from appraisal by the auditors.[948] Orojo submitted that the negative impact of this approach was that auditors could not effectively evaluate companies' group accounts, which hindered the auditors from gaining swift access to necessary financial information.[949]

Economically, the CA 1968 was also considered inadequate. It is noted that the Nigerian industrial revolution in the late 1980s, which saw a surge in multinational corporations, subsidiary/group companies and the emergence of portfolio investors, meant that the confined nature of the CA 1968 was no longer adequate to cater for the dynamic economic growth and auditing challenges within the Nigerian corporate sector.[950] These problems motivated the Law Commission in Nigeria to recommend radical reforms to Nigerian company law, which also included expanding the scope of auditors' responsibilities and the documents they could peruse.[951] In addition to the traditional tasks of fraud and error detection, auditors under the CAMA also have an investigative role to inquire and form an informed opinion as to whether proper accounting records have been kept.[952] Furthermore, the CAMA now stipulates in section 334(2) a further list of items which must be inspected by auditors: alongside profit and loss accounts, it now includes the statement of accounting policies; the balance sheet at the last day of the year; notes on the account; a five year financial summary and, in the case of a holding company, the groups' financial statements.[953] In line with this development, it is apposite to infer one practical benefit from the new expanded list of items in s. 334(2) of the CAMA over the items provided by its predecessor. The fact that companies are required to keep group accounts means that auditors will be able to have timely and easy access to

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[947] J.T. Agbadu-Fishim, *Principles of Nigerian Company Law* (Ilaro, Ogun State: Ips Educational Press 1998) 24.
[948] ibid 26.
[949] J. O Orojo, *Nigerian Company Law and Practice,* (London, Sweet and Maxwell 1976) 87.
[950] O. Akunle, *Development in Commercial, Business and Trade Laws in the Challenges of the Nigerian Nations: An Examination of its Legal Developments from 1960 to 1985* (ed) T.A. Aguda (Lagos, Nigeria Heinemann Educational Books (Nigeria) Ltd, 1985) 68-69.
[951] See the Nigerian Law Reform Commission's *Report on the Reform of the Nigerian Company Law,* (Ikoyi, Lagos, Nigeria: the Commission 1991).
[952] See Section 360(1) of the CAMA.
[953] For more details on the list of all items see section 334(2)(a)-(j) of the CAMA.

the groups' financial records in a single statement, without the need to painstakingly peruse various accounts which might be cumbersome, costly and time consuming.[954] However, these powers are only limited to subsidiaries incorporated in Nigeria, as section 367(1)(a) of the CAMA specifically provides that auditors' powers to obtain information in relation to subsidiaries can only be exercised in respect of companies incorporated locally.

From the above analysis, one may argue from a theoretical standpoint that the CAMA is well equipped to safeguard against financial malpractices, deliberate manipulations, errors or omissions in annual account. However, in practice, the recent unparalleled financial scandals recorded within many Nigerian public firms have called into question the effectiveness of the auditing framework under the CAMA. The debates in Nigeria have focused on the ineffectiveness of auditors' powers, duties and liabilities and the lack of sufficient independence in the membership of audit committees. It is the aim of the following sections to critically examine the duties of auditors, their subsequent liability for breach of their duties and the extent of independence enjoyed by audit committees, with the view to highlight current shortcomings and prospective reforms.

5.3.1 Auditors as a Governance and Monitoring Device under the CAMA

The role of auditors in fraud detection and the prevention of financial malpractices by management clearly highlight their function as watchdogs for shareholders and investors.[955] In this respect, section 357 of the CAMA requires every auditor to scrutinise the financial statement of the company in a manner that represents a true and fair view of the company's financial state.[956] Based on this singular provision, it is accurate to infer that auditors are invaluable as a monitoring device because the function of scrutinising companies' financial statements invariably puts them in a position to also supervise the board of directors and detect any financial malpractices the latter may be involved in. However, this singular mandate of perusing financial statements does not

[954] O.O. Oladele, 'Should Corporate Governance Disclosure and Control in Nigeria be Permissive or Mandatory?' (2008) ICCLR 200.
[955] Institute of Chartered Accountants in England and Wales, "Evolution: the Impact of Audit Committee On Auditing" [2008] 9-10.
[956] See section 357(1) of the CAMA; see also Akinpelu [2011] 239-241.

automatically guarantee auditors' efficiency, as some argue that auditors must also be well equipped with adequate powers and duties, and must also be made accountable if they fail to carry out their functions effectively.[957] Some even believe that the financial scandals recorded within companies such as Cadbury (Nigeria) Plc in 2006 and Oceanic Bank Nigeria Plc in 2009 have cast a shadow over the effectiveness of auditors' powers, duties and liability in financial reporting in Nigeria.[958] It is said that like any other corporate officer, such as directors, the tendency for auditors to abuse their office and power is still probable.[959] In light of this, the principal question, which is addressed below is, to what extent do the duties and powers of auditors, under the CAMA, ensure adequate audit and financial reporting in Nigeria?

5.3.2 Assessing Auditors' Duties and Powers in Financial Reporting under the CAMA

Under the CAMA the duties and powers of auditors are succinctly enunciated by section 360(1) which provides that auditors must carry out investigations as required to enable them to form an opinion on whether proper accounting records have been kept by the company and whether the company's balance sheet and profit and loss account are in agreement with the accounting records or return.[960] What can be discerned from this provision is that an auditor must maintain an enquiring mind to investigate and ensure that the financial records provided by the company are true.[961] Nwete noted that the drawback in s. 360 is that it imposes a very demanding task on auditors to carry out painstaking investigation, which may slow down the inquiry process.[962] However, this is not entirely disadvantageous: one benefit of s. 360(1) is that it ensures that auditors do not merely provide what the directors presented in their report, without taking the necessary steps to ensure that they reflect

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[957] For instance see: I. Salami, 'The Effect of the Financial Crisis on the Nigerian Capital Market: a Proper Regulatory Response' [2009] Journal of International Banking Law and Regulation 612-618; A. Psaraki 'The Protection of Auditors against Civil Liability Towards their Clients in the United Kingdom: Legal Regime with and without Liability Limitations Agreement' [2014] Company Lawyer 277.

[958] O. O. Kolawole 'Auditors Independence and Accountability in Nigeria Public Enterprises: A Case of the Nigerian Ports Authority' [2008]1 KASU Journal of Management Science available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578182> accessed on 10 November 2014.

[959] E.g. see I. Salami 'Private Equity Investment in sub-Saharan African: Regulatory Implications' [2010] Journal of International Banking Law and Regulation 588; Godwin, J. Freedman, 'The Statutory Audit and Micro Company-an Empirical Investigation' [1993] Journal of Business Law 105-130.

[960] Similar provisions are contained under section 498(1) of the UK's CA 2006.

[961] A. O Oyinlolo, 'The Role of Auditors in Fraud Detection, Prevention and Reporting in Nigeria' (2010) Library Philosophy and Practice (e-Journal) University of Nebraska –Lincoln, Paper 517.

[962] See B. Nwete 'The Auditors Liability for Business Failures in Nigeria: a Comparative Analysis' (2006) ICCLR 175.

the company's true financial records and state. In fact, by comparison, it can be said that the functions of auditors in s. 360 of the CAMA are wider and more encompassing than the ones found under the Banks and Other Financial Institution Act 1991(BOFIA)[963] in Nigeria.[964] Section 29(1) of the BOFIA simply requires auditors to provide shareholders with reports on the annual balance sheet and profit and loss accounts; meanwhile, by virtue of s. 360 of the CAMA, auditors are required to inquire and investigate into the accounts and returns of the company.[965] The view of Olopade on the position of section 360 of the CAMA is that it is not favourable to auditors and represents an over imposition of duties, especially when auditors merely occupy a secondary position, unlike directors.[966] However, in contrast Anifalaje has argued that the position is a welcome development since it enhances financial accountability and prevents auditors' laxity in Nigeria.[967] This thesis supports Anifalaje's view as a more logical approach in that, since auditors play an important role in scrutinising the company's account, imposing stringent duties on auditors will no doubt ensure that they carry out their functions effectively. Consequently, the position in section 360 regarding auditors' general powers to investigate and inquire should remain undisturbed.

The auditors' broad investigative powers in s. 360 are commendable; however, the exercise of these powers is strictly limited to locally incorporated firms in Nigeria. In practice, auditors cannot investigate or request material information from overseas subsidiary companies, as the CAMA only permits auditors in section 367(1)(a) to obtain information from subsidiary companies incorporated locally in Nigeria and not subsidiary companies outside the country.[968] This thesis strongly questions the current approach on the basis that it limits the investigative scope of the auditor and their ability to obtain information needed in Nigeria: it undermines effective auditing. For instance, there is the concern that the provisions would prevent auditors' access to fraudulent documents concealed in

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[963] BOFIA, Cap B3, Laws of Nigeria, 2004 (originally enacted in 1991) is the Act regulating the practices of banking business and financial institutions in Nigeria. The powers to regulate banks are vested in the Central Bank of Nigeria (CBN) by imposing certain corporate governance standards on banks, especially of directors and officer of banks.

[964] See Nwete (2006) 175.

[965] ibid.

[966] See O. Olopade, 'Company Audit--an Overview' (2000) 4(3) MPGFIL 106.

[967] See J. Anifalaje, 'Current Principles and Policies on Company Accounts, Annual Returns and Audit in Nigeria' in E. Akanki (ed) *Essays on Company Law* (University of Lagos Press 1992) 200.

[968] A. Idigbe, 'A review of CAMA 1990: Issues in Corporate Governance Audit Committee and Auditors Independence' Paper delivered at Nigerian Accounting Standards Board 4th Annual Corporate Financial Reporting Summit on the 14th of November 2007 at Sheraton Hotels and Towers Ikeja Lagos.

overseas subsidiaries by fraudulent managers, which may signal irregularities within the company's financial statements. Anifalaje postulated that the negative impact of s. 367(1) is that auditors who are bestowed with the duty to peruse groups' financial statements would also have difficulties obtaining the needed financial information where the subsidiaries of the group are incorporated outside Nigeria.[969] It becomes doubtful in this context to say with certainty that auditors will always be able to obtain the necessary information to provide a true and fair view of the company's financial state due to the omission in s. 367. Abugu specifically argues that the restriction of auditors to some parts of a company's financial documents clearly defeats the whole purpose of the auditors' duties in s. 360(3) of the CAMA, which grant auditors right of access to any necessary company financial information, documents, accounts and vouchers. [970]

Abugu's argument is valid because, in actuality, information from overseas subsidiary companies should rightly fall under the ambit of section 360(3). Adversely, overseas subsidiary companies may hold material information relevant to ascertain the true financial state of the company; however, this may not be within the grasp of the auditors. In light of this, it is suggested here that provisions allowing auditors access to information from overseas subsidiaries should be included in s. 367 of the CAMA, in order to enhance their powers and functions in financial reporting. This recommendation is in line with the practice of other common law countries such as the UK. In the UK, the CA 2006 not only grants auditors the ability to require information from local subsidiaries,[971] but it also embellishes them with the power to require a parent company to provide the necessary information from their overseas subsidiary and for its officers to enable them to carry out their duties.[972] While critics argue that its usefulness is only limited to situations where the subsidiary company is directly affiliated with the parent company,[973] this thesis supports the view

[969] See Anifalaje (1992).
[970] J. O. Abugu 'Re-Examining the Basis of Auditors Liability In Nigeria and the United Kingdom' [2014] IJDG 231-254.
[971] See section 499(2)(c) of the UK's CA 2006; Subsection (d) also includes officers, employees and auditors of the subsidiary.
[972] See section 500 of the UK's CA 2006. In particular, s. 500(3) also requires that the parent company must take all necessary steps to obtain the information or explanations from the officers and employees of the overseas subsidiary company. See B. Hannigan, *Company Law* (3rd edn, Oxford University Press, 2012) 371.
[973] A. Psaraki, The Protection of Auditors Against Civil Liability Towards Clients in the United Kingdom: The Legal Regime With and Without Liability Limitation Agreement [2014] Company Lawyer, 227.

of those who argue that it enhances auditors' functions and helps to minimise situations where fraudulent documents are concealed in overseas subsidiaries to prevent auditors from perusing them.[974]

Notably, Nigeria shares similarities with the UK when it comes to the common law duties of auditors to provide a true and fair view of the company's financial state.[975] In Nigeria, this requirement was originally emphasised in *Shonowo v Adebayo*,[976] which endorsed the English case of *Re London and General Bank (No.2)*,[977] where Lindley LJ stated that:

> The duty of auditor is to ascertain the financial state of the company. An auditor however is not bound to do more than exercise reasonable care and skills in making inquiries and investigations. He's not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs or that the balance sheet is accurate according to books of the company.

Although *Re London* requires auditors to inquire, the problem with Lindley LJ's statement is that the duty imposed was too low. It is noted that, because of this low duty, auditors were less inclined to investigate and inquire into companies' financial documents when carrying out their duties.[978] Roach noted that one of the reasons why *Re London's* judgment was made is simply because auditors in that era were originally considered to occupy an ancillary or secondary position in the company, as opposed to directors who discharge the primary functions in the company.[979] Unfortunately, this low duty has further resulted in subsequent bad judgment in English cases, where it is stated that auditors are not necessarily required to take further steps to investigate, as long as the auditor report represents what he believes to be a true and fair view of the company's financial statement.[980] Adversely, this approach could allow an auditor to easily contest a charge for negligence, if he alleges that he has acted reasonably with care and in accordance with the accounting

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974 I. H. Chiu, 'the Role and Liabilities of Auditors in Financial Regulation: Addressing the Expectations Gaps' [2012] International Business Law Journal 545.
975 See section 360 of the CAMA and section 498 of the CA 2006; Abugu [2014] 231-254.
976 (1969) NCLR 82.
977 [1895] 2 Ch 673.
978 L. Roach, 'Auditor Liability: Liability Limitation Agreements: Part 2' [2010] Company Lawyer 167.
979 L. Roach, 'Auditor Liability: the Case of Limitation: Part 1' [2010] Company Lawyer 136.
980 See *Re Kingston Cotton Mill Co (No.2)* [1896] 2 Ch 279 where Lopes LJ states that, an auditor is not bound to be a detective; he is a watchdog but not bloodhound; for more details see D. French, S. Mayson, C. Ryan, *Mayson, French & Ryan on Company Law* (31st edn, Oxford University Press 2014) 531.

standards in providing the report. Fortunately, the English courts have since devised better rules, which are found in other judgments.[981] For instance, in *Barings Plc v Cooper and Lybrand*,[982] Leggett LJ said that: 'the primary responsibility for safeguarding a company's assets and preventing errors and defalcation rests with the auditor. An auditor's task is to conduct the audit as to make it probable that material misstatement in financial documents will be detected.'[983] Leggett LJ's judgment is an obvious disapproval of Lindley LJ's statement in *Re London*.

This thesis endorses *Baring's* position as more desirable, because an auditor would now be expected to attend stock accounts and test stock records for reliability and authenticity. This position is clearly reflected under s. 360 of the CAMA and s. 498 of the CA 2006, which requires auditors to investigate whether the accounting records of the company's profit and loss accounts are in agreement with the company's returns. In particular, s. 367(1) of the CAMA further expands the investigative powers of the auditor to inquire into the financial information and statements of subsidiary companies in order to enable them to discharge their duties.[984] These provisions are undoubtedly commendable but, as explained above, Nigerian auditors cannot obtain information from overseas subsidiary companies, which means that the usefulness of such wide powers are drastically limited, as opposed to the position in countries such as the UK, where auditors may exercise such powers both locally and within subsidiary companies incorporated outside the UK. This issue further justifies why this thesis advocates for provisions empowering auditors to obtain financial information from overseas subsidiary companies. The author is of the view that empowering auditors in this manner will enhance their investigative powers significantly.

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[981] For example, just after *Re London*, it was also held in *Re Gerrard and Sons Ltd* [1968] Ch 455 that an auditor who is put under inquiry must carry out an exhaustive investigation into the company's return to determine if there are any errors or deliberate falsification within the company's account - Per Pennycuik J.
[982] [1997] 1 BCLC 427.
[983] See French, Mayson and Ryan [2014] 531.
[984] Similar provisions are found in section 500 of the UK's CA 2006.

5.3.3 Auditors' Liabilities for Misconducts under the CAMA

5.3.3.1 Proposing a Framework for Auditors' Criminal Liability Towards the Company

The extent of auditors' accountability for corporate misconduct, as imposed by the CAMA, suffers from one major drawback. This is the fact that the Act fails to stipulate criminal liabilities for auditors. The current provision in section 368 of the CAMA, which deals with auditors' liability, imposes only civil liabilities, which is based upon the common law of negligence. In respect of this, section 368(2) provides *inter alia* that 'where a company suffers loss or damages as a result of the failure of its auditor to discharge the fiduciary duty imposed on him, the auditor shall be liable for negligence and the directors may institute an action for negligence against him in court.'[985] The general conception of auditors' civil liability in s. 368, as encapsulated in the case of *Equitable Life Assurance Society v Ernst And Young*,[986] is that auditors only owe an implied duty of care to the company when carrying out their auditing functions.[987] By interpretation, it means that any wrongful conduct by auditors under the CAMA could only be treated under civil law/negligence; this will mostly result in pecuniary fines.[988] The negative effect of this inadvertence in s. 368 is that the Nigerian courts lack the statutory powers under the CAMA to impose any criminal sanctions on auditors who deliberately falsify or make false statements in their reports.[989] It is not surprising that in some Nigerian public companies, auditors have been known to escape imprisonment for deliberate falsification and financial malpractices. For example, following the financial scandals at Cadbury Nigeria Plc and Unilever Plc, it is said that the auditors involved only faced monetary penalties; none of the culprits faced serious criminal sanctions such as imprisonment.[990] Akinpelu further observed that even though a fine of N20 million was imposed on the auditors, they subsequently challenged the fine in court.[991]

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[985] Nwete noted that the liabilities under the provisions are based upon common law duty of care and an auditor will be liable where he acts negligently or carelessly; Nwete [2006] 175.
[986] [2003] EWCA Civ 1114.
[987] See French, Mayson and Ryan [2014] 531.
[988] Abugu [2014] 231-254.
[989] Though, as noted above, auditors could be found criminally liable under part 6 of the Criminal Code Act 1990 for deliberate falsification of documents or accounts.
[990] Akinpelu (2011)341.
[991] ibid 341.

Adeyemi and Akinniyi hold the view that auditors' laxity and poor behaviour are simply a byproduct of the insufficient deterrent capabilities of the CAMA, which emerges from the Act's failure to impose criminal liabilities for auditors in financial reporting.[992] They argued that, as a result of this, auditors in Nigeria sometimes deliberately disregard their statutory duties under the CAMA, which requires them to investigate companies' accounting records and peruse financial statements.[993] Adeyemi and Akinniyi's assertion can clearly be reconciled with the situation in Nigeria, because in practice auditors have been slow and sometimes unwilling to investigate and detect obvious fraudulent activities within the recent corporate scandals in many companies.[994] For instance, in Cadbury Nigeria Plc, Okara and Okafor observed that despite the overstatement of the company's account by the managing director in excess of N13 billion between the period 2002 to 2006, the auditors refused to investigate and address the account irregularities.[995] They also submitted that even when the transfer of N7.7 billion was made to the account of Cadbury (Nigeria) Plc in 2005, no attempt was made by the auditors to confirm such a payment from the bank's balances.[996] The rationale for auditors' deliberate refusal to discharge their duties in Nigeria has been attributed to the fact that they either compromise their integrity or allow their personal interests to conflict with the company's interest.[997] Arguably, this is partly because the existing framework under the CAMA, which fails to impose a criminal liability for auditors, does not seem to provide adequate deterrent to induce or compel them to act proactively and carry out their statutory duties effectively. Muraina et al. posited that many of the corporate collapses, such as Cadbury Plc (Nigeria), could have been avoided if the auditors had been effective in carrying out their duties.[998] This thesis suggests that in addition to the civil liability imposed by the CAMA, criminal liability is also imperative and should be imposed where an auditor wilfully provides false reports. This will not

[992] S.B. Adeyemi, and K. O. Akinniyi, 'Stakeholders' Perception of the Independence of Statutory Auditors in Nigeria' (2011) 6(2) Serbian Journal of Management 247-267.
[993] ibid.
[994]Akinpelu noted that the financial fraud within companies such as Wema Bank Nigeria Plc in 2007 and Oceanic Bank Nigeria Plc in 2009 went unnoticed despite being supposedly scrutinised by auditors: see Akinpelu [2011] 351 – 352.
[995] S. C. Okaro and G. O. Okafor, 'Drivers of Audit Failure in Nigeria- Evidence From Cadbury (Nigeria) Plc [2013] 4 Research Journal of Finance and Accounting 6.
[996] ibid.
[997] J. O. Otusanya, S. Lauwo, and L. State, 'The Role of Auditors in the Nigerian Banking Crisis' (2010) 9(0) Accountancy Business and the Public Interest, 159-204.
[998] A. Muraina, E. Okpara, E. and S. Ahunanya, 'Transparency in Corporate Governance; A Comparative Study of ENRON, USA and Cadbury PLC, Nigeria' (2010) 5(6) Medwell Journals 471-476.

only ensure that they are properly held accountable but it will also act as an effective deterrent mechanism.[999] It is clear that if criminal liability is introduced, the fear of subsequent imprisonment for participating in or promoting criminal activities will force auditors in Nigeria to take their duties more seriously.[1000]

In other common law countries, such as the UK, the importance of imposing criminal liability on auditors is clearly highlighted, as s. 507 of the UK's CA 2006 specifically stipulates criminal liability on auditors for knowingly or recklessly causing an auditors' report to include any matter that is misleading, false or deceptive.[1001] In comparison with the UK, it is apposite to conclude that the current deterrent capability of the CAMA, which fails to impose an additional criminal liability, is inadequate. In order to improve the situation in Nigeria, provisions similar to s. 507 of the CA 2006 should be introduced in s. 368 of the CAMA. This will not only enhance the existing framework prescribing auditors' accountability under the CAMA, but it will also ensure that auditors are well incentivised to carry out their duties effectively. It is thought that the problem with auditors' laxity and unwillingness in Nigeria to discharge their duties effectively would remain if such reforms were ignored.

The CAMA's failure to accommodate auditors' criminal liability for deliberate falsification is not the only downside to imposing purely civil obligations in section 368. It must be noted that the manner in which the provision is formulated also raises controversial issues. For instance, section 368(1) of the CAMA provides that 'a company's auditor shall in the performance of his duties, exercise all such care, diligence and skill as is reasonably necessary in each particular circumstance.' The idea that auditors have an implied contractual duty of care raises an important question regarding how civil liability should be ascertained by the courts: *what conditions have to be satisfied before an auditor is found liable for negligence?* Early judicial opinion indicates that the starting point in establishing liability is to prove that the auditors owe the company a duty of care and the auditor has

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[999] P. Giudici, 'Auditors Multi Layered Liability Regime' (2012) 13 EBOR 501- 523.
[1000] See Abugu [2014] 231-254.
[1001] Sealy and Worthington [2013] 466.

breached such duty.[1002] Secondly, that the plaintiff (i.e. the company) has suffered damages or loss as a result of breach of duty.[1003] In view of this, Lopes LJ in *Re Kingston Cotton Mill Co. (No.2)*[1004] established that the level of care that an auditor should demonstrate includes the use of reasonable care and skills in investigating the accounts and documents required. It can be said with certainty that the aforementioned principles are captured under the CAMA, since s. 368 clearly states that an auditor will normally be liable in negligence where he carelessly provides inaccurate statements, which are relied on by the shareholders in the company.[1005] Who may petition for losses caused by auditors? One can clearly postulate from the provision that the right to sue under the ambit of section 368(2) is borne by the company alone because of the principles in *Foss v Harbottle*,[1006] which state that only the company can maintain an action for wrongs done to it and not an individual shareholder.[1007] This principle is logical when viewed in light of the doctrine of corporate personality, which considers the company as a separate person capable of suing and being sued in its own name.

The idea that only the company stands as the proper plaintiff has however received disapproval, as some have suggested that a third party or even the general public, who may have suffered loss by relying on the reports provided by the auditor, should be allowed to petition.[1008] The controversial question raised in this context is, should a third party who suffers loss by relying on an auditor's statement be allowed to bring a claim? By virtue of s. 368 such persons (e.g. public or other stakeholders) have no statutory or judicial grounds to initiate an action against the auditors for loss, as section 368 of the CAMA only applies to loss suffered by the company.[1009] Given that only shareholders and the company stand to lose directly from auditors' recklessness, it is understandable

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[1002] See *Murphy v Brentwood District Council* [1991] a AC 398*; Re Gerrard* and *Son Ltd* [1968] Ch 455 (Ch*)* and *AGG Advances Ltd v R. Lower Lippman Fidgor and Frank* (1991) 4 S.C.S.R.
[1003] See *Caparo Industries Plc v Dickman* [1990] 2 AC 605.
[1004] [1896] 2 Ch 279.
[1005] See Nwete [2006] 175; See also the case of *AGG Advances Ltd v R. Lower Lippman Fidgor and Frank (Supra).*
[1006] (1843) 67 ER 189.
[1007] Nwete [2006] 175.
[1008] M. Paterson, 'Reform of the Law of Auditors Liability: an Assessment' [2012] International Company and Commercial Law Review 55.
[1009] I. Inhenyen, 'Roles and Liabilities of Auditors in the Safeguard of Nigerian Stakeholders' (5th September 2013), Seminar Paper Presented 31st August, 2013 to Members of Institute of Chartered Accountants of Nigeria (ICAN) Lagos, Mainland District Society available online at <http://www.nigerianlawtoday.com/2013/09/roles-and-liabilities-of-auditors-in.html>accessed on 16th November, 2014.

that a duty is owed directly to the company/shareholders alone. Besides, it is said that the interests of members are easily ascertainable when compared to third parties or the public, who do not have direct vested interests in the company. [1010] However, in ascertaining auditors' possible duties towards the public or third parties, Lord Denning LJ gave a rather contentious dictum in the early case of *Candler v Crane Christmas and Co.*[1011] He stated that: 'auditors owe the duty of course to their employer or client, and also I think to any third person to whom themselves show the accounts or whom their employer is going to show the accounts so as to induce him to invest money or take some action.' Lord Denning LJ's dictum in *Candler* is normally contested on the basis of pragmatism. For instance, it is considered it would be difficult to quantify the third parties and other stakeholders not closely associated with the company, which means that the essential ingredient - to prove proximity between the auditor and the claimant within the law of tort for negligence - might not be satisfied.[1012] In other words, the claimant has to be an individual or a member of an identifiable class to initiate a claim. [1013]

A more appropriate approach, which also reconciles with the view of this thesis, can be found in the case of *Caparo Industries v Dickman.*[1014] In Caparo, the House of Lords held that an auditor does not automatically owe a direct duty to members of the public who rely on the accounts in deciding whether to invest in the company's shares.[1015] Their Lordships explained that for an auditor to owe a duty to a third party, it must be proved under the law of tort that there is foreseeable damage, duty of care and proximity of relationship between the individual and the auditor.[1016] Hence, the auditor must know that his statement would be communicated to the person relying on it as an individual or as a member of an identifiable class.[1017] Lastly the House of Lords held that it must be reasonable in that circumstance to impose a duty. [1018] In *Caparo* it was consequently held that it was unreasonable to say that the auditor owed a duty of care to an outside investor, because at law the

[1010] M. Paterson, 'Reform of the Law on Auditors Liability: an Assessment' [2012] ICCLR 55.
[1011] (1951) 2 K.B. 164.
[1012] Paterson [2012] 55.
[1013] ibid.
[1014] [1990] UKHL 2.
[1015] Sealy and Worthington [2013] 470.
[1016] ibid 470-471.
[1017] ibid.
[1018] M. Hemraj, 'Taking Stock of Caparo' (2006) 27 Company Lawyer 82.

auditor only owed such duty to the company; only the company itself has the standing to sue for losses caused by the accounts that were negligently prepared.[1019]

Although there have been doubts whether the case of *Caparo* was rightly decided,[1020] *Caparo* definitely sets a reasonable precedent when compared with *Candler*. For instance, it offers a more practical method of ascertaining auditors' liability towards third parties. In comparison with Lord Denning's dictum in *Candler*, the approach in *Caparo* is also more useful in preventing frivolous and vindictive claims, as third parties who lack sufficient interest, proximity or relationship with the auditor cannot petition. The statutory position regarding auditors' liability towards third parties in Nigeria is somewhat similar to the approach in *Caparo*, although it differs in other material aspects. For instance, section 368(2) of the CAMA provides *inter alia* that when an auditor fails to exercise the required duty of care, diligence and skill and the company suffers loss, only the company may institute an action against the auditor. Fundamentally, section 368(2) incorporates the principle in *Caparo*, which recognises the company as the proper party to sue for any losses it suffered. However, it differs from *Caparo* in the sense that it does not provide any means for third parties to petition where they suffer loss. In essence, it is considered that, even if a third party in Nigeria suffers loss by relying heavily on an auditor's report, the claim would be unsuccessful since he will not be able to bring himself within the ambit of section 368 as the proper claimant (i.e. the company).[1021] While the focus on the company in section 368 of the CAMA is not unreasonable, it would be better if third parties who could meet the requirements in *Caparo*, such as those proving duty of care and proximity of relationship under the law of negligence, are allowed to pursue a civil claim against the auditors where they suffer loss for relying on auditors' reports. This will further strengthen auditors' accountability, integrity and honesty in Nigeria. Surely, the current limitation of auditors' civil liability and their lack of criminal liability under the CAMA cannot be classed as laudable initiatives for ensuring corporate efficiency, especially when there are so many discrepancies with financial reporting involving auditors in Nigeria.

[1019] See C. Byrne 'Is Caparo on the Way Out?' [2004] 66 Company Lawyer 49-51.
[1020] For instance, Roach observed that the decision in *Caparo* may impede claims brought by a third party against an auditor even if the party had relied on the information provided and subsequently suffered loss: see L. Roach, 'Auditor Liability' (2010) 31 Company Lawyer 136.
[1021] Abugu [2014] 231-254.

5.4 Assessing the Audit Committee Framework under the CAMA

5.4.1 The Functions, Establishment and Qualifications of the Audit Committee: Issues

Globally, the use of audit committees as a corporate governance tool is not a contemporary phenomenon, given that the practice in countries such as the United States of America dates back to 1967.[1022] However, in Nigeria, the statutory establishment of audit committees came fairly late, as the CAMA 1990 was the first statute in the country to create the requirement for an audit committee. Ofo noted that Nigeria's previous 1968 Companies Act had no provision relating to audit committees.[1023] The reason for this is mainly because Nigeria, which only attained political independence in 1960, had not encountered auditing problems during that era, and since the state and individual shareholders closely monitored companies at that time, there was no need for rigorous monitoring mechanisms such as audit committees.[1024] Akinpelu submitted that major corporate governance reforms were only introduced in Nigeria after the near collapse of the financial sector through the phenomenon of failed banks in the late 1980s.[1025] According to Ofo, the near collapse of the financial sector was mainly as a result of poor accounting and disclosure practices exhibited by banks and financial institutions during that era.[1026] Hence, it is accurate to infer that the subsequent introduction of the audit committee under the CAMA formed part of the government's agenda to tackle the weaknesses of corporate governance in the late 1980s. However, this singular objective has rather driven the legislature to impose enormous functions on audit committees, which some believe to be too arduous a burden.[1027] For instance, not only does s. 359(4) of the CAMA require audit committees to examine auditors' reports and make recommendations thereon to the annual general meetings as it thinks fit, but this is further embellished with a non-exhaustive list of functions in s. 359(6) which includes *inter alia:* the committee must assess whether the accounting and reporting policies of the companies are consistent with legal requirements and ethical practices; review the

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[1022] F.L.S. Spira, 'Audit committee: Beginning the Question?" (2003) 13 Corporate Governance 180-188.
[1023] N. Ofo, 'Composition of Audit Committees in Nigeria: Matters Arising' (2011) International Company and Commercial Law Review 392.
[1024] A. O. Enofe, 'Audit Committee Reporting in Corporate Financial Statements: User's Perception in Nigeria' (2013) 1 European Journal Of Accounting Auditing and Finance Research 16-28.
[1025] Akinpelu [2011] 337-338.
[1026] See Ofo (2011) 329.
[1027] ibid.

scope and planning of the audit requirement; review the effectiveness of accounting systems and internal controls; make recommendations to the board in regards to the appointment, removal and remuneration of auditors and authorise external auditors to carry out investigations.[1028]

The functions of the audit committee are therefore clearly very broad and demanding, but the author contends that this wide-ranging scope is necessary in Nigeria where financial malpractices are considered to be somewhat common. In practice, the audit committee has an important role in overseeing the financial reporting process, and ensuring the integrity and transparency of financial reporting. Therefore granting the committee with a broad range of functions should be useful in providing them with the necessary statutory tools to carry out their duties effectively. However, it is rather perplexing and strange that in light of these enormous functions, the whole framework governing the establishment of such an important committee under the CAMA is briskly buried within a single provision in s. 359(3), which relates to auditors' reports. Section 359(3) tersely provides that 'in addition to the report made under subsection (1) of this section, the auditor shall in the case of a public company also make a report to an audit committee which shall be established by the public company.'[1029] This rather basic provision has one major drawback: it lacks important preliminary provisions relating to the qualification and expertise of members of the committee. This is a considerable statutory anomaly, as Azieres and Lambert have particularly observed that matters such as qualifications and skills are crucial in the selection process of a capable and effective audit committee.[1030] Although section 359(4) of the CAMA provides that the members of the audit committee must constitute equal representation for shareholders and the board of directors, it fails to stipulate measures for assessing their competence on the committee. In practice, this could render the committee incompetent, because the lack of specified qualifications for members of the audit committee indicates that, hypothetically, any member can be appointed by other members at general meetings, irrespective of whether he/she possesses the relevant financial, accounting and academic

[1028] See sections 359(6)(a)-(f) of the CAMA 1990 for the non-exhaustive list of functions.
[1029] See section 359(3) of the CAMA.
[1030] O. Azieres and C. Lambert, 'Audit Committees: Improving the Way Directors Exercise their Responsibilities' [1995] International Business Law Journal 923.

skills. It is also highly doubtful if this approach is compatible with the wide functions imposed on the audit committee by s. 359, which upon closer inspection appears to be designed for a well-qualified member with superb accounting and financial skills. The importance of qualification and the expertise of members of audit committees in Nigeria cannot be overemphasised in light of the important role they play in financial reporting. Where the expertise of the members is lacking or compromised, their effectiveness in reviewing the accounting process is definitely doubtful, if not jeopardised. Therefore, statutory reforms should be introduced in the next modification of the CAMA to include provisions that provide for audit committees' qualifications and expertise.

5.4.2 Problems with the Composition of Audit Committees under the CAMA: Inadequate Members' Independence

The functions of the audit committee in Nigeria are further impeded by the peculiar membership composition outlined in s. 359(4) of the CAMA, which provides that: 'the audit committee shall consist of an equal number of directors and representatives of the shareholders of the company (subject to a maximum number of six members.' This membership composition is odd because it does not conform to international best practices and principles, which are widely accepted by many common law countries and corporate governance organisations as a more appropriate composition to ensure effective and independent oversight of financial reporting. For instance, in the UK it is required that the membership of the audit committee must comprise of mainly non-executive independent directors in order to ensure that they provide independent review and opinion on the company's internal financial control.[1031] In other African countries, such as South Africa, the members of the audit committee also include independent non-executive directors, who are required to provide a fair, unbiased and independent assessment of a company's financial state and prospects.[1032] In fact, the OECD particularly recommended that audit committees must be independent of the board of directors in order to ensure that they are not subjected to unnecessary

[1031] See principle C.3.1 of the UK's Combined Code of Corporate Governance 2014. These practices are also consolidated into the *Audit Committees Combined Code Guidance 2003*. For more details on the development of the Audit Committee in the UK see M. Habbash, C. Sindezingue and A. Salama 'The Effect of Audit Committee Characteristic on Earning Management: Evidence from the United Kingdom' [2013] 10(1) International Journal of Disclosure and Governance 13-38.
[1032] See s. 3.2.1 King III Report of South Africa which encourages independent non-executives on the audit committee.

influence from the company they audit.[1033] The practice in Nigeria regarding audit committee composition may deviate from international best practice, but is it ineffective? Does it sit well with the Nigerian socio-economic situation?

Ofo argues that allowing the board of directors to participate on the audit committee is counterproductive in that, in practice, this type of arrangement hinders the committees' independence and quality.[1034] He explains that it simply creates an environment where management can influence or interfere with the decisions of the committee, which are supposed to be made in the absence of the directors in the first place.[1035] In contrast, Chukwunedu and Okafor believe that the directors who sit on the committee will ensure a greater level of efficiency by applying their directorial skills and knowledge to appraise corporate documents that they are already familiar with.[1036] Both sides of the arguments have their merits; however, in actuality, Ofo's argument is more practical and consistent with the corporate culture in Nigeria, where audit committees have been known to be under the control of management. For instance, Okara and Okafor noted that one of the reasons why the audit committee in Cadbury Nigeria Plc was ineffective in carrying out their functions is because they were under the influence of the managing director.[1037] This is not surprising given that s. 359(4) essentially permits potential delinquent and fraudulent directors to take part in the auditing process and consequently exert supremacy over any decisions taken by the committee. Hence, it is appropriate to say that established international principles of corporate governance that promote the audit committee's independence from the board of directors are lacking under the statutory framework of s. 359(4) of the CAMA. This statement remains true especially when viewed in light of the fact that s. 359 is silent on the question of the independence of the directors who sit on the

[1033] See Principle IV, F of the G20/OECD principles (2015).
[1034] See Ofo (2011) 329
[1035] Ofo also observed that the composition of the audit committee in Nigeria weakens its effectiveness as the involvement of the board of directors in the committee undermines the independence the audit committee requires to carry out its functions. Ofo (2011) 329.
[1036] O. S. Chukwunedu and G. O. Okafor, 'Repositioning the Audit Committee as an Effective Watchdog in Corporate Governance in Nigeria' [2011] Journal of Management Science 11-13.
[1037] S. C. Okara and G. O Okafor, 'Drivers of Audit Failure in Nigeria-Evidence From Cadbury (Nigeria) Plc' [2013] Research journal of Finance and Accounting 6 available at http://www.iiste.org/Journals/index.php/RJFA/article/viewFile/5644/5756 accessed 20 July 2015.

audit committee. It merely requires that there should be executive directors on the audit committee without specifying if the directors should be independent.[1038]

In comparison, the equivalent provisions in the US, as outlined in s. 301(3) of the SOX act, clearly state that the executive directors who form the audit committee must be independent and must not be affiliated with the company or any subsidiary. [1039] This thesis suggests that, in order to further enhance the independence of the audit committee in Nigeria, section 359(4) of the CAMA should be amended to ensure that only non-executive independent directors are allowed to sit on the board of the audit committee. This will also align Nigeria with international best practices and procedures in other common law countries. Although the rationale for the audit membership composition in Nigeria has been attributed to the need to ensure efficiency,[1040] there is no doubt that the presence of executive directors on the audit committee could interfere with the latter's ability to carry out its designated roles. As previously demonstrated, the directors who also sit on the audit committee sometimes manipulate the review process to conceal any irregularities that may be contained in their (directors') reports. It is not surprising why audit committees were dormant and ineffective in deterring and detecting financial irregularities perpetrated by managing directors in some of the recent corporate scandals in Nigeria.[1041] Recent empirical data collected by Esang et al. also highlighted the audit committees' ineffectiveness.[1042] It is therefore correct to assert that while the audit committee is intended to facilitate integrity, accuracy and transparency within the financial

[1038] D. Ogbuozobe, 'A Consideration of the Impact of the Companies and Allied Matters Act (1990) and the Insurance Act (2003) on the Board of Insurance Companies in Nigeria: Part 2' [2009] IJLM 421.

[1039] For an in-depth analysis of the regulatory scope of the audit committee under SOX 2002 in the US, See J. R. Fitchner 'The Recent International Growth of Mandatory Audit Committee Requirements' [2010] 7(3) International Journal of Disclosure and governance 227-243.

[1040] N. Ofo, 'An Appraisal of Audit Committees of Public Companies in Nigeria' (2011) Kogi State University Law Journal 2-4.

[1041] For instance, the crisis in Unilver Plc in 1997 and Cadbury Nigeria Plc in 2006 clearly revealed that despite the presence of the audit committee, managing directors were able to carry out their corporate wrongdoings without being detected by the audit committee. For more details on the case studies, See Akinpelu [2011] 339-340.

[1042] E. Esang et al. observed in their study based on the recent collapse of public companies in Nigeria that the audit committee has never successfully and timely reported any anomaly of either the auditors or directors to the annual general meeting, which would have been capable of preventing collapse. In conclusion, the duties of the audit committee in Nigeria were described as "perfunctory" in nature. A. Esang et al., 'The Challenges of Nigerian Economy Under Her Present Audit Committees' (2009) Working Paper Series. Kogi State University and Cross Rover University of Technology 9-10.

reporting process in Nigeria, the purpose for which they were established is consequently undermined by the membership composition. [1043]

Those who endorse the dual membership composition in section 359(4) of the CAMA mostly do so on the basis of shareholders' protectionism and activism. Kingsley argues that the use of shareholders' representatives on the committee acts to protect the interests of shareholders, because they will be more inclined to act and report their findings in a manner that will coincide with the overall interests and wishes of shareholders.[1044] Kingsley's view is only theoretically valid when considered in light of the procedures and arrangements of board meeting and audit committee meetings within Nigerian public firms. In practice, the vast majority of public companies in Nigeria hold their board meeting before the audit committee's meeting.[1045] Consequently, in a situation where financial statements are to be considered, they may have already received the approval of the directors at the board meeting. Accordingly, it would be difficult for the committee to question the validity of the account statement, since the members of the audit committee also include members of the board who initially approved the statements.[1046] This type of meeting arrangement also undermines the relevance of the audit committee as an independent probing tool, especially if the directors who approved the financial report will also take part in reviewing the company's internal audit process. A more appropriate and effective structure should promote an environment where the audit committee approves the result before it is presented to the board for authorisation and where the board of directors cannot participate in reviewing the auditing process.

[1043] Okoye and Akabor also submitted that one of the major hindrances to the effectiveness of the audit committee in Nigeria is that they lack independence from management, as members of the board of directors are present in the committee and in most cases their efforts are normally frustrated by the management. E. I Okoye and C. Akabor 'Enhancing the Effectiveness of Audit Committee in Nigerian Manufacturing Companies' [2010] 4 Journal of Policy and Development Studies 9.

[1044] A. O.O. Kingsley, 'Audit Committees: the Journey so Far in Nigeria' [2014] 3 Journal of Economics and Finance 40-43. Available online at <http://www.iosrjournals.org/iosr-jef/papers/vol3-issue1/Version-1/E03114043.pdf >Accessed 20th July 2015.

[1045] See Ofo, (2011) 392.

[1046] N. Ofo, 'What Role for Independent Directors in Nigeria?' [2012] International Journal and Commercial Law Review 117; Nat Ofo, 'Much Ado about Independent Directors in Nigeria' [2011] ICCLR 250.

More importantly, due to the shareholding pattern of public firms in Nigeria, Kingsley's contention that the use of shareholders' representatives on audit committees protects shareholders' interests is also problematic. As examined in chapter 3, shareholding in Nigerian public companies is highly dispersed and shareholders' interests in the companies differ significantly. Therefore, even if shareholders' representatives are assigned to the audit committee, the former will only represent the interests of the dominant and influential shareholders and not the vast majority of shareholders in the company, especially the minority shareholders.[1047] The only plausible value of having shareholders' representatives in the audit committees is that the "scuffle" by shareholders' associations to elect their members into the committee serves as an incentive to motivate shareholders to attend annual general meetings, where the shareholders' representatives are normally appointed.[1048] Nonetheless, since the representatives in the audit committee normally have a close relationship with the majority shareholders of the company in question, any attempt to remove shareholders from the committee will be vigorously opposed.

There is also the concern that the presence of shareholders' representatives on the audit committee could make the former less inclined and unwilling to present and deliberate on price-sensitive information not yet available to the public, since such information may be damaging to the company's reputation.[1049] Particularly, given that the shareholders' representatives do not owe the same duty as the directors under the CAMA and common law, they are not under any strict legal obligation to maintain the same level of care, skill and diligence and confidentiality in handling information as expected of a director.[1050] Therefore, due to their close relationships with influential shareholders, the representatives would be at liberty to report confidential information to those powerful shareholders to whom they declare their allegiances and loyalty, thereby promoting a system of nepotism. Moreover, a representative's refusal to disclose such information may be viewed

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[1047] N. Ofo, 'Proposed Dual Audit Committee Structure for Banks in Nigeria: Issues for Consideration' (2013) International company and commercial Law Review 117-123.

[1048] S. A. Owalabi an S. O. Dada 'Audit Committee: An Instrument of Effective Corporate Governance' [2011] European Journal of Economic, Finance and Administrative Sciences 35. See also D. Alford, 'Nigerian Banking Reform: Recent Action and future Prospects' [2010] Journal of International Banking Law and Regulation 337.

[1049] Ofo (2011) 392-399.

[1050] O. Ayaduba 'The Impact of Audit Committee on Corporate Governance Practices in Nigeria' [2006] Benin Journal of Social Sciences 87-98.

as an act of insubordination or disloyalty, which could impact negatively on their relationship with influential shareholders or, in worse cases, limit their chances of being re-elected or reappointed in the future.

Ofo's supposed solution to improve the relevance of the audit committee in Nigeria was to recommend that the appropriate provisions should be administered and enforced by the Securities and Exchange Commission under the Code, as part of their routine assignment in the regulation of corporation in Nigeria and entrenchment of sound corporate governance practices.[1051] It is doubtful if Ofo's recommendation is compatible with the peculiar state in Nigeria because, as analysed in chapter 3, compliance to voluntary or non-statutory codes is low. Hence, if the audit committee is administered under the SEC Code, the likelihood of complying with and enforcing the provisions relating to the audit committee will be drastically diminished. Therefore, due to this particular problem in Nigeria, it is maintained in this thesis that the inclination to take a statutory path in Nigeria is more desirable in order to ensure compliance and proper enforcement of rules with regard to audit committees. Rather, the focus for reform in Nigeria should be restructuring the membership composition of audit committees as recommended in this thesis by removing executive directors and adopting a framework where only non-executive independent directors will sit on the audit committee.

Considering that the potency of the law is somewhat determined by the pragmatism of relevant statutory provisions,[1052] the provision relating to audit committees under the CAMA must be amended to include more practical rules. In order to ensure the effectiveness of audit committees of public companies in Nigeria, their structure, operation and format need to be extensively reviewed and reformed by highlighting the independence of members of the audit committee as the primary priority in Nigeria. A legal framework that fails to provide audit committees with the required

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[1051] Ofo, 'An Appraisal of Audit Committees of Public Companies In Nigeria' [2010] Social Science Research Network 11 available online at <http://ssrn.com/abstract=1641603> accessed June 25, 2014.

[1052] K. M. Hess and C.H. Orthmann, *Introduction to Law Enforcement and Criminal Justice* (10th edn, Cangage Learning, 2011) 279 independence from the board of directors which they are expected to oversee cannot guarantee a fair, transparent and independent system of internal control.

5.5 Conclusion

In this chapter, important corporate governance mechanisms designed to ensure adequate auditing under the CAMA have been thoroughly analysed. The analysis clearly reveals that some of the existing provisions relating to auditors' duties, auditors' liability and audit committees' independence are defective and need to be reformed. This thesis highlights the important role of auditors in financial reporting through their investigative powers to request and scrutinise financial documents. In this context, it has been demonstrated that the investigative powers of auditors in Nigeria have been diminished because of the failure of s. 367 of the CAMA to bestow auditors with the power to obtain information from overseas subsidiary companies. This thesis argues that the practice in s. 367 impedes effective financial reporting and disclosure because it deters auditors from gaining access to necessary financial information in affiliated companies outside Nigeria, which would normally assist them in their investigations. The recommendation in this thesis is that s. 367 of the CAMA should be amended to include provisions allowing auditors to obtain information from overseas company, just as it is provided in section 500 of the UK's CA 2006.

In terms of auditor's liability, it has been demonstrated that the failure of s. 368 of the CAMA to prescribe auditors' criminal liabilities undermines auditors' accountability, because the existing civil liability in s. 368 - which is measured on the basis of auditors' reasonableness under the law of negligence - is simply not adequate in terms of addressing situations where an auditor acts fraudulently or deliberately falsifies reports. In effect, an auditor could easily contest a charge for fraudulent conduct in their report if they allege to have acted reasonably. It proposes therefore that criminal liabilities should also be introduced alongside the already existing civil liability stipulated in section 368. As explained above, criminal liabilities for auditors are well espoused in companies' legislations within other countries, such as the UK, [1053] and as such should equally be promoted in Nigeria.

Lastly, the analysis reveals that the provisions relating to the audit committee under the CAMA also engenders peculiar problems, predicated upon the composition of the membership of the audit committee. This thesis argues that the requirement for shareholders' representatives and members of the board of directors to participate on the board of the audit committee in section 359(4) of the CAMA is disadvantageous to companies' financial reporting processes because, in reality, it simply undermines the independence required by the committee to carry out their functions effectively. For instance, the directors who sit on the audit committee are more disposed to frustrate the oversight function of the audit committee, which is intended to highlight any financial irregularities carried out by the directors. This does not promote efficiency in financial reporting; it rather impedes the auditing process in Nigeria. This thesis calls for a complete restructuring of the composition of the statutory audit committee under the CAMA by recommending that the board of directors and shareholders' representatives should be prohibited from sitting on the audit committee. Section 359(4) should be amended to ensure that the audit committee is comprised of only independent non-executive board members. As explained above, this should enhance the independence of the audit committee in Nigeria, and also bring the committee on per with the practices in the UK/US.

[1053] For instance see s. 507 of the UK's CA 2006.

Chapter 6: Assessing the Regulatory Framework of the Nigerian Code of Corporate Governance 2011: the Need for a Rule-Based Approach of Regulation?

6.1 Introduction

As explained in chapter 1, the principle-based approach adopted by the 2011 SEC Code, which mirrors that of the UK's 2010 Code, has the potential to undermine its overall regulatory vigour and impact on corporate regulation. The effectiveness of the Code has thus been doubted on the basis that it lacks the necessary force of law to command compliance and enforcement.[1054] As noted in previous chapters, Akinkoye and Olasanmi found in their recent study that a significant number of companies (up to 55% in some industries) hardly comply with the 2011 SEC Code, simply because there is no legal obligation on their part to comply.[1055] This chapter argues that the Code has been rendered weak in terms of regulating corporate affairs, as its principles and provisions do not have any legal force to effectively control companies and deter against corporate malpractices. It is understood that in Nigeria, some corporate executives are more inclined to exploit corporate funds for their own personal gains.[1056] Thus, it is suggested here that a proactive and robust Code is required in Nigeria.

Against this background, the author considers as an alternative approach the possibility of introducing, under the Code, a rule-based approach of regulation similar to the SOX. This would not be considered as a perfect model, but as a necessary regulatory solution to address the abovementioned weaknesses of the Code. The benefits and strengths of a rule-based Code, as will be demonstrated, is that rules have the potential to enhance corporate transparency, disclosure and financial performance in Nigerian public companies, through mandatory compliance to fundamental governance standards. In addition, it is considered that rules would also ensure consistency in terms of enforcement and command more compliance.[1057] However, it will also be noted that a rule-based

[1054] L. Opara and A. Alade, 'The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis; [2014] 26 Journal of Law, Policy and Globalisation 38-43.
[1055] See Akinkoye and Olasanmi [2014] 1.
[1056] See Opara and Alade [2014] 38-43.
[1057] M.L. Abarca, 'The Need for Substantive Regulation on Investors Protection and Corporate Governance in Europe: Does Europe Need a Sarbanes-Oxley? [2004] Journal of International Banking Law and Regulation 419.

system of regulation has its weaknesses and difficulties. For instance, rules are considered inflexible and may not be as easily adaptable to changing corporate environments and future threats as principles.[1058] Also, the certainty of rules could also encourage companies to circumvent them by engaging in activities that are not prohibited by rules but cause equal harm.[1059] It is suggested, however, that these problems can be mitigated if rules are swiftly reformed and broadly formulated to proactively deter against misconducts.[1060] However, no regulatory system can or has been known to completely prevent every corporate malpractice, considering the fact that jurisdictions relying on principles or rules have all experienced one form of corporate collapse or scandal. The author nonetheless recognises that rules could also be difficult to implement due to the variety of companies with different structures and sizes.[1061] However, this difficulty is most apparent when the companies being regulated emanate from a wide spectrum with various sizes and organisational layouts. As previously explained in chapter 1, the rule-based code recommended in this thesis only applies to public companies which, as previously explained, share similarities in terms of ownership and board structures. Thus, it is suggested here that the difficulties with implementation can be averted (or minimised) if the rules are specifically tailored to various industries.

Establishing an appropriate enforcement/monitoring agency and the cost for compliance and implementation are also considered as challenges facing the employment of a rules-based system. But in fact these issues also affect principle-based regulations, as principles also require an appropriate body to monitor them, and costs in drafting and complying with the principles invariably arise. In Nigeria, the SEC is already empowered with the responsibility of enforcing the Code. Therefore, it is suggested in this thesis that the SEC can also be empowered with the same mandate to enforce and monitor a rule-based Code. Nonetheless, the SEC is known to face peculiar challenges emanating from institutional and infrastructural weaknesses. For instance, the SEC is considered to lack the proper infrastructures, manpower and expertise to investigate corporate abuses

[1058] I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation* Debates (Oxford University Press 1992) 110, 129
[1059] C. R. Sunstein, 'Problems with Rules' (1995) 83 California Law Review 953.
[1060] Abarca,[2004] 419.
[1061] Ayres and Braithwaite (1992) 110.

and monitor the Code. Therefore, it will be recommended later in this chapter that, the SEC should invest in the provision of better infrastructure and equipment, greater manpower and professional technical training and education for their personnel.

As illustrated in chapter 2, the UK/US and Nigerian Anglo-American style of governance has had the effect of excluding stakeholders' involvement in the company and as such limited monitoring levels on management and created inequality. A more stakeholder-friendly approach was hence promoted. In this chapter, the author considers how this type of stakeholders' approach to governance could be introduced under a rule-based Code, by recommending mechanisms for stakeholders' representatives to occupy advisory and supervisory roles. Against this backdrop, the first section of this chapter presents issues on corporate corruption/malpractices in Nigeria, in order to highlight the economic and social impetus behind the author's reasons to advocate a robust form of regulation under the Code. While strongly advocating a rule-based Code, it proceeds by analysing the flaws of the principle-based model adopted by the Code with a particular focus on its enforcement and compliance mechanisms. Conversely, it also examines the strengths and weaknesses of a rule-based regulation, indicating that a rule-based code may be appropriate for Nigeria but it is not a perfect model. This is embellished by an analysis of the various challenges Nigeria must also surmount in introducing a rule-based code, namely implementation, enforcement, and cost issues. It further analyses the institutional and infrastructural weaknesses facing the SEC and proposes appropriate reforms. It concludes with a proposal of a stakeholder approach of governance under a rule-based code.

6.2 Issues of Corporate Malpractice and Corruption in Nigeria: the Importance and Need for Robust Regulation

The notion that corporate governance practices in Nigeria have improved significantly[1062] is immediately undermined by the recent corporate collapses and scandals instigated by corrupt and fraudulent directors in the country. Generally, corruption in Nigeria is extensively seen as the single greatest impediment to the country's overall economic and social development. [1063] For this reason, some believe that effective governance within the political and corporate sector in Nigeria is sometimes disrupted by corruption and bribery.[1064] For instance, there have been situations where government officials have collected bribes from representatives of multinational companies in order to foster certain trade agreements and ventures. A typical example is the National Identity Card fraud involving SAGEM S.A in 2003, where it is thought that certain ministers received around $2.4 million in bribes in order to award SAGEM a contract to handle the National Identify Card scheme. [1065] Likewise, the scandal involving the former subsidiary of Halliburton, Kellogg Brown and Root, also revealed that senior Nigerian officials received $180 million in bribes to guarantee a contract to build the Nigerian Liquefied Natural Gas Plant in Bonny in 2003.[1066] These scandals not only bring great disrepute to the Nigerian economy but they also have the potential to dissuade future investors. In extreme cases, large companies operating in the country have been known to withdraw their investments, consequently resulting in losses of billions of Naira in the process. For example, in 2015, Brunel, a Dutch company, which normally generates over 100 million Euros a year, pulled out of Nigeria due to corruption: the chief executive of Brunel, Jan Arie Van Barnveveld described the situation as a security risk which had eroded the quality of their service and threatened the safety of

[1062] E.N.M. Okike, 'Corporate Governance in Nigeria: the Status Quo' [2007] 15(2) Corporate Governance 173-193.
[1063] According to Waziri, the former Executive Chairperson of the Nigerian anti-corruption agency, the *Economic and Financial Crimes Commission* (EFCC), "corruption has eaten deeply into the marrow of our existence that looters and fraudsters have become the managers of corporations and leaders of our country" F. Waziri, 'Corruption and Governance Challenges in Nigeria' [2010] Cleen Foundation Monograph Series No. 7 available at <http://www.cleen.org/Corruption%20and%20Governance%20Challenges%20in%20Nigeria%20-%20Final%20Version.pdf.> accessed 13 January 2015.
[1064] M.A. Oji and V.U. Oji, *Corruption in Nigeria: the Fight and Movement to Cure the Malady* (University Press of America, 2010) 13. Particularly, Transparency International currently ranks Nigeria as the 38th most corrupt in the world. This makes Nigeria the 13th most corrupt nation in Africa: see Transparency international, Corruption Perception Index [2014] available online at <http://www.transparency.org/cpi2014/results> accessed 13 January 2015
[1065] R. I. Rotberg, 'Troubled Nigeria: Great Opportunities, Tough Challenges' in R.I. (eds) *Crafting the New Nigeria: Confronting the Challenges* (Lynne Reinner Publishers Inc. 2004) p.15.
[1066] O.A. Akinpelu, Corporate *Governance Framework in Nigeria: an International Review* [iUniverse inc. 2011] 358.

their workers.[1067] As Oji has rightly stated, because of corrupt corporate executives, the risk of doing business in Nigeria is extremely high, as investors/shareholders are normally exposed to environments where directors who collect bribes jeopardise the former's interests and investments simply to satisfy their selfish desires.[1068]

Deterring against foreign and local investments in Nigeria is certainly not a good way to repair the porous economic situation in the country, which desperately needs serious growth.[1069] As a developing country, Nigeria currently has a population of over 170 million [1070] with a high level of poverty (around 33% of the population live below the poverty line).[1071] It could be argued that the country is overpopulated considering the fact that the resources to satisfy the basic needs of most citizens are considered to be limited.[1072] Although it is argued that this large population represents a strong labour force,[1073] this is not an entirely accurate assessment. In reality, Nigeria is affected by a high unemployment rate of 13.3%,[1074] which means that a majority of the youths (34%) are unemployed.[1075] There is also a constant rising inflation rate of over 9%.[1076] These socioeconomic constraints have simply created an economic turmoil, whereby many Nigerians - including some corporate executives - are compelled to resort to dishonest and deceptive business practices, most of which aim to siphon funds from companies and extract wealth generated from oil and petroleum, which is currently the country's biggest source of revenue. Oil and petroleum currently account for more than 90% of the country's export earnings and about 80% of the federal government's

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[1067] This Day Live, 'Dutch Firm, Brunel Pulls out of Nigeria Because of Corruption' [August 27th 2015] available online at http://www.thisdaylive.com/articles/dutch-firm-brunel-pulls-out-of-nigeria-because-of-corruption/218598/ accessed on 25 December 2015.

[1068] M.A. Oji and V.U. Oji, *Corruption in Nigeria: the Fight and Movement to Cure the Malady* (University Press of America, 2010) 14.

[1069] See Waziri [2010].

[1070] See World Meter (Population of Nigeria 2015) available at <http://www.worldometers.info/world-population/nigeria-population/> accessed 4 December 2015

[1071] See UNDP, 'National Human Development Report, 2015: Human Security and Human Development in Nigeria' (December 2015) 21. Available at <http://www.ng.undp.org/content/nigeria/en/home/library/poverty/national-human-development-report-2016.html> Accessed December 20, 2016.

[1072] M. Duze, H. Mohammed and I. Kiyawa, *Poverty in Nigeria: Causes, Manifestation and Alleviation Strategies* [Adonis and Abbey Publishers Limited, 2008].

[1073] E.g. See A.A. Adekoya, 'Corporate Governance Reforms in Nigeria: Challenges and Suggested Solutions' (2011) Journal of Business Systems, Governance and Ethics 38-50.

[1074] See Punch, 'Nigeria's Unemployment Rate Rises to 13.3% - NBS' (August 31, 2016) available at <http://punchng.com/nigerias-unemployment-rate-rises-13-3-nbs/> accessed December 20, 2016.

[1075] See UNDP, (December 2015) 35- 36.

[1076] ibid, 39.

revenue.[1077] As Dine has rightly said, 'in Nigeria where oil exports constitute roughly a quarter of the country's GDP, whoever takes power can count on this revenue to enrich himself.'[1078] This desire for quick wealth has motivated some corporate executives to self-deal, thereby further highlighting the agency problem which exists in Nigeria. In practice, this problem has been constantly manifested in some Nigerian corporations, where executives have been seen to perpetrate insider fraud and misappropriate corporate funds for themselves.[1079] A classic example is Wema Bank Nigeria Plc, where the former managing director (Tunde Lemo) was indicted in 2007 for abusing his managerial position in order to conceal debt worth over N8.1 billion and for embezzling over N450 million while in office.[1080] The same can be said about the scandal at Oceanic Bank in 2009 where Cecilia Ibru, the managing director, was indicted for siphoning funds in excess of N23 billion.[1081] This corrupt behaviour by corporate executives has not only caused colossal losses for investors/shareholders but has also resulted in the demise of prominent companies such as Cadbury Nigeria Plc.[1082] It seems that although the agency problem in Nigeria originates from the separation of ownership from control, the dismal economic state in Nigeria appears to heighten this problem by providing a conducive environment for executives to self-deal and continue to perpetrate fraud. Given that chief corporate actors, such as the directors/managers, are usually those who are locked into the corruption and fraud, achieving sound corporate governance practices would undoubtedly require regulations capable of affecting the mindset and behaviour of these actors.

Adewale has noted that the presence of codes of corporate governance in Nigeria does not seem to have mitigated the unethical behaviour exhibited by managers in the aforementioned firms.[1083] Makanjuola, however, submitted that the codes were never strictly adhered to because,

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[1077] ibid, 20.
[1078] J. Dine, 'The Capture of Corruption: Complexity and Corporate Culture' [2008]1 European Journal of Legal Studies 1-37.
[1079] A. A. Afolabi, 'Examining Corporate Governance Practices in Nigerian and South African Firms' [2015] 3 *European* Journal of Accounting Auditing and Finance Research 10-29.
[1080] For more information, see Akinpelu [2011] 352.
[1081] See Adewale, [2013] 110-118.
[1082] It is said that in 2007 alone shares in Cadbury Nig Plc fell from N54 to N46 in just 2 weeks and the company reported an operating loss of over N15 billion in the same year: see Akinpelu [2011] 341.
[1083] Adewale [2013] 110-118.

since the codes are non-statutory, companies do not have any obligation to comply with them.[1084] Thus, it is not surprising that poor corporate governance practices have recently been documented in some Nigerian companies. Particularly, this revelation appears to indicate that mere principles are insufficient to govern some Nigerian corporate executives, especially since ethics and norms stipulated by the codes are rarely adhered to. MacNaughton and Wong also observed that, in an economy where corruption is high, a non-legal form of regulation would be inadequate to compel compliance to sound governance principles or practices. [1085] In all fairness, it is logical to equate the behaviour of dishonest Nigerian corporate executives to Thomas Pogge's description of corruption: a 'moral deflection device' where individuals knowingly or intentionally try to avoid complying with moral norms and ethics.[1086] An objective application of Pogge's interpretation within the Nigerian corporate sphere tends to underscore the classical directors' departure from widely accepted principles under the Code and the corporate goal of advancing shareholders' wealth in pursuit of their own selfish interests, as exemplified in the cases cited above.

Certainly, corruption in Nigeria is an inherent problem facing companies, especially in terms of achieving sound governance.[1087] This is a clear indication that corporations in Nigeria need to be adequately regulated in order to combat the unethical behaviour exhibited by some corporate actors in the country.[1088] The general notion of some commentators is that robust regulation is only needed at the time of business collapse.[1089] However, this view is simply a misconception because, in practice, it is incompatible with the modern corporate culture described by MacLennan. [1090] MacLennan noted that the pre-industrial liberal society, which was based on small business enterprises, has now transformed into corporate capitalism, which no longer conform, to past business practices; modern corporate behaviour has become increasingly corrupt and the criminal

[1084] Y. Makanjuola, *Banking Reforms in Nigeria: the Aftermath of the 2009 Financial Crisis* (Palgrave Macmillan, 2015) 77-78.
[1085] E. MacNaughton and K. B. Wong 'Corruption Judgments in Pre War Japan: Locating the Influence of Traditional, Morality and Trust on Criminal Justice' in M. Nuijten nd G. Anders (eds) *Corruption and the Secret of Law: A Legal Anthropologist Perspective* (Aldershot: Ashgate, 2007).
[1086] T. Pogge, *World Poverty and Human Rights* (Polity Press in Association with Blackwell, 2002) 5.
[1087] Adegbite 'Corporate Governance Regulation in Nigeria' (2012) 257 – 276.
[1088] One such is Emmanuel Adegbite: see Adegbite (2012) 257 – 276.
[1089] A. Johnston, *EC Regulation of Corporate Governance* (Cambridge University Press, 2009).
[1090] C. MacLennan 'Corruption in Corporate America: Enron-Before and After' in D. Haller and C. Shore (eds) *Corruption: Anthropologist Perspective* (London: Pluto Press 2005) 157-158.

behaviour of management is now pervasive.[1091] Clearly, MacLennan is referring to the dominance of modern hierarchical and bureaucratic corporations, where firms now encompass multiple individuals such as directors and shareholders with various interests, where conflicts are likely to arise.[1092] Surely, a proactive regulatory approach is necessary, prior to business collapse, in order to regulate the multiple stakeholders' relationships, prevent corporate abuse by managers and future corporate failures. It is argued in subsequent sections that this form of regulation is imperative and should always represent the cornerstone of any future Nigerian regulatory framework: a stringent and proactive form of regulation should be adopted under the 2011 SEC Code.

6.3 The Framework and Scope of the Code as a Regulatory Device: is it Fit for Purpose?

Unethical practices by corporate executives and the adoption of poor auditing and accounting practices have been commonly highlighted in this thesis as some of the main reasons for the recent collapses of public companies in Nigeria and in other countries such as the UK and US.[1093] The 2011 SEC Code, which was specifically introduced with the view of addressing these issues, also focused on improving the enforcement and compliance elements considered to be lacking under the previous 2003 SEC Code. [1094] The ultimate goal was to align the 2011 Code with international best practice.[1095] However, this thesis questions if the new Code has indeed brought about any significant improvement, considering the fact that it replicates the previous 2003 Code in many respects. The following subsections analyse the regulatory scope of the 2011 Code and argue that the new Code contains weak enforcement and compliance mechanisms, and this has rendered it toothless in regulating or controlling public companies in Nigeria.

[1091] ibid,158.
[1092] A.C. Fernando, *Corporate Governance: Principles, Policies and Practices* (3rd edn, Pearson Education: 2009) 12-13.
[1093] Adewale [2013] 110-118.
[1094] N. Ofo, 'Code of Corporate Governance in Nigeria 2011: its Fourteen Fortes and Faults' [October 2011] Igbinedion University –College of Law, available at <http://ssrn.com/abstract=1937896 >Accessed July 202015] See also the introductory part of the 2011 SEC Code.
[1095] ibid.

6.3.1 Scope of Application Under the Code: Issues on Adoption

An essential yet controversial aspect of the 2011 SEC Code relates to its scope of application, which applies broadly to all public companies. According to section 1 of the 2011 SEC Code, the Code shall apply to all public companies whose securities are listed on the recognised securities exchange in Nigeria and all other public companies.[1096] The implication of this statement is that every public company, regardless of its size and structure, must apply the Code. Ezeani noted that by encouraging all public companies to apply the Code, a higher standard of accountability and transparency is consequently promoted within Nigerian public companies.[1097] Clearly, this is important to the goal of ensuring corporate efficiency in Nigeria, as most public companies will be familiar with the fundamental principles and practices of sound corporate governance. However, there is the concern that the broad scope of the Code creates confusion, as Nigeria has other industry specific Codes such as the National Insurance Commission's Code for Insurance Companies 2009 ("NAICOM"),[1098] which stipulates different principles.[1099] In other words, some of the provisions of the 2011 SEC Code differ from other industry specific Codes and in some cases there are even conflicts. For example, the NAICOM Code 2009 provides that 'no insurance company shall have less than seven (7) members and more than fifteen (15) members on its board,[1100] meanwhile, section 4.2 of the SEC Code 2011 provides that the board size shall not be less than five (5)'.[1101] This conflict initially created a colossal problem under the previous 2003 SEC Code, as most insurance companies faced difficulties in deciding which of the Codes should take precedence.[1102] However, such confusion is now somewhat averted by s. 1.3(g) of the 2011 Code, which states *inter alia* that where there is a conflict between the SEC Code and other Codes, the one with the stricter provision shall apply.[1103] In theory, this confusion now ceases to exist under the new regime. However, it is still

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[1096] See section 1.1 of the 2011 SEC Code.
[1097] E. C. Ezeani, 'Economic and Development Policy-Making in Nigeria' [2012] Journal of African Law 109.
[1098] Hereinafter referred to as NAICOM Code 2009.
[1099] A. Adeyemi 'An Evaluation of Corporate Governance Practices in Nigeria: Challenges and Recommendations' [2011] Working Paper Series, University of Manchester 3-6.
[1100] See Section 5.04(i) of the NAICOM 2009.
[1101] N. Ofo, 'What Role for Independent Directors in Nigeria' [2012] ICCLR 117, 121.
[1102] W.K. Olayiwola, 'Practice and Standard of Corporate Governance in Nigerian Banking Industry [2010] International Journal of Economic and Finance*,* 178-182.
[1103] N. Ofo, 'Securities and Exchange Commission of Nigeria's Draft Revised Code of Corporate governance: an Appraisal' [2011] Journal of African Law 280-299.

doubtful if section 1.3(g) is pragmatic, as applying the stricter provision may not necessarily be suitable to the company's particular circumstances.

For example, in light of the above-mentioned provisions on directors' composition, one could argue that a minimum of seven (7) members under the NAICOM code may be a stricter provision, but on the other hand it is more difficult or even impractical for smaller companies to source seven (7) directors as opposed to five (5) directors.[1104] Meanwhile, it could also be argued that the "no less than five members" prescribed by the 2011 SEC Code is more suitable, especially in large public companies, because - since the maximum number of potential directors is not prescribed - companies are at liberty to make appointments that are well suited to their peculiar management needs and circumstances. In consideration of this point, it appears that while the broad application of the Code is useful in promoting sound corporate governance within Nigerian public companies, the SEC should also adopt a robust engagement with other regulators to ensure that the industry codes are in alignment with the 2011 SEC Code.

6.3.2 Compliance and Enforcement Mechanisms of the Code: the Imperfections of the Principle-Based Approach of Regulation

One of the major criticisms levelled against the previous 2003 SEC Code and the rationale behind the introduction of the 2011 SEC Code was that the former lacked adequate compliance and enforcement mechanisms and therefore resulted in a weak regulatory document.[1105] Opara and Alade noted that the compliance mechanism of the 2003 SEC Code was mainly weak because it adopted a principle-based approach of regulation, which was based on soft law and self-regulation. The limitation of the 2003 SEC Code was captured in s. 1.2 of the 2003 SEC Code, which provided that it is not a rigid set of rules; it consists of principles.[1106] Opara and Alade argued that this approach was not robust enough to compel compliance, mainly because directors were at liberty to

[1104] ibid.
[1105] See Opara and Alade, [2014] 38-43.
[1106] ibid.

defy the principles of the Code, especially since there were no sanctions for contravention.[1107] Their views, which are supported in this thesis, can be reconciled with the study conducted by Babatunde and Olaniran on the level of compliance to the 2003 SEC Code in 2008.[1108] The study revealed a gloomy result, as less than 40% of companies listed on the Nigerian Stock Exchange complied with the Code due to the fact that the compliance and enforcement mechanism was too weak.[1109] It is therefore commendable that one of the aims of the 2011 Code was to improve enforcement and compliance. To advance this goal, the 2011 SEC Code not only makes the Code applicable to all public companies but it also stipulates that it should form the minimum standard expected of all public firms.[1110] Dembo and Rasaratnam, in interpreting this provision, asserted that since the 2011 SEC Code prescribes the minimum standard, it implies that compliance is compulsory and penalties follow where there is non-compliance.[1111] This view is not entirely accurate, because a closer examination of the formulation of the 2011 and 2003 SEC Codes immediately shows that the new Code contains virtually all its predecessor's flaws and many more weaknesses, which undermine its compliance and enforcement capabilities. For instance, as with its predecessor, section 1.3(a) of the 2011 SEC Code also provides that the 'Code is not intended as a rigid set of rules but expected to be viewed as a guide to facilitate sound corporate practices and behaviour.' In addition, the 2011 Code merely requires in sections 1.3(b) 'that it is the responsibility of the board to ensure compliance' and subsequently states in 1.3(c) that 'whether a company has complied with the code would be determined by the same board of directors' It must also be noted that, in line with its predecessor, there are also no sanctions for contravention stipulated under the 2011 Code. In view of this, it is just to say that Dembo and Rasaratnam's assertion that the code imposes penalties for contravention is incorrect.

[1107] ibid.
[1108] A. Babatunde and O. Olaniran 'The Effects of Internal and External Mechanisms on Governance and Performance of Corporate Firms Nigeria' (2009) 7 Corporate Ownership and Control 4.
[1109] ibid.
[1110] See Section 1.3(a) of the 2011 SEC Code.
[1111] A. Dembo and S. Rasaratnam, 'Corporate Governance and Disclosure in Nigeria: An Empirical Study' [2014] Social and Behavioural Science 161-171.

From the above analysis, certain inferences can be made. Firstly, the 2011 SEC Code also appears to favour the principle based-approach of compliance and regulation which, as previously noted, was insufficient under the 2003 SEC Code. The reliance on soft law and self-regulation instead of rigid rules produces a negative result because, theoretically, even if the Code applies to all public companies, the absence of no legally binding rules emasculates any form of robust compliance, sanction or enforcement.[1112] Adewale noted that this is counterintuitive, since it seems to defeat the overall objective of the SEC to improve enforcement and compliance.[1113] Secondly, it is also clear that the Code further absolves any obligation on the part of the board of directors to comply with the Code, since the abovementioned provisions in section 1.3(b) and 1.3(c) of the SEC Code[1114] indicate that directors may choose to avoid complying with the Codes if they wish. In other words, it is a matter for the boards of directors to decide whether to comply. In light of this, one fundamental conclusion can be drawn: the 2011 SEC Code has not in practice brought about any noticeable improvement over its predecessor in terms of compliance, enforcement and sanction since it basically mirrors the 2003 Code in that respect.

It is not surprising nonetheless that a principle-based approach of regulation is adopted by the 2011 SEC Code given that the Nigerian Codes have always been modelled after the UK's Codes, where soft law and principles form the cornerstone of governance. For instance, s. 1.3(a) of the 2011 Code is a direct replica of the UK's 2010 Combined Code of Corporate Governance[1115] which provides *inter alia* that 'the code is not a rigid set of rules; it consist of principles.'[1116] The dominant view and rationale behind this form of regulation in the UK is that corporate governance Codes should be flexible and regularly adapted to respond to constant changes and newly emerging trends;

[1112] See Adewale [2013] 110-118.
[1113] ibid.
[1114] For more details see section 1.3(b) and 1.3(c) of the SEC 2011 Code.
[1115] The Financial Reporting Council's 2010 UK's Combined Code of Corporate Governance, available at https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/The-UK-Corporate-Governance-Code.pdf
[1116] See page 4, principle 2 of the UK's 2010 Code. Similar principles are found under the UK's new 2014 FRC's Code of Corporate Governance: see principle 2, page 4 on Comply or Explain. Available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf >accessed 28th July 2015.

this approach has been the norm around the world and especially in the UK.[1117] Hugill and Siegel endorsed this approach by submitting that the regular adaptation of code and the principle-based approach is beneficial in terms of ensuring the contemporariness and suppleness of the codes.[1118] However, this view has been somewhat rejected by MacNeil and Li, who argue that the frequent modification seems to indicate that the principles and mechanisms of the codes immediately become obsolete or inadequate to tackle current corporate and economic issues as soon as they are reformed.[1119] Therefore, it is apposite to say that although a frequent revision of the Codes theoretically keeps them contemporary, it somewhat undermines their credibility in view of how quickly they are adapted simply to fulfill the goals they were initially intended for. Particularly, the non-statutory nature of the Codes seems to undermine their vigour as regulatory devices.

Essentially, one would argue that it is not unreasonable for Nigeria to modify the code and to learn from practices in the UK. However, the concern in this thesis is that carelessly transplanting corporate governance principles, best suited to the UK's more developed economy, could engender severe misfits and incompatibility issues. For instance, as explained in chapter 3, the UK has a higher compliance rate to voluntary corporate governance Codes, a rate which is far greater than the compliance level in Nigeria. Recent studies reveal that in the UK compliance level to the code is 95%;[1120] meanwhile in Nigeria compliance to the Codes is less than 60%. [1121] Akinpelu, who traced the collapses of large Nigerian companies such as Lever Brothers Nigeria Plc; Cadbury Nigeria Plc; Oceanic Bank Nigeria Plc and Wema Bank Nigeria Plc, has observed that one thing was consistent: he noted that aside from the fund embezzlement by the managing directors, these companies were not forthcoming in complying with the principles of the SEC Code.[1122] This is mostly due to the fact

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1117 A. Keay, 'Assessing Accountability of Boards under the UK Corporate Governance Code' [2015] Journal of Business Law 551.
1118 A. Hugill and J. Siegel, 'Which Does More to Determine the Quality of Corporate Governance in Emerging Economies, Firms or Countries?' [2014] Working Paper Series, No.13-055,Harvard Business School.
1119 I. MacNeil and X. Li 'Comply or Explain": Market Discipline and Non-Compliance with Combined Code' (2006) 14(5) Corporate Governance 486-496.
1120 S. Djankov et al., 'The Law and Economics of Self-Dealing' [2008] 88 Journal of financial Economics 430-435.
1121 See Akinkoye and Olasanmi [2014] 1.
1122 Akinpelu, (2011) 337-344.

that the principle-based or soft law approach of regulation adopted by the SEC Code does not seem to be sufficient to ensure adherence to existing governance principles.

Oladele submitted that the reason why compliance with the UK's Code is very high is not simply because good corporate governance has been absorbed by public companies in the country, but also because the UK's Code has a more robust compliance mechanism which the SEC Code 2011 is currently lacking.[1123] In practice, the UK's combined Code applies a principle called 'comply or explain' to ensure some degree of compliance; such principles are not clearly prescribed under the Nigerian 2011 SEC Code. In basic terms, the 'comply or explain' approach is intended to act as a safety net to encourage compliance, because the intention is to require all public listed companies in the UK to maintain an ongoing obligation to comply with the Code or explain lucidly the reason for non-compliance.[1124] However, while the UK's approach may guarantee compliance to an extent, it is still problematic. Moore noted that since companies could always explain their reason for non-compliance, it renders the principle somewhat redundant and superfluous.[1125] This view is valid especially when seen in light of the fact that the UK's code specifically requires that 'the way in which the core principle of the code applies should be the central question for the board to determine.'[1126] Therefore, the board could decide not to follow the UK's Code provided they could convince the company and regulatory authorities that compliance is unnecessary. For instance, it is noted that compliance with the UK's Code could be disregarded in favour of self-regulation.[1127] In view of this, it is highly unlikely that the 'comply or explain' principle in the UK will be suitable in Nigeria, especially since some companies are known to avoid complying with optional codes. Materially speaking, the 'comply or explain' principle in the UK could easily be circumvented by dishonest directors in Nigeria who might argue that the company has in place personal risk

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[1123] O. Oladele, 'Should Corporate Governance disclosure and Controls in Nigeria be Permissive or Mandatory?' [2008] 19(6) International Company and commercial Law Review 200-209.
[1124] Dine and Koutsias [2013] 216; See also S. Nestor 'Global Corporate Governance Challenges for Public Companies and their Shareholders in the 21st Century: Beyond Berle and Means' in Institute of Directors UK, in *The Handbook of International Corporate Governance: A definitive Guide* (Kogan Page Limited, 2009) 5-6.
[1125] M.T. Moore, 'The End of "Comply or Explain" in UK Corporate Governance?' [2009] 60(1) Northern Ireland Legal Quarterly 85-103.
[1126] See Comply or explain principle 2 on page 4, UK's 2014 Code.
[1127] Moore [2009] 85-103.

management strategies and governance principles, even though such strategies might not be of high standards. Adversely, this would also prevent the SEC from monitoring whether such companies adhere to ethical standards under the Code, as their explanation for non-compliance would mean that the company is no longer covered by the Code. In light of these issues, the author argues in the following section that a rule-based approach of regulation under the 2011 SEC Code is a better and more robust alternative to the existing principle-based approach.

6.4. Is there a Need for a Rule-Based Approach of Regulation under the 2011 SEC Code?

6.4.1 Analysing the Strengths and Weaknesses of Rule-Based Regulation

The above analysis has demonstrated that the principle-based approach of regulation is not a suitable regulatory mechanism under the Code. Therefore, the next issue to determine is what is the most appropriate regulatory approach? Backer has suggested that in a polity where corporate fraud and weak governance are rampant, a rule-based approach of regulation could be a more suitable regulatory system in order to improve disclosure and transparency, enforcement and compliance.[1128] A rule-based approach, in basic terms, is the exact opposite of the principle-based approach of regulation analysed above. It prescribes detailed rules on how companies and their officers should act, with emphasis on compulsory compliance and penalties for violations. As previously highlighted, this type of regulation is strongly promoted by the SOX Act passed by U.S. Congress. The SOX Act is perceived to be a legislative solution to poor corporate governance practices, as highlighted in the aftermath of Enron and the WorldCom collapse.[1129] The general view is that the collapses of Enron and WorldCom were mainly due to poor accounting practice, fraudulent activities and the failure of executives to adhere to basic disclosure and transparency principles.[1130] Therefore, a major impetus behind SOX was to enhance corporate integrity resulting in the introduction of provision on compulsory financial disclosure[1131] and criminal penalties for violation; directors and

[1128] L.C. Backer 'Corporate Surveillance after Sarbanes-Oxley' [2005] 26 Company Lawyer 2005 3-9.
[1129] ibid.
[1130] S. Griffin, 'Corporate collapse and the Reforms of Boardroom Structure-Lesson from America?' [2003] Insolvency Lawyer 214-225.
[1131] See part 3, and 4 of the SOX 2002,which deals with financial disclosure and corporate transparency.

CEOs guilty of fraud now face intensified criminal penalties, including prison sentences, alongside their disqualification.[1132]

Within the context of corporate governance, the benefits and strengths of the rule-based approach of the SOX are attributed to the fact that it has the potential to enhance corporate transparency, disclosure and financial performance by heightening regulatory compliance for companies at all levels. [1133] In this regard, Abarca has noted that the rule-based model of the SOX is a positive way to bring back market confidence and prevent future corporate fraud, because it prescribes mandatory accounting and board practice standards which are necessary to shape the corporate culture and behaviour of corporate actors.[1134] This statement was confirmed by Arping and Sauttner, who examined the benefit of the SOX in a recent study by analysing the impact of the Act on firms' transparency: it was discovered that companies subjected to the SOX became more transparent as opposed to comparable firms which were not subjected to the Act.[1135] In addition, a study conducted by Governance Metrics International (GMI) [1136] in 2005 also revealed that the SOX led to a 10% improvement in the corporate governance performance of US public companies and a decline in fraud incidences as opposed to their foreign counterparts.[1137] This appears to suggest that SOX has had a positive impact on the corporate governance of public companies in the US. However, the subsequent collapse of US companies such as Lehman Brothers Holdings Inc. in 2008 also indicates that, in spite of the useful tenets of the SOX, it cannot prevent every possible fraud and accounting malpractice in every single company. Realistically, however, no regulatory system could or has been known to completely prevent every corporate malpractice and scandal.

[1132] See Part 8, 9 and 11 of the SOX 2002, which deals with criminal penalties for corporate fraud and crimes.
[1133] M.L. Abarca, 'The Need for Substantive Regulation on Investors Protection and Corporate Governance in Europe: Does Europe Need a Sarbanes-Oxley? [2004] Journal of International Banking Law and Regulation 419.
[1134] ibid.
[1135] S. Arping and Z. Sautner, 'Did SOX Section 404 Makes Firms Less Opaque? Evidence From Cross –Listed Firms' [2012] Contemporary Accounting Research 113-1165, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561619> accessed August 12 2015.
[1136] Governance Metrics International Inc. provides institutional investors with corporate governance research, rating and data on over 7,000 public companies worldwide. See G. Anderson, Governance Metrics International: A Detailed Approach (2003) online at <http://www.iijournals.com/doi/pdfplus/10.3905/sp.2003.664338> accessed 22 December 2016.
[1137] Y. Jahmani and W. Dowling, 'The Impact of Sarbanes-Oxley Act' (2008) 6 Journal of Business and Economic Research 57.

In comparison to principles, rules are considered to also reduce arbitrariness in terms of interpretation, enforcement and application, thus ensuring swift and efficient regulation. Korobkin noted that rules provide certainty in terms of adoption, compliance and implementation; 'when you follow a rule, you know that you will be compliant'.[1138] A rule-based system simply requires more effort from the regulator, because details and boundaries need to be fixed in advance.[1139] Consequently, the subjects to the rules - the regulated companies - must act in accordance with the prescribed boundaries set by the rules. In contrast to a principle-based system, which can be interpreted, enforced and applied arbitrarily, a rule-based regulation would appear to be more suitable in terms of ensuring consistency in compliance and enforcement of the corporate governance provisions under the 2011 SEC Code. The fact that it introduces a regimented system for corporations means that a real effort would have to be made by companies to improve their governance practices and stay within the prescribed boundaries of the law.

Rules also have their limits and weaknesses. Ayres and Braithwaite noted that one significant advantage that self-regulation and principles have over rules is that they can more quickly adapt to changing environmental realities and perceived threats than laws imposed by states; they can also be tailored to match the companies.[1140] In this context, it is noted that rules lack flexibility[1141] and could easily be made obsolete by market changes and dramatic growth in industries.[1142] However, as explained above, one of the problems with principles and self-regulation is that they usually lack the force of law to command compliance and enforcement. In this regard, Ayres and Braithwaite suggested that an alternative approach should be 'enforced self-regulation,' whereby companies are allowed to draft their private rules tailored to the unique set of contingencies facing them and such rules should be approved by a regulatory agency.[1143] They posited that the rules should be enforced by the company through established compliance and inspectorial groups and

[1138] R. B. Korobkin, 'Behavioural Analysis and Legal Form: Rules vs. Principles Revisited' (2000) 79(1) Oregon Law Review 23 - 60. See also B. Brugemeestre, J. Hulstijn and Y. Tan, 'Rule-Based Versus Principle-Based Regulatory Compliance' in G. Governatori (ed) *Frontier in Artificial Intelligence and Applications* (JURIX, 2009) 37 – 46.
[1139] See Brugemeestre, Hulstijn and Tan (JURIX, 2009) 38.
[1140] I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation* Debates (Oxford University Press 1992) 110, 129.
[1141] L. E. Ribstein, 'Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002' (2002) 28 Iowa Journal Corporate Law 1.
[1142] K. M. Sullivan 'The Justice of Rules and Standard' (1992) 106 Harvard Law Review 22.
[1143] See Ayres and Braithwaite (1992) 106.

monitored by the state.[1144] The advantage of this model is that not only does it offer flexibility but it also benefits from the fact that the rules have the force of law, as a violation of the privately written and publicly ratified rules would be punishable by law.[1145] Nonetheless, it presents significant weaknesses. For instance, it is noted that companies could still draft their rules in a way that allowed them to evade the spirit of the law and also companies cannot command compliance as effectively as the government.[1146] In addition to this, the company and regulatory bodies would bear an increased and unnecessary cost in drafting, redrafting and approving vast numbers of different rules every year.[1147] Moreover, since the rules apply to different companies, monitoring non-compliance would be difficult, as the state would be required to peruse each and every company's individually drafted rules and procedures. Inevitably, this will also be time-consuming and costly. It would seem that the enforced self-regulation proposed by Ayres and Braithwaite is mostly useful in regulating various types of companies and industries with a wide spectrum of business types, structure and sizes where diverse rules are needed. In this thesis, the proposed rule-based system is only made applicable to public companies in Nigeria which, as previously highlighted, are identical in terms of their configuration and ownership structures. In this context, a rule-based code, which offers universal rules and consistencies in terms of enforcement and compliance, could prove more useful. Rather than requiring companies to draft their own rules and risk non-compliance and insufficient monitoring and enforcement, and incurring unnecessary costs, the state could simply draft the rules tailored to individual industries instead of individual companies.

Another weakness attributed to rules is that their 'clear edges' could encourage organisations to simply evade them by engaging in conducts that are technically exempted but create similar harm.[1148] A good illustration of this weakness can be found in the previous undertakings of Goldman

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[1144] ibid.
[1145] ibid.
[1146] ibid, 124, 125.
[1147] Ibid 120, 122.
[1148] C. R. Sunstein, 'Problems with Rules' (1995) 83 California Law Review 953.

Sachs,[1149] an American multinational investment bank, which was partly blamed for the European sovereign debt crisis in 2010.[1150] Goldman Sachs systematically assisted the Greek government in concealing its national debts through derivatives and a special credit swap index, which were legal in the context of financial arrangements in 2001 but against the spirit of the law.[1151] Theoretically speaking, in this context, a principle-based regulation could have been more effective, as while the concealment of debts may have been completed in accordance with the law it would have been against principles and ethics. But realistically, if principles do not stipulate the right standards or provisions effectively deterring against the unscrupulous actions of an actor like Goldman Sachs, it is highly unlikely that those actions could be efficiently deterred or even give rise to any liability or sanctions under a principle-based regulation. It would appear that governments advocating rules and principles face a similar challenge; that is prescribing adequate and appropriate provisions to proactively deter against future misconducts. Nevertheless, rules - unlike principles - ensure that a violation of the rule is enforced and punishable by law. Thus, rules tend to have greater deterrent capabilities.

For over a decade, the past and present SEC Codes implemented in Nigeria have relied on principles to regulate corporations and improve their governance practices but the result has been disappointing, as evident by some of the recent corporate scandals and collapses in the country.[1152] In addition, compliance and enforcement of the 2011 SEC Code is also inadequate, as has been illustrated. This thesis has demonstrated, with regard to several corporate failings, that some directors in Nigeria have a tendency to act dishonestly and embezzle corporate funds. It is therefore noted that some Nigerian executives are inherently fraudulent.[1153] The 2011 SEC Code has thus stipulated in section 4 that directors 'should consist of individuals with upright personal characteristics, and

[1149] The Goldman Sachs Group Inc., founded in 1869, engages in investment banking, securities trading, assets management and underwriting services, primarily with institutional clients. See Goldman Sachs online at < http://www2.goldmansachs.com> accessed December 21 2016.
[1150] L. Story, L. Thomas and N. Schwartz, 'Wall St. Helped to Mask Debt Fueling Europe's Crisis' (February 13 2010) online at New York Financial Times <http://www.nytimes.com/2010/02/14/business/global/14debt.html?pagewanted=all&_r=0> accessed 21 December 2016.
[1151] B. Balzli 'How Goldman Sachs Helped Greece to Mask its True Debt' (February 2010) online at Spiegel Online<http://www.spiegel.de/international/europe/greek-debt-crisis-how-goldman-sachs-helped-greece-to-mask-its-true-debt-a-676634.html> accessed 21 December 2016.
[1152] Some examples include Spring Bank Nigeria Plc in 2007, Wema Bank Nigeria Plc in 2007 and Oceanic Bank Nigeria Plc in 2009.
[1153] N. Okoye, 'The Corporate Governance Code in Nigeria and the Behaviour and Personalities of Board Members: a Stretch Beyond Norms' [2012] ICCLR 317.

entrepreneurial spirit'.[1154] In this regard, Okoye posited that a board of directors with a good personality composition would be more inclined to act ethically and discharge good governance.[1155] While there is some truth to this statement, it cannot simply be assumed that fraudulent directors in Nigeria will automatically exhibit good behaviours without the appropriate rules requiring them to act ethically. It has therefore been suggested that formal legal incentives must also be present to control directors' behaviours in companies.[1156] Therefore, the author suggests that a more suitable way to truly influence the behaviours of boards of directors under the Code would be to enact the relevant provisions into law by adopting a rule-based approach of regulation. As already illustrated, there are various ways in which the Nigerian corporate governance system could benefit from this method of regulation. Firstly, a rule-based approach of regulation would ensure that the Code is robust enough to regulate the affairs of Nigerian public companies by stipulating mandatory governance principles necessary to enhance corporate transparency, disclosure and good financial performance for all public companies at all levels. Secondly, a mandatory code will not only command more compliance but it will also ensure that the SEC has the mandate to enforce and impose sanctions for violations. Consequently, the problem of inadequate compliance and enforcement created by the Code's existing principle-based regulation would be addressed. As demonstrated earlier, the existing 2011 SEC Code has had little impact in controlling the conduct of corporations in Nigeria, not least because the Code is hardly ever adhered to.

6.4.2 Challenges and Difficulties in Introducing a Rule-Based Code in Nigeria: Implementation, Enforcement and Cost Issues

It has been argued in the previous section that a rule-based regulation could prove more useful in addressing the existing weaknesses brought about by the principle-based regulation of the Code. These deficiencies include inadequate compliance, weak enforcement and an overall weak

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[1154] See section 4.4 of the 2011 SEC Code.
[1155] Okoye [2012] 317.
[1156] H.E. Es, J. Gabrielsson and M. Huse, 'Towards a Behavioural Theory of Boards and Corporate Governance' [2009] 17 Corporate Governance: An International Review 307-319.

regulatory structure. Nonetheless, the author recognises that introducing a rule-based regulation under the Nigerian Code poses real challenges, which need to be surmounted in order to ensure a smooth transition into a mandatory era of governance. Within the existing literature, the challenges of implementing a rule-based regulation for corporate governance are usually considered within the context of issues such as implementation, enforcement and cost. In this respect, it is posited that a rule-based regulation must be implemented appropriately to avoid a one-size-fits-all approach, which is considered by some commentators to create efficiency issues.[1157] Secondly, it is also considered that a reliable regulator must be empowered to enforce non-compliance and impose sanctions for violation.[1158] Lastly, the cost of implementation and compliance must be reasonable and not outweigh its intended values and benefits.[1159] These issues must therefore be examined in order to ascertain how a rule-based Code of governance could be successfully introduced for Nigerian public companies.

The first and obvious issue to address in Nigeria would be implementation. According to Burgemeestre, Hulstijn and Tan, the implementation of a rule-based regulation requires both legal knowledge and expertise about the domain. [1160] In other words, regulators need to understand what type of companies exist in the country, their structures and the industries in which they operate before working out what rules should apply to them. In Nigeria, public companies hail from various industries, such as agriculture, manufacturing, financial services, healthcare, construction and oil and gas.[1161] However, these companies all share similarities in terms of their ownership structures and board structures, in that they all have a dispersed ownership structure[1162] and a unitary board

[1157] B. Burgemeestre, j. Hulstijn and Y. Tan, 'Rule-Based Versus Principle-Based Regulatory Compliance [2009] IOS Amsterdam Press, the Netherlands 37-46.
[1158] ibid.
[1159] C. Leuz, 'Was the Sarbanes-Oxley Act of 2002 Really this Costly?: a Discussion of Evidence From Event Returns and Going-Private Decisions' (2007) 44 Journal of Accounting and Economics 146.
[1160] See Burgemeestre, Hulstijn and Tan [2009] 37.
[1161] See the Nigerian Stock Exchange, 'Q3 Fact Sheet' (2016) available online at <http://www.nigerianstockexchange.com/market_data-site/other-market-information-site/NSE%20Fact%20Sheet/Q3%20Fact%20Sheet%20-%202016.pdf> accessed on 27 November 2016.
[1162] See O. Amao and K. Amaeshi 'Galvanising Shareholder Activism: Prerequisite For Effective Corporate Governance and Accountability in Nigeria' (2008) 82 Journal of Business Ethics 119.

structure made up of executive and non-executive directors.[1163] On this basis, one could argue that implementation and application of a rule-based regulation should be easier to attain, due to the fact that the main internal organs of governance (i.e. the board and shareholders) are constituted similarly. Nevertheless, it is understandable that companies may vary in terms of size and their objectives, which mean that applying a mandatory single rule to all the various public companies in Nigeria could create the problems of a one-size-fit-all approach. One of the criticisms levelled against the one-size-fits-all approach is that although it ensures consistency and certainty, due to the heterogeneous nature of companies, one rule may not meet the needs of all companies and this could lead to unintended consequences such as unnecessary regulation and excessive cost.[1164] Therefore, it is generally recommended that one way to address this problem is that regulations and rules should be tailored to companies' peculiarities and needs.[1165] It would therefore logically follow that a rule-based code of governance in Nigeria could be formulated in a manner that reflects the various industries in Nigeria. This might require the introduction of distinct sections for various industries whereby specific rules are made applicable to their respective companies. For example, with regards to audit and disclosure rules, companies with market capitalisations greater than N1 billion within the manufacturing industries could be required to have a mandatory external audit with a mandatory internal audit. Meanwhile, for smaller public companies in healthcare with market capitalisations of less than N1 billion, a mandatory external audit and an optional internal audit may be required. The advantages of this approach is that not only does it ensure basic standards of corporate governance across all Nigerian public companies through mandatory compliance, but at the same time it also offers some degree of flexibility, as companies would only be required to apply and comply with the rules which specifically apply to their respective industries and economic needs.

The second issue usually discussed with regards to introducing a rule-based regulation is enforcement. Within this context, the commonly asked question is: who should be responsible for

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[1163] See A. Paul, O. Friday and O. Godwin, 'Board Composition and Corporate Performance: an Analysis of Evidence From Nigeria" (2011) 2 Research Journal of Finance and Accounting 64.

[1164] S. R. Arcot and V. G. Bruno, 'One Size Does Not Fit All, After All: Evidence from Corporate Governance' (2007) 4 Journal of Empirical Legal Studies 1041.

[1165] See Burgemeestre, Hulstijn and Tan [2009] 37.

enforcing these rules and how should it be enforced? In Nigeria, the SEC is already empowered with the mandate to administer the Code and monitor compliance.[1166] However, the fact that the Code is merely optional means that the SEC lacks the directive to enforce non-compliance or introduce sanctions for violation. It is postulated in this thesis that under a rule-based approach, the SEC could be empowered to carry out the functions of monitoring and enforcing non-compliance. However, it is noted later in this chapter that the SEC suffers from infrastructure and institutional weaknesses, which must be addressed in order for the commission to effectively carry out these designated functions.

With a rule-based regulation, the cost associated with implementation and compliance is also an issue which deserves consideration. However, it must be noted that cost is not a problem affecting only mandatory regulations. No regulation is cost-free because like every other governance regulation (both voluntary and mandatory), legal expertise and knowledge are required in drafting the rules and principles, and manpower/hours and money are required to achieve compliance.[1167] Understandably, this will create a monetary cost. However, as has been rightly observed by the London Stock Exchange ("LSE") 'there will be a cost in achieving efficient and effective governance, but this should be offset by increases in value'.[1168] In line with this view, it could be argued that the value and benefit of introducing a rule-based Code in Nigeria should outweigh the financial cost. This is because, as previously illustrated in this chapter, a rule-based Code should stipulate for public companies the mandatory governance principles necessary to ensure transparency, accountability and possibly tackle the managerial and audit problems that are said to plague several firms in the country.

Conceivably, the exact cost of introducing and complying with a rule-based Code in Nigeria cannot accurately be pinpointed at this early stage, until a bill has been proposed and enacted.

[1166] N. Ofo, 'Securities and Exchange Commission of Nigeria's Draft Revised Code of Corporate Governance: An Appraisal (2011) 55 Journal of African Law 280.
[1167] Burgemeestre, Hulstijn and Tan [2009] 37.
[1168] London Stock Exchange, 'Corporate Governance for Main Market and Aim Companies' (2012) Published by White page Ltd. available online at http:<//www.londonstockexchange.com/companies-and-advisors/aim/publications/documents/corpgov.pdf> accessed 26th November 2016.

However, an estimate could be inferred from the cost associated with the implementation and compliance with other mandatory governance regulations, such as the US SOX Act. In 2005, Financial Executive International conducted a study to determine the cost of complying with the SOX. For large public companies with market capitalisation of over $750 million, an average cost of $4.3 million was required to comply with the SOX.[1169] In the same study, it was shown that it costs small companies around $1 million to comply.[1170] This is estimated to be just 1% of their annual revenue.[1171] While the exact cost involved in enacting the SOX is not known, it is estimated that the proposal, drafting and enactment of bills in the US normally ranges from $453 to $39,795.[1172] Based on these figures, it could be estimated that the cost of implementing and complying with a rule-based Code in Nigeria will run into millions of Nairas. However, in all fairness, this cost is reasonable considering the fact that the monetary cost suffered by investors and economies for poor corporate governance practices is usually significantly greater than the cost of implementation and compliance. For instance, in the case of Enron, investors/shareholders lost around $60 billion of investments, in which $45 billion was attributed to fraud and poor accounting practices, and $2.1 billion in pension plans, while 5,600 jobs were also lost following the collapse.[1173] Likewise in Nigeria, the Cadbury (Nigeria) Plc and Oceanic Bank Plc financial scandals and account manipulations cost investors around N15 billion and N450 billion respectively.[1174]

[1169] The Financial Executive International, 'FEI Survey on Sarbanes-Oxley Section 404 Cost' (2005) available online at <https://www.sec.gov/info/smallbus/acspc/fei.pdf> accessed on the 27th November 2016.
[1170] ibid.
[1171] Y. Jahmani, and W. Dowling, 'The Impact of Sarbanes-Oxley Act' (2008) 6 Journal of Business and Economic Research 57.
[1172] L. Malm and R. Maness, 'How Many Bills Can State Legislators Introduce?' (December 2015) available online at <https://www.multistate.com/insider/2015/12/how-many-bills-can-state-legislators-introduce/> accessed on 28th November 2016.
[1173] The Associate Press, 'Enron Sentences Will be Tied to Investor Losses' (26 May, 2006) available online at <http://www.nbcnews.com/id/12993408/ns/business-corporate_scandals/t/enron-sentences-will-be-tied-investor-losses/#.WELHqqKLRZo> accessed on 30th November 2016.
[1174] See Akinpelu (2011) 340, 354.

6.5 Challenges in Enforcement and Monitoring of the 2011 SEC Code: Institutional and Infrastructure Weaknesses

The Securities and Exchange Commission ("SEC") plays an important role within the Nigerian corporate governance system as the apex regulator of the capital market and enforcer of the Code.[1175] According to section 13 of the Investment and Securities Act 2007, the SEC, among other functions, has a duty to protect the integrity of the securities market against all forms of insider dealings; prevent unfair and fraudulent practices in Nigerian public companies; safeguard the interest of all investors in the market and to investigate and research all or any aspect of companies dealing in securities.[1176] These functions are essential in advancing the goal of corporate governance in Nigeria, because not only do they ensure that the adequate external monitoring and regulation of corporations is provided but they also highlight the need to protect corporate stakeholders against fraudulent conducts perpetrated by management. Pertinently, it is said that in addition to the above functions, the SEC also has an important responsibility to ensure that the code is adequately enforced and complied with.[1177] However, it is doubtful if this function is easily attainable in practice, as the ability of emerging economies to adequately enforce established regulation is normally impeded by environmental, social and institutional challenges.[1178]

For instance, the Report on the Observance of Standards and Codes in 2011 ("ROSC") highlighted the lack of adequate infrastructure and manpower to investigate public companies dealing in securities as one of the main challenges facing the SEC.[1179] The reason for this is predicated upon two issues: firstly, it is said that the viable institutional tools such as technology and information dissemination systems within the SEC are still underdeveloped.[1180] Secondly, some personnel are not properly trained and equipped with the knowledge of capital markets to adequately

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[1175] See section 13(a) of the *Investment and Securities Act 2007(ISA 2007)*: see Akinpelu [2011] 263.
[1176] O. Olawoye, *Corporate Governance in Nigeria* (LAP Lambert Academic Publishing, 2013) 34.
[1177] N. Ofo, 'Nigeria: Capital Markets-Investors Protection' [2013] International Company and Commercial Law Review 34.
[1178] A. Carvajal, and J.A Elliot, 'The Challenges of Enforcement in Securities Markets: Mission Impossible?*'* (2009) IMF Working Paper NO. WP/09/168, 34.
[1179] Other challenges highlighted include lack of a proper enforcement mechanism, lack of proper infrastructure and manpower to investigate potential corporate governance anomalies, poor transparency and disclosure, etc.: see pages 6-8 of the ROSC.
[1180]Adegbite (2012) 257-276; see also J. E.O. Abugu, 'Technology, Globalisation and the Nigerian Securities Market' [2003] Journal of International Banking Law and Regulations 284-292.

deal with securities issues.[1181] Evidently, this is a setback for corporate governance regulation in Nigeria, because it means that the SEC in practice struggles to perform its regulatory function to effectively monitor the level of compliance and enforce the Code.[1182] Particularly, Oladele has noted that the administrative powers granted to the SEC to investigate fraud under the ISA are also made redundant, because the lack of adequate resources and manpower to carry out these functions means that fraud cases are not effectively addressed on time.[1183] He observed that the SEC's timely investigation of insider trading and violator of securities listing rules, as required by section 115 of the ISA 2007, has always been a difficult task for the commission to attain due to delays in concluding a supposed investigation.[1184] This is a serious impediment to fraud prevention in Nigerian firms because, in practice, indictment and necessary sanctions will only be imposed following conclusive evidence of culpability made through investigations provided by the SEC. It is therefore accurate to say that due to these issues and the delays in investigation and provision of definite evidence, perpetrators of fraud within Nigerian companies could continue to self-deal without facing any sanctions.

There is also the concern that the poor investigation process involving Nigerian criminal cases also acts as a hindrance to the investigation of any alleged fraud cases by the SEC and subsequent enforcement of the Code.[1185] In Nigeria, criminal cases relating to fraud and market manipulation normally require police investigation, which is later brought to court by the SEC on the finding of sufficient evidence.[1186] Unfortunately, in practice, the vast majority of cases fail to make it past the investigation stage, since most police investigators are not familiar with laws regulating securities.[1187] For instance, Ibuakah, a corporate governance officer in Nigeria, has correctly noted that, 'some police investigators in Nigeria are unfamiliar with what a stock entails and we would

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[1181] See Adegbite (2012) 257-276.
[1182] N. Ofo, 'Nigeria: Capital Market-Investors Protection' [2013] 24(6) International Company and Commercial Law Review. 34-35.
[1183] O.O. Oladele, 'Information Equalisation and Candour in Public Offers of Securities in Nigeria' [2008] International Company and Commercial Law Review 311-324.
[1184] ibid.
[1185] O. O. Oladele, 'Disclosure in Secondary Securities Transactions in Nigeria' [2008] (19)(8) ICCLR 254.
[1186] P. N. Okoli and C. I. Umeche, 'Attitude of Nigerian Courts to Illegally Obtained Evidence' [2011] 37(1) Common Law Bulletin 81-90.
[1187] ibid.

have to explain to them what it means'.[1188] In particular, it is also thought that not all investigators/prosecutors within crime agencies in Nigeria are familiar with crimes involving equities and securities, since securities law in Nigeria is still evolving and has so many grey areas.[1189] Consequently, with the lack of full understanding or knowledge of securities law and the limited resources available to the police force and the SEC, it stands to reason that they will be incapacitated or less motivated to deploy the necessary time and effort required in investigating a crime.

Even if the case is brought to the court, the procedural difficulties associated with the courts system in Nigeria may stand as an obstacle against enforcement. In Nigeria, as with many other common law countries, it is required by criminal procedure, on the basis of standard of proof, that the prosecution must establish its case beyond reasonable doubt with regards to all criminal elements.[1190] However, the hard evidence, witness statements and scienter required for this are typically difficult to accumulate in securities fraud and market manipulation, due to the secrecy of the crime and the lack of adequate resources to gather such evidence. Occasionally, in light of this, cases sometimes fail on procedural defects or technicalities.[1191] One typical example where technicalities emasculated the SEC's ability to carry out their function was in the case of *Securities and Exchange Commission* v *Owena Bank Nigeria Plc*,[1192] where the courts reversed the SEC decision to suspend shares on the basis that while the investigation was taking place, the SEC had exhausted its 12 month statutory limitation period for initiating an action to suspend shares in Owena Bank Plc.[1193] The courts decided that the action to suspend the shares was consequently null and void. This case particularly highlights the devastating impact a delay in investigation can have on fraud cases. Clearly, if the SEC had been swift in concluding its investigation, the courts would not have dismissed the case against them and the perpetrators would have been properly sanctioned in accordance with the securities laws of

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1188 See, I. Ibuakah at the 'International Conference on 'Key Corporate Governance Issues in Emerging Markets: Theory and Practical Executive' (June, 12, 2012) Centre For Corporate governance, HHL Leipziq Graduate School of Management, Germany.
1189 N.S. Okogbule,'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' [2006] 13(1) Journal of Financial Crimes 92-106.
1190 P. Anyebe, 'Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shifts' [2011] 1 Nials Journal on Criminal Law and Justice 152.
1191 O. Doherty: *Criminal Procedure in Nigeria: Law and Practice,* (Blackstone Press Limited, 1999) 317-320.
1192 [1997] 8 NWLR (pt.515).
1193 For more details on the case see Ankinpelu [2011] 267 and 317.

Nigeria. This raises serious concerns in Nigeria, because even if the SEC may initiate a criminal action against those in charge of fraud and manipulation of market securities, the overall issue of delay in the SEC's investigation, as illustrated above, has a negative consequence by hindering the necessary enforcement capable of ensuring discipline within the capital market. In view of this, it is not surprising that decided cases in this area are relatively scarce because, although certain cases of insider trading violations and market manipulation in publicly listed companies are frequently recorded, it is noted that the SEC has been very slow to respond.[1194] In contrast to other common law countries, the Security and Exchange Commission in the US has been very proactive and has successfully brought insider trading cases against violators, such as corporate officers and directors, who traded in securities after receiving confidential information for providing services to companies where they traded.[1195]

Despite the commendable effort and objectives of the SEC to protect market integrity in Nigeria, it is correct to say that the provision of the securities laws has suddenly become ineffective due to the institutional challenges presented above. Particularly, even in light of the current market violation in the country, it is difficult to ascertain any cases where the securities laws on insider dealing have been successfully applied or where a person has been penalised for violation of the ISA provision on insider dealings or general provisions of the SEC Code. Al-Faki described this as a grave setback in the Nigerian corporate governance system because it seriously undermines the SEC's ultimate objective, which is to develop the capital market, prevent fraudulent activities and advance market competitiveness.[1196] In particular, a serious concern here is that both local and

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[1194] I. Salami, 'The Effect of the Financial Crisis on the Nigeria Capital Market: a Proper Regulatory Response' [2009] Journal of International Banking Law and Regulation 612.

[1195] A recent example is the Wall Street trading scandal involving Raj Rajaratnam in 2011. He was investigated and charged by the SEC for trading with corporate secrets provided to him by an informant. He was sentenced to 11 years in prison - one of the longest jail sentences for insider dealing. For more details please see Daily Mail, "Billionaire Convicted in Wall Street's Biggest Insider Trading Scandal is jailed for 11 years" [14th October 2011] Available online at <http://www.dailymail.co.uk/news/article-2048914/Raj-Rajaratnam-convicted-Wall-Streets-biggest-insider-trading-scandal-jailed.html> accessed on 20 July 2015.

[1196] Musa Al-Faki, 'The Incidence of Inaccurate Corporate Financial Reporting in Nigerian Capital Market: The Role of Securities and Exchange Commission in preventing future occurrences' (Director General's Speech at the seminar organised by the Shareholders Association Ibadan Zone, June 14, 2007), available at<*http*://www.sec.gov.ng/uploads/speeches/THE_INCIDENCE_OF_INACCURATE_CORPORATE_FINANCIAL_REPORTING.pdf>accessed November 7, 2014.

foreign investors may lose the confidence in investing in a market that fails to provide basic protection for investors against insider dealings.

In light of the above challenges, the SEC needs to first of all implement professional technical training and programmes to educate its personnel, especially its investigators, on securities laws and the operation of the capital market. This will ensure that the SEC has the required expertise and skills to investigate and supervise cases relating to securities. Furthermore, in order to tackle the issue of poor infrastructure and the unavailability of information, the SEC needs to invest more in information technology systems for the dissemination of securities information to investors. It is observed that annual accounts and other company information in Nigeria are not always readily and easily available to investors.[1197] The market can only be fair in a regime that ensures access for all investors to timely and adequate securities information. In order to attract foreign investments into Nigeria, it is especially clear that the SEC needs to enhance their oversight and monitoring functions and ensure that a viable, transparent and well-regulated capital market is available to do business.

6.6 Proposing a Stakeholder Approach of Governance under a Rule-Based Code in Nigeria

As examined in chapters 2 and 3, the Nigerian model of corporate governance shares similarities with the UK/US model, which both have a strong shareholder element. This means that not only is shareholder supremacy advocated in these countries but also, although companies are recommended by their companies' statutes to recognise the interests of stakeholders,[1198] these regulations do not really offer provisions for stakeholders' actual participation in the governance of their public companies. In this regard, it is noted that the two main features which underlie corporate governance in the UK/US (and likewise in Nigeria) are investor ownership and delegated

[1197] C. A. Udora 'The Role of the Securities and Exchange Commission in the Resolution of Capital Market Dispute' Seminar Paper presented at the Capital Market solicitors Association in Lagos on 15th September 2010 available online at http://www.nigeriastockalert.com>accessed on 8th November 2014.

[1198] E.g. see section 172 of the UK's CA 2006 and section 279(4) of the CAMA: however, as analysed in chapter 4, the CAMA is only employee-friendly; it excludes other stakeholders.

management.[1199] The former implies that ultimate control over the firm often lies partly or entirely in the hands of stockholders at general meetings and the latter implies that the day-to-day control of the company is the responsibility of directors.[1200] This idea essentially emphasises the conventional view that corporate governance is a matter for the management and shareholders alone.[1201] However, this notion has been challenged on the basis that the actors of corporate governance transcend the board and shareholders at general meetings; it includes other stakeholder actors.[1202] This latter line of reasoning advocates the German stakeholder-oriented model. As previously analysed in chapter 2, the stakeholder model is strongly considered as one of the ways to truly ensure accountability and responsibility towards diverging interests in the company. It is thought that, through this model, inequality within the corporate setting could be mitigated, transparency and monitoring enhanced, and long-term economic value could also be added to the company.[1203]

Although, the agenda of this chapter is to recommend a rule-based Code in Nigeria, it is worth considering how a stakeholder model of governance might fit into this context: this is mainly because of the supposed benefits of increased accountability, monitoring and transparency a stakeholder model could bring to Nigerian public companies. As examined in chapter 2, Germany has successfully devised a way in which to integrate a stakeholder model into their corporate structures. This includes the use of stakeholders' representatives on a special supervisory board, whereby they are sometimes granted a determining say on the company's affairs.[1204] However, this setting requires a two-tier board structure, as there is the management board on the one hand and a separate supervisory board on the other hand. In contrast, Nigeria has a unitary board structure similar to the UK/US, comprising a single board made up of both executives who are responsible for the running of the company and the non-executives who are responsible for supervising the functions

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[1199] R. Kraakman, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford university Press 2009) 65.
[1200] ibid.
[1201] J. Matheson and B. Olson, 'Corporate Law and the Longterm Shareholder Model of Corporate Governance' (1992) 76 Minnesota Law Review 1313.
[1202] M. Clarkson, 'A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance' (1995) 20 Academy of Management Review 92.
[1203] Dine and Koutsias 105, 106
[1204] Ibid, 241, 242.

of the executives.[1205] The author is not advocating for the actual inclusion of individual stakeholders, such as employees, consumers, and creditors, in the actual running of the company or the replacement of the unitary board structure in Nigeria with the German two-tier board structure. It is recommended in this thesis that there should be mechanisms, which allow stakeholders' representatives to sit on the non-executive board, undertaking advisory roles whereby they are permitted to directly voice their concerns to the directors of the company. The benefit of this approach over the existing approach, where directors are merely required to take into account the interests of stakeholders, is that this new approach should actually allow stakeholders' representatives, by means of their advisory/supervisory roles, to influence the decisions of the executive directors to a certain extent and to have a decisive say on corporate matters which affect individual stakeholder groups.

6.7 Conclusion

It was established in this chapter that the principle-based approach of the Code, which relies on soft law and mere principles, lacks the required legal force to effectively regulate the affairs of public companies in Nigeria. It was argued that since the Code is merely optional, important governance provisions and principles are easily flouted, as there is no legal obligation for companies to comply. This observation is in line with the study conducted by Akinkoye and Olasanmi who found that several public companies surveyed on the NSE were not complying with important governance provisions of the Code. The author particularly questions if the Code, which promotes voluntary self-regulation, is effective in addressing corporate issues such as the directors' conflict of interest which, as has been demonstrated, seems to plague several Nigerian public companies. In this regard, it was submitted that directors could not be expected to automatically act ethically in discharging their duties without any legal incentives or law to control their behaviours. Directors of large companies are more likely to carry out certain instructions if the law insists upon it. It was also

[1205] See Paul, Friday and Godwin (2011) 64.

shown that enforcement of the 2011 SEC Code is weak because the SEC has no legal mandate to enforce non-compliance and impose sanctions on those who violate it.

In light of the above weaknesses, a rule-based approach of regulation similar to the US SOX Act was recommended: not as a perfect model, but as a necessary (alternative) approach to improve compliance and enforcement, and also to strengthen corporate governance in Nigeria. It is envisioned that the focus on mandatory compliance under a rule-based Code would stipulate core governance values/principles for public companies, necessary to combat corporate malpractices in Nigeria. As demonstrated above, several studies have shown a decline in corporate fraud cases in the US following SOX's enactment, as opposed to the pre-SOX era. However, it has been highlighted that a rule-based approach has some limitations and challenges, which could hinder its success. It was recognised that rules are more prone to circumvention and may be difficult to adapt to fast changing circumstances as opposed to principles. Therefore, the challenge in Nigeria would be to ensure that the rules are adequately and timely reformed to respond to changing corporate environments. It was also highlighted that due to the heterogeneity of companies, implementation of rules could be difficult to attain. However, it was submitted that the similarities in the structures of public companies in Nigeria means that an implementation of a universal code should prove less difficult. Moreover, to avoid difficulties in application, and to prevent a one-size-fits-all approach, it was also suggested that the rules under the Code should be tailored to various industries. Cost of implementation and compliance was also considered as a challenge, which must be surmounted. Realistically, however, cost is an issue which affects both rules and principles, as no regulation (whether voluntary or mandatory) is cost-free. All forms of regulation require time, expertise in drafting, implementation and compliance, all of which undoubtedly result in monetary cost.

In terms of enforcement, it was recommended that the SEC should be empowered to enforce the rule-based Code. It was nevertheless acknowledged that the SEC faces institutional weaknesses, such as inadequate manpower, infrastructure, and expertise, which have the potential to impede the SEC's ability to enforce the Code. In this context, the author proposed that the commission should invest more in information technology systems for the timely circulation of information within the organisation and externally to investors and other regulatory bodies. There is also the need for the SEC to offer professional technical training to its personnel, especially its investigators, on matters relating to securities and corporate fraud cases. This will ensure that the SEC has the required expertise and skills to investigate and supervise corporate malpractices in Nigeria. The author concludes by proposing that, as part of the agenda to strengthen the position of stakeholders in Nigeria, the Code should also provide mandatory provisions allowing stakeholders' representatives to sit on the non-executive board, discharging oversight and advisory roles.

Chapter 7: Conclusion and Recommendations

7.1 Introduction

This chapter summarises the main issues, findings and recommendations of this research. The author posits that reforms are needed under the CAMA 1990 and the 2011 SEC Code in order to strengthen the regulatory framework of corporate governance for public companies in Nigeria. Firstly, it proposes reforms to improve the existing governance provisions under the CAMA, which pertain to directors' accountability, shareholders and stakeholders' protection, and auditing. Secondly, reforms relating to the regulatory approach of the Code are proposed to improve its enforcement and compliance mechanisms, and particularly to enhance its overall effectiveness in terms of regulating the practices of public companies in Nigeria.

7.2 Concluding Remarks: a Summary of the Key Issues, Findings and Recommendations

In chapter 2, it was revealed that the UK/US and Nigeria's adherence to the Anglo-American model of corporate governance, which promotes the neoliberal form of capitalism, accords primacy to shareholders, whereby the company is seen as a capitalist concern managed mainly for the benefit of the shareholders. The problem with this model is that, as highlighted in this thesis, aside from the fact that it encourages managerial abuse of powers, it can also create inequality in the company, whereby the interests of non-shareholder constituencies are not properly protected or can be ignored in some cases, all in the name of shareholders' wealth maximisation. The author acknowledges that the emphasis on shareholder supremacy in these countries is a natural response to peculiar corporate issues, such as the potential agency problem (i.e. conflict of interests between management and shareholders), created by the separation of ownership and control currently found in their public companies. However, it was submitted in chapter 2 that a good corporate governance system should ensure that in addition to protecting shareholders' interests, other non-shareholder constituencies should also be protected. The rationale for this, as previously explained, is that stakeholders are considered to constitute a valuable resource in terms of ensuring the overall growth and success of a company and, as such, it is only logical that their interests should also be protected. In this regard, the

UK has made some efforts to recognise the interests of other stakeholders by requiring that directors, in section 172 of the CA and in addition to promoting the interests of shareholders, should also take into account/act in the interests of employees, consumers, suppliers, creditors and the environment. This is in contrast to the situation in Nigeria, where it was shown in chapter 4 that comparable provisions under the CAMA only recognise shareholders and employees, thus excluding other stakeholders. It was argued that this approach undermines stakeholders' protection and encourages corporate irresponsibility in Nigeria, as companies could carry out their activities without considering the potential harm to corporate outsiders. It was therefore suggested that Nigeria should learn from the UK by introducing provisions which also recognise other stakeholders' interests. However, the UK's approach in section 172 is not without its flaws. As highlighted above, not only is it considered to impose a rather vague obligation on directors, but it is also thought that considering all the various interests could also slow down decision-making processes. Therefore, the challenge for directors in Nigeria would be to ensure that the various stakeholders' interests are adequately balanced with that of the shareholders.

It was presented in this thesis that one of the ways to curtail the conflict of interest and to minimise the expropriation of shareholders by management is to impose duties on directors, and to also provide shareholders with adequate statutory tools to enforce directors' breaches of duties. In this regard, it was revealed in chapter 4 that directors in Nigeria are not subjected to adequate accountability and constraints under the CAMA because the shareholders' remedies designed to tackle directors' wrongdoings, such as the derivative action, are inherently narrow. This was demonstrated with reference to the cases of *Yalaju v A.R.E.C.*[1206] and *Agip(Nig) v Agip*,[1207] which stipulate that claimants relying on derivative actions must establish fraud on the part of directors, whereby the term fraud is narrowly interpreted to mean conducts which constitute self-serving elements or misappropriation. The problem with this approach is that directorial misconducts which are not of a fraudulent nature become difficult to address under a derivative action, even though the

[1206] Supra.
[1207] Supra.

misconduct appears to result in significant losses to the company. It was argued that this also has the potential to encourage directors to abuse their powers more in Nigeria, as breaches of duties are not effectively addressed. In this regard, it was suggested that a more encompassing remedy, similar to the UK's derivative claim, should be introduced under the CAMA. As explained in chapter 4, the UK's derivative claim, in contrast to the Nigerian action, permits a claim in respect of all directors' breaches of duties - default, breach of trust and negligence -without the need to show fraud. However, one of the criticisms levelled against the UK's remedy is that this broad approach could lead to frivolous and vindictive claims by shareholders. However, it is submitted that the strict factors/conditions in section 263 of the CA, which a shareholder has to prove before continuing a derivative claim, normally act as a deterrent against frivolous suits in the UK. However, it was recognised with reference to the case of *Franbar Holding v Patel*[1208] that claimants in the UK normally face difficulties in satisfying the conditions in section 263; not only are they difficult to satisfy but a failure to meet any of the conditions would also result in the claim being dismissed. Therefore the factors in section 263 have been considered as obstacles to shareholders wishing to bring a claim in the UK. However, it is considered that the conditions are necessary in order to deter unmeritorious claims by shareholders.

In chapter 5, reforms to improve the auditing framework under the CAMA were recommended. It was shown in this study that the statutory framework of auditing in Nigeria is insufficient, as the CAMA suffers from fundamental weaknesses which hinder auditors' and audit committees' functions and responsibilities. For instance, the CAMA's failure to provide provisions enabling auditors to access information from overseas subsidiary companies is seen to undermine their ability to effectively acquire important financial statements needed to detect financial irregularities in certain companies. Secondly, it was argued that the failure of the CAMA to prescribe criminal liability for auditors further undermines their overall accountability towards the company and increases their chances of deliberately falsifying their reports. As explained in chapter 5, the auditors who were responsible for falsifying audit reports in the Cadbury scandal were never

[1208] Supra.

found criminally liable, and even the N20 million fine imposed on them was subsequently challenged.[1209] Additionally, it was also demonstrated that the audit committee, which constitutes an important financial probing tool, also lacks the required independence and integrity to adequately carry out their roles because of the committee's membership composition. The committee includes executive directors, which essentially exposes the members to undue influence from the directors who sit on the committee. For example, in Cadbury Nigeria Plc, it is thought that the members of the audit committee connived with the manager and some executive directors to manipulate their account.[1210] In light of these weaknesses, it is suggested that a similar approach to the UK's approach under the CA should also be prescribed under the CAMA, granting auditors rights to information from overseas subsidiary companies, and outlining their criminal liability. It was also suggested, in line with the approach in the UK and the US, that the audit committee should also be comprised of only non-executive independent directors in order to enhance the independence and integrity of the process. It is anticipated that these reforms are necessary in order to fortify the audit framework under the CAMA, in terms of regulating auditing practices and also improving financial reporting in Nigerian public companies.

In chapter 6, it was demonstrated with reference to pertinent studies[1211] that the principle-based approach of regulation adopted by the 2011 SEC Code largely encourages non-compliance, results in weak enforcement, and renders the Code ineffective in terms of regulating corporate activities in Nigeria. Consequently, the Code is seen as a mere menu of options, whereby its fundamental governance provisions can be disregarded at the behest of the company and its directors. In this context, the author suggests that in order to improve compliance and enforcement of the Code, a mandatory regulatory approach similar to the rule-based approach of the US SOX Act is necessary. As explained in chapter 6, a mandatory approach should afford the Code with the necessary legal backing to command compliance. Furthermore, the emphasis on regulatory compliance with governance standards could also have a positive impact on the governance performance of public

[1209] See Akinpelu (2011) 341.
[1210] ibid, 340-341.
[1211] E.g. see Akinkoye and Olasansmi (2014) 13.

companies in Nigeria. Alternatively, it was highlighted that the 'comply or explain' principle under the UK's Code might ensure compliance to some degree, as companies are required to either comply or explain their non-compliance. Nonetheless, attention was drawn to the fact that dishonest directors could still evade its principles by simply justifying non-compliance on the basis of optimum financial performance or self-regulation, thus rendering the Code toothless. It was however demonstrated that a rule-based regulation, like other forms of regulation, also has its limitations. For instance, other than the fact that the rules may not be flexible enough to respond to fast changing corporate environments, there is also the view that rules may also be evaded where the regulated subjects engage in conducts which are not clearly prohibited by the rules, even though such conducts lead to similar harm. It was suggested therefore that timely reforms would be needed to keep the rules contemporary in order to tackle emerging corporate issues in Nigeria. There is also the concern that in addition to the cost of implementation and compliance, universal rules could be difficult to implement because of the differences in corporate structures. As recommended in chapter 6, this issue could be mitigated if the rules are specifically tailored to various industries, rather than universally applied to all public companies in Nigeria. Against this backdrop, the author does not present the rule-based approach as a perfect model, and while it could improve compliance and enforcement, and possibly even strengthen corporate governance practices in Nigeria, the above-mentioned weaknesses seem to suggest that it might not be suitable in every circumstance. The current situation in Nigeria demands reform and – while no governance system is perfect - the intelligent implementation of the range of reforms suggested in this thesis will undoubtedly benefit Nigerian companies and the wider economy as a whole.

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