Towards A Reformed Governance In Nigeria: A critique of the shortcomings of the current corporate governance regime and proposals for its reform, drawing from the UK and the US corporate governance models and the OECD Principles.

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ABSTRACT

This thesis argues that whilst there have been encouraging improvements in the regulation and practice of Corporate Governance in Nigeria, as evident with the release of the Nigerian Code of Corporate Governance (NCCG) in 2016, Nigeria still requires significant improvement to be in line with international best practice.[1] This thesis, therefore, recommends far-reaching reforms to key components of any corporate governance system, such as the structure and composition of the board, executive remuneration, disclosure, transparency as well as shareholders' rights and interests, and enforcement of regulations.

To this end, the thesis adopts a comparative analysis of the main regulatory framework and instruments for corporate governance in Nigeria and the United Kingdom, the OECD principles, and the USA legal instrument that deals with the subject of corporate governance. More importantly, the thesis argues that it is of paramount importance that CG structures are developed in the context of the firm while taking cognizance of local peculiarities to achieve desired organisational outcomes

A detailed analysis of the distinguishing features in various corporate governance models adopted in different jurisdiction was done in order to identify an approach or a combination of approaches that are most suited to Nigeria. Models such as the stakeholder model and the German concessionary model were analysed and as a result, the stakeholder model is considered most suited to Nigeria.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AGM	Annual General Meeting
ADR	Alternative Dispute Resolution
BIS	Bank for International Settlements
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CAC	Corporate Affairs Commission
CACG	Commonwealth Association for Corporate Programme
CBN	Central Bank of Nigeria
CAMA	Companies and Allied Matters Act
CG	Corporate Governance
EFCC	Economic and Financial Crime Commission
FDI	Foreign Direct Investment
FITC	Financial Institute Training Centre
FRC	Financial Reporting Council
FRCN	Financial Reporting Council of Nigeria
FSA	Financial Service Authorities

FRQDA	Financial Reporting Quality Measured by the Discretionary Accruals of firm
ICPC	Independent Corrupt Practices Corruption
IMF	International Monetary Fund
IAU	Internal Audit Unit
LISE	London International Stock Exchange
NSEC	Nigeran Stock Exchange Commission
NIEO	New International Economic Order
NEDs	Non-Executive Directors
NSE	Nigerian Stock Exchange
NCCG	National Code of Corporate Governance
NAICOM	National Insurance Commission
OECD	Organisation for Economic Co-operation and Development
PCAOB	Public Company Accounting Oversight Board
PACFCG	Pan-African Consultative Forum on Corporate Governance
PENCOM	National Pension Commision
ROSC	Report on the Observance of Standards and

	Codes
SOX	Sarbanes-Oxley Act
SAP	Structural Adjustment Programme
SEC	Security and Exchange Commission
SID	Senior Independent Director
UKCG	United Kingdom Code of Corporate Governance.
UNDP	United Nations Development Programme
USA	United State of America
UK	United Kingdom

LIST OF LEGISLATION

- Financial Reporting Council of Nigeria Act NO.6 of 2011
- Corporate Allied Matter Decree (CAMD 1990
- Companies and Allied Matters Act of 1990
- Sarbanes-Oxley Act 2002
- Companies Ordinance of 1922
- UK Companies Act 2006
- UK Companies Act of 1948
- Nigerian Enterprises Promotion Decree No 4 of 1972
- Companies and Allied Matters Act Cap, C20, Laws of the Federation of Nigeria 1990, amended in 2004 CAMA
- Central Bank of Nigeria Act No 7 of 2007
- Bank And Other Financial Institutions Act 2004
- Central Bank of Nigeria Act 2007
- BOFIA Cap B3 Laws of the Federation of Nigeria (LFN) 2004
- NAICOM Act [Cap 117 LFN 2004,]
- PENCOM Act 4 of 2014
- FRC Act No 6 2011, NDIC Act [No 16 2006]

- NCC Act [2003]
- ISA No 29 0f 2007
- Investment and Securities Act 1999
- Securities and Exchange Commission Act [SECA] 1988
- US Securities Exchange Act of 1934 (15 U.S.C)

LIST OF CASES

- Trenco (Nig) Ltd. V. African Real Estate Ltd (1978) All N.L.R 124
- Longe v First Bank of Nigeria (2010) (Pt. 1189) 1 SC
- Artra Industries (Nig) Ltd v. NBCI (1998) 4 NWLR (Pt.546)357
- Mrs Olajumoke Akinwale Oguntimehin (substituted for late Mr Benjamin Onilari), Olaoni Nigeria Limited, Mrs Hannah T.Onilari vs Trade Bank Plc CA/L/340M/2011
- Federal Republic of Nigerian v. Ajayi (1998) 3 F.B.T.L 32.

LIST OF TABLES

LIST OF FIGURES

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DEDICATION

I dedicate this thesis to my parents Alhaji Fatai Akinade and Alhaja Bintu Akinbade. Most importantly my husband, Olakunle Jimoh, my beautiful daughters Zahra and Zayna for their constant support and unconditional love.

I love you all dearly.

CHAPTER ONE

Conceptual Framework

1.1 Background

Nigeria needs a reformed corporate governance system to reflect global best practices by learning from developed economies[2] and better developed systems of corporate governance. There is a link between corporate governance [herein after CG] and performance, which could be positive when the right principles are followed and negative when the best practices are jettisoned. Reforming critical components of the corporate governance system, specifically the structure and composition of the board, executive remuneration, disclosure, transparency as well as shareholders' rights and interests, is the solution to the current state of distrust and poor performances in the business landscape in the country. Drawing from international patterns that exist in specific places such as the United Kingdom, the United States, and the OECD principles, the reform being proposed is adjustable to the Nigerian legal, political, and economic realities. As the thesis will be drawing from these countries' international experience, it is important to note that there are variations in the corporate governance system in the USA, UK, and Nigeria. The main distinction between the UK and the US CG lies in its regulatory approach and style of governance adopted by each country. The US's regulatory approach is a rule-based approach which is determined by the Sarbanes-Oxley Act of 2002 and others while the UK's approach is a

[2] A developed economy is typically characteristic of a developed country with a relatively high level of economic growth and security. Standard criteria for evaluating a country's level of development are income per capita or per capita gross domestic product, the level of industrialization, the general standard of living, and the amount of technological infrastructure [https://www.investopedia.com/terms/d/developed-economy.asp accessed on 11/02/2020]

principle-based approach with its regulations provided by a number of different regulations, rules, and recommendations in form of Codes. Nigeria's approach to corporate governance over the years lean towards the traditional Anglo-Saxon model due to its colonial legacy and ties with the UK and the US. The proposal for the reform will be achieved by analysing and having a comparative study of the system of corporate governance in Nigerian, the United Kingdom, United States, and the OECD as an international benchmark.

Also, in establishing the thesis, this work argues that there are two main aspects to CG: corporate governance structure and corporate governance process.[3] Corporate governance structure refers to the framework that helps organisations to pursue their scope and goals within the regulatory, social, and market environment.[4] Though CG structures vary on the ground of institutional, political, and social traditions, it is of paramount importance that CG structures are developed in the context of the firm while taking cognisance of local peculiarities so as to achieve desired organisational outcomes. The failure to consider the local peculiarities, this thesis will argue, contributes to the ineffectiveness of corporate governance codes as a result of non-compliance or seeking to exploit loopholes at every opportunity. For example, in some jurisdictions, national diversity or distinct cultural identity is crucial in the implementation of codes of corporate governance because business owners and managers resist codes likely to impact their revenue generation or personal interests[5]. The argument has been that it is imperative to consider the country's political

[3] Liang Guo Clive Smallman Jack Radford, (2013),"A critique of corporate governance in China", International Journal of Law and Management, Vol. 55 No. 4 Pp257 – 272

[4] Osei, E (2004), A Winning Governance Structure: Basic Components of Corporate Governance Structure That Supports a Winning Corporate Strategy and Enterprise Value Enhancement; Tricker, A (2009); Essentials For Board Directors: An A-Z Guide. Bloomberg Press. New York.

[5] Dine, J., and Koutsias, M., (2013) "The Nature of Corporate Governance: The Significance of National Cultural Identity" Queen Mary University of London, School of Law Legal Studies Research Paper No. 140/2013 https://core.ac.uk/download/pdf/16388018.pdf Accessed on 24/01/2018

ideology and the cultural difference before formulating codes of corporate governance to make users comfortable and find their identities within corporate governance practice.[6]

Apart from the consideration of the ideological and cultural differences, the corporate governance process is about the interaction among the owners, directors, legal and regulatory agencies based on existing organisational structures. CG process accounts for the interaction between regulations and company procedures aimed at implementing such regulations and how the different players are affected. Failure to consider these will ultimately undermine the effectiveness of corporate governance practice because process and structure are crucial to the effectiveness of organisations in any jurisdiction.[7]

The subject of corporate governance in the emerging economies of Africa has not been given enough academic attention. This work will provide thorough insights into corporate governance practices in Nigeria. It will identify existing legislation and regulations, critically examine the laws and the role of government agencies in comparison to what exists in the United Kingdom, the United States of America and the OECD. This will be within the view to establishing a legal and regulatory framework to safeguard shareholder investments and ensure a secure and sustainable business environment in the country.

This thesis must be seen as contributing from a theoretical perspective because, in practical experience, it has been argued that rules, models and institutions transferred

[6] Ibid

[7] Okpara, G.C., and Iheanacho, E., (2014) Banking Sector Performance and Corporate Governance in Nigeria: A Discriminant Analytical Approach *Expert Journal of Finance* No. 2, 10-17

wholesale from western jurisdictions have not delivered optimal results in Africa.[8] This is due to the low level of consistency between the transferred system and the local context. This thesis thus seeks to demonstrate how transferred rules can be adapted to deliver optimally by answering the question: how can Nigeria evolve a corporate governance system that provides for all: the shareholders, the corporation, other stakeholders[9] , and the economy?

This work will be a comparative analysis of the main regulatory framework and instruments for corporate governance in Nigeria and the United Kingdom and the United State. It will also examine and consider the principle of CG recently revised by the OECD as an international benchmark. This sort of 'rainbow comparison' is necessary because of the recently released Code of Corporate Governance in Nigeria, whilst drawing largely from the UK Code, the Code also has features of the American System as well as some underlying OECD principles of CG. However, the argument for a comparative analysis between the UK and Nigeria is compelling for two reasons. First, Nigeria's company law system has been historically linked to the United Kingdom system, a link which dates back to the colonial era. This has, in principle, accorded many shareholders the opportunity to enjoy similar legal rights as shareholders in Anglo-Saxon economies. Despite this, there is a high level of information asymmetries, deep-rooted corruption[10] , and a general disregard for the

[8] Yakasai, G. A. (2001). Corporate Governance in a Third World Country with particular reference to Nigeria. Corporate Governance: An International Review, 9(3), 239– 240

[9] "A stakeholder is a member of "groups without whose support the organization would cease to exist" Freeman, R. Edward Stockholders and Stakeholders: A New Perspective on Corporate Governance California Management Review Spring 1983; 25, 003; ABI/INFORM Globalpg. 88. [Organisational stakeholders will be discussed in greater details in Chapter 2 where the Stakeholder model of CG is analysed]

[10] Corruption according to the Transparency International is defined as "the abuse of entrusted power for private gain"; According to the ICPC Act (section 2), corruption includes vices like bribery, fraud, and other related offences. Corruption is the abuse or misuse of power or position of trust for personal or group benefit (monetary or otherwise)

rule of law[11] in the Nigerian system. More importantly, the thesis will level the effectiveness of the UK and Nigerian Codes focusing on the manner in which their provisions are implemented. To this end, the thesis will also seek to answer the question: How effective has the Nigerian approach of mandatory compliance been in comparison to the 'comply or explain' approach in operation in the UK?

Defining Corporate Governance

Corporate governance has benefited in recent times from considerable attention from many scholars and stakeholders of corporations in recent times due to many corporate scandals that have been experienced worldwide. Over the years, there has been constant variations and discrepancy on the scope of Corporate governance which keeps increasing in its content and context. However, there is no universally accepted definition for what good corporate governance is despite academic write-ups about the subject.

Corporate governance is generally conceptualized as a framework for coordinating the relationship between directors, managers, and shareholders.[12] Mastovicz defines corporate governance as "a set of processes, customs, policies, laws, and institutions, affecting the way a corporation is directed, administered or controlled, and its purpose

[11] Tamanaha describes "The rule of law" as framework within society that "respects and protects without fear or favour, the rights and liberties of every citizen…"
Tamanaha Brian Z. (2004) On the Rule of Law: History, Politics, Theory pg1 Cambridge University Press, Cambridge.

is to influence directly or indirectly the behavior of the organisation towards its stakeholders" and indeed its role in the larger society. This definition does not only recognise the importance of corporate governance, but it also situates corporate governance at the heart of the firm and its relationships, both internally and externally.

The Cadbury Report defined corporate governance as '*the system by which companies are directed and controlled'*. Sir Adrian proposed a broader understanding of the corporate governance concept by stating that "corporate governance is concerned with holding the balance economic, social and global goals between individual and communal goals.[13] The aim, therefore, is to align as nearly as possible, the interests of individuals, corporations, and society. Another broad definition of corporate governance was given by Oman stating that corporate governance refers to private and public institutions including laws, regulations, and accepted business practices, which together govern the relationship, in a market economy, between corporate managers and entrepreneurs on one hand and those who invest resources in corporations on the other.[14]

The Organisation for Economic Cooperation and Development (OECD)'s described corporate governance as a set of relationships between companies' management, its board, its shareholders and other stakeholders by providing a structure through which the objectives of the companies are set, and the means of attaining those objectives and monitoring performance are determined.[15] Thus it is clear that corporate

[13] World Bank [1999], Corporate Governance: A framework for Implementation-Overview, the World Bank, Washington. D.C

[14]OMAN, Ch. (2001) Corporate Governance and National Development. OECD Development Centre, Technical Papers No. 180.

[15]OECD [2015], G20/OECD Principles of Corporate Governance, . Organisation for Economic Co-operation and Development, Paris. https://read.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en#page3 accessed 30/04/18

governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders, and other stakeholders and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structures through which the company objectives are set and the means of attaining those objectives and monitoring performance.[16] In addition, an effective governance structure requires a sound legal, regulatory, and institutional framework that market participants can rely on when they establish their private contractual relations. Therefore, corporate relationships in a market economy between corporate managers and entrepreneurs on one hand, and those who invest resources in corporations, on the other.[17] After giving these elaborate definition of corporate governance, the Code published its principles of good corporate governance which includes; that the corporation should protect shareholders and facilitate their rights in the company [rights of shareholders][18]; and Board of directors should set the direction of the company and monitor management in order that the company will achieve its objectives.[19] Many of these principles will be greatly discussed in chapter 5 of this thesis both in line with the OECD Codes and the UK and Nigerian Codes.

[16]OECD [2015], G20/OECD Principles of Corporate Governance, . Organisation for Economic Co-operation and Development, Paris. https://read.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en#page3 accessed 30/04/18

[17]OECD [2015], G20/OECD Principles of Corporate Governance, . Organisation for Economic Co-operation and Development, Paris. https://read.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en#page3 accessed 30/04/18

[18] that all shareholders should be treated equitably including those who constitute of minority, individuals and foreign shareholders; that the legal rights of stakeholders should be recognised and to facilitate corporation with then in order to create wealth, employment and sustainable enterprises; that companies should make relevant, timely disclosures on matters affecting financial performance, management and ownership of the business

[19] https://www.accaglobal.com/content/dam/acca/global/PDF-students/2012s/sa_oct12-f1fab_governance.pdf

Corporate governance is the system of rules, processes, and practices through which companies are directed and controlled. It identifies what power is wielded by the different players, where accountability lies, and who makes the decision. Corporate governance ensures an appropriate path for decision making and control exists so that the interests of all stakeholders, both internal and external are balanced. Corporate governance also encompasses ethical processes through which a firm's objectives are determined and can be achieved.

After looking at several definitions by different scholars, it is important to state that there is no likelihood of having one universally accepted definition to describe the relationships within the dominion of corporate governance. In summary, from the definitions given, CG can be categorised into two different categories which include the shareholder's orientation [the Anglo-Saxon] and the Stakeholder definition. The shareholder's view of corporate governance is mainly applicable to Anglo-Saxon countries like the UK and Nigeria which are the main focus of this thesis. Under the Shareholder's view of corporate governance, the main concern of corporate governance is to create value for the shareholders and ensure that mechanisms are put in place to align the interests of the firms' manager with their shareholders and maximise their profits while the Stakeholder's definition takes a broader view of the firm by creating value to benefit shareholders and other stakeholders with a view to providing a long term sustainable value for all stakeholders. These two will be discussed in Chapter 2 of the thesis.

Therefore, for this thesis, I will adopt a more comprehensive definition by Razee who defined CG as "the process affected by a set of legislative, regulatory, legal, market mechanisms, listing standards, best practices, and efforts of all corporate governance participants, including the company's directors, officers, auditors, legal

counsel, and financial advisors, which creates a system of checks and balances with the goal of creating and enhancing enduring a sustainable shareholder value, while protecting the interests of other stakeholders".[20] This definition identifies and attempts to address the principal-agent relationship, which is expected to deliver value to shareholders and indeed other stakeholders but very often does not. And as laudable as these ideals are, as enumerated in the definition, the world economy has nevertheless had to endure several financial crises.

In addition, it must be noted from the several definitions given above, that different Codes produced by different countries referred to governance structures that are based on governance principles that can be applied to the board structure of corporations in other to achieve good corporate governance practice. These principles are set up as guidelines that could be used across different markets and countries. Also, the effectiveness of these principles of corporate governance and achieving good corporate governance practices depends on the applications of the principles in a way that is set to benefit the shareholders, stakeholders, the industries, and the economic sector of the country. Having a good corporate practice comes with several benefits such as; it helps the firm to attract low-cost investment capital, strong internal controls, discipline, and creditor's confidence both at local and international level; it helps in improving long term performance;[21] it promotes fair return for investors and firm-wide efficiency; it also helps to promote financial and economic stability and increases national and global growth rates in which poorly governed

[20]REZAEE, Z. (2009) Corporate Governance and Ethics. John Wiley & Sons, Inc. New Jersey, United States.

[21] Gregory, HJ & Simms, ME 1999, 'Corporate Governance: What it is and Why it Matters', paper presented to The 9th International Anti-Corruption Conference, 10-15 October 1999, Durban, South Africa http://9iacc.org.s3.amazonaws.com/papers/day2/ws3/dnld/d2ws3_hjgregorymesimms.pdf accessed on 06/01/19

companies do not[22], and it bring better management of company's resources and enhance corporate performance which significantly contributes to an increase in the value of shareholder's holding in the company and company's share price.

After looking at the several definitions and benefits of corporate governance, one can come to the conclusion that no matter what definition given to corporate governance, its main concern will be the means by which a corporation assures investors have well-performing management in place and that corporate assets provided by the investors are being put to appropriate and profitable use.[23]

1.2 The structure of the thesis

This thesis is structured into 6 chapters.

Chapter 1 defines corporate governance and explains the rationale behind selecting Nigeria as a case for understanding how corporate governance is being practiced in the developing world. It explains why Nigeria should learn from developed countries where corporate governance practices have evolved over many years to regulate corporate behaviour sufficiently. As there are no systems without challenges. In this chapter, I examine the positions of various scholars who have investigated corporate governance issues in Nigeria, aiming at establishing their views on corporate governance practice. This leads to the analysis of corporate governance models and theories to further understand the context within which the Nigerian CG system is to be examined. Chapter 1 argues that Nigeria corporate governance system needs

[22] Banks, E 2004, Corporate Governance, Financial Responsibility, Controls and Ethics, Palgrave Macmillan, New York.

[23] Gregory, HJ & Simms, ME 1999, 'Corporate Governance: What it is and Why it Matters', paper presented to The 9th International Anti-Corruption Conference, 10-15 October 1999, Durban, South Africa http://9iacc.org.s3.amazonaws.com/papers/day2/ws3/dnld/d2ws3_hjgregorymesimms.pdf accessed on 06/01/19

overhauling considering the recent financial distress and the need to align with the best global practices.

Chapter 2 explains CG practice by identifying models and theories capable of enhancing understanding of the issues and needs within the practice. Corporate governance system and world's interest, through searches, about code of corporate governance and corporate failure (to establish that world has discourse on failures of companies due to financial impropriety) are explained before the discussion of the models and theories.

Chapter 3 argues that the hegemony of the contractual model of corporate governance in Nigeria contributes to the issues of trust between principals and agents. This is done through examining the evolutionary nature of the regulatory environment which has seen various sectors of the economy adopting different sets of codes that resulted in a multiplicity of regulations that hindered rather than enhance corporate governance practice. The chapter also examines some social-economic and political issues that affect corporate governance in the country.

Chapter 4, examining the equally evolutionary development of CG in the United Kingdom, demonstrates that the experience of Nigeria in terms of the evolution of its codes is not a unique experience. It also examines specific sections of the US Act as well as the OECD principles that are relevant to corporate governance evolution

Chapter 5 presents a comparative analysis of the key pillars of the research work with the different reference jurisdictions namely; board structure and composition,

executive and board remuneration, shareholders' rights and interests, minority shareholder protection, disclosure and transparency, and compliance and enforcement. With the comparative analysis, the work is able to establish the areas where reforms are needed, where the best example could be drawn, and where a homegrown solution is required.

The central focus of chapter 6 is to present the crucial findings from the previous chapters, drawing relevant conclusions, and making necessary recommendations.

1.3 The motivation of the Thesis

The reason for choosing Nigeria in this research is that Nigeria is at the forefront of corporate governance research and development in Africa.[24] Hence, its corporate governance regulation is critical to the emergence of a robust corporate governance system within the Sub-Saharan African region. Secondly, the capacity of Nigeria to attract investments is linked to the capacity to make necessary improvements in corporate governance regulation.[25] Unfortunately, Nigeria is marred by weak corporate governance regulations and infractions.[26] This which have led to various problems that impacted companies' performance[27] in nearly every sector listed on the Nigerian Stock Exchange. For instance, between 1997 and 2006, the financial and

[24] Yakasai, G. A. (2001). Corporate Governance in a Third World Country with particular reference to Nigeria. Corporate Governance: An International Review, 9(3), 239– 240

[25] Ibid.

[26] Ibid.

[27] The concept of organisational performance focuses principally on the ability and capability of an organisation to effectively exploit available resources in an efficient manner to accomplish results consistent with its objectives. In defining organisational performance, effectiveness and efficiency are two components identified as most essential. Different schools of thought exist when it comes to defining organisational performance. While some view organisational performance in terms of effectiveness and efficiency achieved through minimum resources, others, as mentioned earlier performance is focused on the capability and ability to utilize resources in an efficient manner. Essentially it defines how an organisation's achievements measures against its most important parameters such as financial, markets and shareholder performance.

accounting scandal enveloped the banking sector, causing 26 banks to fold up in 1997 alone. In 2006, Cadbury Nigeria PLC allegedly falsified its financial statement. This became a scandal of reference to date. In 2009, post-consolidation banking crises resulted in the declaration of 10 banks as insolvent, while the Central Bank of Nigeria terminated eight(8) executive management teams of the banks. Corporate governance practice is also affected by the economic meltdown of 2008.[28] When the stakeholders realised that executive remuneration, compensation, and bad debts impacted the banking sector negatively in that year, executive compensation became a critical issue of discourse. This necessitated the call for the regulation of executive pay.[29]

To explore and understand the implications of these observations, among others, this study aims at revealing similarities and differences among Nigeria, the UK, and the US principles of corporate governance. Efforts will also be made to understand the similarities and differences within the OECD countries' principles of corporate governance. Specifically, this thesis seeks to make recommendations for the reform of critical components of CG, including board structure and composition, executive, and board remuneration. Other areas include disclosure and transparency as well as shareholders' rights and interests.

[28] Peters, G.T., and Bagshaw, K.B., (2014) "Corporate Governance Mechanisms and Financial Performance of Listed Firms in Nigeria: A Content Analysis" Global Journal of Contemporary Research in Accounting, Auditing and Business Ethics (GJCRA) Volume 1, No. 2 Pp103-128

[29] Yusuf, I., and Abubakar, S., (2014) "Chief Executive Officer's Pay in Nigerian Banks: Are Corporate Governance, Firm Size, and Performance Predictors?" A Paper presented at the 4th International Conference on A Century of Public Sector and Corporate Governance in Nigeria, 1914-2014 7th-9th October, 2014. Nasarawa State University Keffi Nigeria; Osemeke, L. and Adegbite, E. (2016) 'Regulatory Multiplicity and Conflict: Towards a combined code on Corporate Governance in Nigeria.', Journal of Business Ethics., Volume 133, No 3 Pp431-451; Olarinoye, S.A., and Ahmad, A.C., (2016) Corporate Governance and Financial Regulatory Framework in Nigeria: Issues and Challenges Journal of Advanced Research in Business and Management Studies Volume 2, No. 1 Pp50-63

1.4 Background to the Thesis

In 2011, the Nigerian parliament enacted Act NO.6 of 2011 named the Financial Reporting Council of Nigeria [FRCN], a body charged with the responsibility of establishing a new corporate governance regime. The work of the body culminated in the release of the Nigerian Code of Corporate Governance (NCCG) in 2016. Prior to the release of the code, Nigeria implemented a sector-based approach to corporate governance resulting in the multiplicity of codes. The NCCG was issued to unify the Corporate Governance Code in Nigeria. The code came into effect from the 17th of October 2016 but has since been suspended for a review due to some queries raised by the public and business organisations in Nigeria. The suspension has created the need to examine the code along with those obtainable in developed countries such as the US and UK in order to be in line with international best practices.[30] Some of the country's biggest corporations have had to endure varying degrees of corruption and other governance issues, calling to question the country's CG structure and practices.[31] It is imperative to compare the code with the UK, USA, and the one put in place by the OECD as a guide for countries to follow in order to have the best practice of corporate governance.

[30] Some of the best practices include building a competent board, aligning strategies with goals, being accountable, having a high level of ethics and integrity, defining roles and responsibilities, and managing risk effectively.

[31] Ifeanyi, D. N., Olagunju, A. and Adeyanju O. D () Corporate Governance and Bank Failure in Nigeria: Issues, Challenges and Opportunities Research Journal of Finance and Accounting www.iiste.org Vol 2, No 2, 2011
Benjamin, J. I. () Nurturing Corporate Governance System: The Emerging Trends in Nigeria; Journal of Business Systems, Governance and Ethics Vol. 4, No 2 pp. 2-12
Okike, E. N. M. (2007) Corporate Governance in Nigeria: the status quo Corporate Governance: An International Review - Wiley Online Library Vol. 15, No 2 pp. 173-193 **https://doi.org/10.1111/j.1467-8683.2007.00553.x accessed on 12/05/2016**

The reason for choosing Nigeria in this research is because; Nigeria is at the forefront of corporate governance research and development in Africa[32] hence her corporate governance regulation is critical to the emergence of a robust corporate governance system within the Sub-Saharan African region.[33] Secondly, the continued capacity of Nigeria and the region to attract investments is linked to the capacity to make necessary improvements in corporate governance regulation.[34] Yet, it is well documented that Nigeria is marred by weak corporate governance regulation and infractions.[35] Against this background, this study aims at revealing similarities and differences among Nigeria, UK, and US principles of corporate governance. Efforts will also be made to understand the similarities and differences within the OECD countries' principles of corporate governance. Specifically, this thesis seeks to make recommendations concerning certain critical components of a CG structure, including board structure and composition and executive and board remuneration. Other areas include disclosure and transparency, as well as shareholders' rights and interests.

1.5 The Conceptual Framework

From developed to developing countries, there has been a need to have a reformed corporate governance regulation. Various financial crises that affected the global economy are attributed mainly to the lack of decent corporate laws governing public and private companies. Corporate governance remains a significant framework or

[32] Yakasai, G. A. (2001). Corporate governance in a Third World country with particular reference to Nigeria. Corporate Governance: An International Review, 9(3), 239– 240
[33] Franklin Nakpodia, Emmanuel Adegbite, Kenneth Amaeshi 'Neither Principles Nor Rules: Making Corporate Governance Work in Sub-Saharan Africa' Journal of Business Ethics, Aug 2018 https://paperity.org/p/76229768/neither-principles-nor-rules-making-corporate-governance-work-in-sub-saharan-africa accessed on 21/06/2019.
[34] Ibid 13
[35] Ibid. 13

structure in ensuring the effective and efficient management of human and material resources towards sustainable value creation.

In order to mitigate failures of public and private companies and its attendant grieve to investors and the economy at large, governments across the world have had the course to develop codes of corporate governance that align with their social, economic, legal, and political environment in the last three decades. From the United Kingdom to the United States of America, and from Nigeria to the Organisation for Economic Co-operation and Development, (a group of 34 countries that discuss and develop economic and social policy), codes of corporate governance have been developed and revised several times.[36]

The Financial Reporting Council or its equivalent in these countries is saddled with the responsibility of refining the codes whenever the changes in social, economic, political, and legal are impacting the practicability of the principles specified in the codes. In 2018, the Financial Reporting Council of the United Kingdom published the new Corporate Governance Code (the 2018 Code) after fundamental review in 2017. The new code aims at improving trust in business.[37]

From 1960 to 2001, corporate governance was largely understood within managerial capitalism, investor capitalism and the deal decade, executive defense and the

[36] OECD (2017), OECD Corporate Governance Factbook https://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf

[37] EY (2018) 2018 UK Corporate Governance Code and New Legislation Latest Governance Developments Impacting UK Premium Listed Companies

ideology of shareholder value, and Enron.[38] Managerial capitalism featured prominently between the 1960s and 1970s. Active managers and weak owners characterised the period.[39] Investor capitalism and the deal decade manifested in the 1980s and managers' authority and power were challenged by slowing macroeconomic growth and external pressure from foreign competitors. And indeed, there are the big multinational companies who play a significant role in people's daily lives, their stakeholder interest and concern extends far beyond shareholders, employees, and suppliers.

In preparation for the US corporate governance model in the 1970s, most of the key pillars that would be used have been put in place. These pillars helped concerned stakeholders to understand the specific elements as a normative benchmark for "good" corporate governance practices having learned from Enron's incident, which proved that shareholders were quite unprotected in the United States of America.[40]

In the OECD countries, the principles of corporate governance were first adopted in 1999 and became one of the references for corporate governance reforms. OECD countries' corporate governance emerged on the conviction that there is no single model generally accepted in all countries and organisations. The identification of differences in economic, legal, and political spheres of the members of OECD resulted in the development of an acceptable model.[41] Despite the earlier

[38] Jackson, G., (2010) Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment https://www.boeckler.de/pdf/p_arbp_223.pdf accessed on 12/02/2019
[39] Ibid.
[40] Boţa-Avram, C., and Răchişan, P.R., (2013) Analysing The Similarities Between OECD Principles Versus European Corporate Governance Codes – An Internal Audit Perspective Annales Universitatis Apulensis Series Oeconomica, 15(2), 2013, 493-502
[41] Ibid.

identification of the issues within economic, legal, and political environments impacting effective corporate governance practices, a significant number of bankruptcies of big companies reduced investor confidence in financial markets and the organisations' management ability. This became one of the reasons for a meeting on the modification of the principles. It was clear that the principles needed to be amended or revised, considering the new conditions that characterise global financial and economic realities. On 22 April 2004, a revised OECD principle of corporate governance emerged, adding to, and modifying existing principles.[42]

In Nigeria, a body formed under the Financial Reporting Council Act NO.6 of 2011 named the Financial Reporting Council of Nigeria [FRCN] issued a National Code of Corporate Governance. The FRC issued the code based on the power given to it under section 50 of the FRC Act 2011 and it was aimed at enhancing management credibility, to promote high standards of corporate practice, preserving long-term investments, encourage sound systems of internal and information systems control to safeguard shareholders' investment and assets of public interest entities. In 2016, the Nigeria Code of Corporate Governance was introduced to eliminate the problem of the multiplicity of codes in Nigeria.

Prior to the release of the code, Nigeria implemented a sector-based approach to corporate governance resulting in a multiplicity of codes. The NCCG was issued to unify the Corporate Governance Code in Nigeria. The code came into effect from the 17th of October 2016 but has since been suspended for a review due to some queries

[42] Yakasai, G. A. (2001). Corporate Governance in a Third World Country with particular reference to Nigeria. Corporate Governance: An International Review, 9(3), 239– 240

raised by the public and business organisations in Nigeria. The suspension thus made it possible to carry the detailed analysis of critical provisions of the code vis a vis what obtained in developed countries such as the US and the UK in order to establish a corporate governance regulation in line with international best practices. Some of the country's biggest corporations have had to endure varying degrees of corruption and other governance issues, calling to question the country's CG structure and practices. It is imperative to compare the code with the UK, USA, and the one put in place by the OECD in order to emulate some of the best practices of corporate governance.

The collapse of corporate giants across the world Enron, Xerox, WorldCom, HIH, and Parmalat produced adverse effects on the world economy and in some cases resulted in global financial crises. These crises demonstrated in unmistakable terms that "even strong economies, lacking transparent control, responsible corporate boards, and shareholder rights can collapse quite quickly as investor's confidence collapse"[43] and emphasising the need for cooperation between the public and the private sector in developing the capacity to ensure effective corporate governance to ensure the development of market-based economies and democratic societies based on the rule of law.[44] These scandals affected the confidence and trust of investors and the general public in the corporate institution. As a result of this collapse, there was a new consensus among academic and business professionals that further efforts were

[43] Boţa-Avram, C., and Răchişan, P.R., (2013) Analysing The Similarities Between OECD Principles Versus European Corporate Governance Codes – An Internal Audit Perspective Annales Universitatis Apulensis Series Oeconomica, 15(2), 2013, 493-502

[44] T. Ademola Oyejide & Adedoyin Soyibo 'CORPORATE GOVERNANCE IN NIGERIA' Paper Presented at the Conference on Corporate Governance, Accra, Ghana, 29 - 30 January, 2001 https://nigerianlawguru.com/articles/company%20law/CORPORATE%20GOVERNANCE%20IN%20NIGERIA.pdf accessed on 04/05/2018

essential to improve corporate governance practices to protect shareholders' interests[45] and to stabilise the market economy as it was generally seen as the financial crises were linked to the failure of corporate governance.[46]

1.6 Research Questions.

In light of the foregoing, the thesis will seek to answer the question: compared to the UK, the USA, and the OECD countries' CG practices, are shareholders' rights and interests adequately protected under the Nigerian CG system? Nigeria's economic capital, Lagos is the commercial and financial hub of West Africa, and its ambition is to become the financial heartbeat of Africa as a whole, much like London is to Europe. Nigeria's economy in the last decade has become more integrated with the world economy and efforts are being made towards further integration. It is thus expected that the policy framework to govern the business environment is attuned with global best practices to prevent corporate failures which might have ripple effects on West Africa. Therefore, given certain peculiarities between the UK and Nigeria, how can Nigeria benefit from the UK experience and avoid some pitfalls that the UK experience?

Corporate Governance codes are regarded as soft laws and their application, from evidence in different countries is done in either of two ways: principle-based or a rule-based approach. Principle-based compliance is generally voluntary, in which case companies choose whether to comply or not and have to explain why not when

[45] RafaelLa Portaa, Florencio Lopez-de-Silanesb Andrei Shleifer and Robert Vishny (2000) Investor protection and corporate governance Journal of Financial Economics Vol 58, Issues 1–2, pp 3-27 Inessa Love and Leora F. Klapper (2002) Corporate Governance, Investor Protection, and Performance in Emerging Markets eLibrary doi.org/10.1596/1813-9450-2818

[46] Allen N. Berger Bjorn Imbierowicz and Christian Rauch (2016) The Roles of Corporate Governance in Bank Failures during the Recent Financial Crisis Journal of Money, Credit and Banking Vol 48, Issue 4 doi.org/10.1111/jmcb.12316

they have not complied. The UK comply or explain is a good example of a principle-based approach. On the other hand, with the rule-based compliance approach companies are compelled by law to comply with the provisions of the code without exception. A good example of this can be found in the US where the Sarbanes-Oxley Act 2002 compels companies to implement provisions contained therein. In the light of the foregoing, which compliance approach best suits Nigeria: should Nigeria adopt the principle or rule-based compliance approach to implementing her CG Codes?

1.6 Evidences on Corporate Governance Practice in Nigeria

Preliminary research on corporate governance among companies in Nigeria suggests that corporate governance is still relatively weak and this impacts negatively not only on the perception of Nigerian companies by foreign and local investors but also affecting the performance of the stock market.[47] It is also part of the myriad of reasons why the country ranks low [145] on the ease of doing business relative to other countries in the world while attracting huge investor interests still.[48] Studies have largely been conducted within the manufacturing, banking, financial, non-financial, and oil and gas industries in the country. Scholars {see Table 1 for details} have considered different variables at independent and dependent levels towards understanding various factors that contributed to the corporate governance practice. For instance, previous scholars have investigated the impact of corporate governance on financial performance, size of companies on the voluntary disclosure of financial statements or accounting information to the shareholders and stakeholders, including

[47] Emmanuel Adegbite 'Good corporate governance in Nigeria: Antecedents, propositions and peculiarities' International Business Review 24 (2015) 319–330.
[48] http://www.doingbusiness.org/rankings accessed on 03/05/2018

the regulatory agencies, and factors affecting new accounting adoption within the corporate governance initiative.

Literature is also replete with the role of corporate governance, and ownership structure attributes in intellectual capital (IC) disclosure practices, the influence of corporate governance on the timeliness of financial reports of listed banks, the antecedents of internal audit effectiveness, and the determinants of audit report lag. The extent to which corporate governance impacted Internet Financial Reporting practice and environmental reporting has been equally studied. Scholars have similarly made us understand that the association between organisational governance and profitability is possible within the context of deposits money banks. This could be one of the reasons, for instance, studies were done with the primary purpose of identifying the financial distress symptoms that can result in a bank's failure[49], and the need to pinpoint the relationship among corporate governance, risk management, and firm performance. The link between high and low earnings and corporate governance mechanisms have also been investigated.

Size, diversity, and ownership structure within the corporate governance principles have also been studied. For example, the size and performance of Chief Executive Officers have been used to understand the extent to which these could determine their salary in the banking sector. Beyond the salary determination, another scholar examined the causal relationship between the CEO's pay and the company's performance. At the diversity level, a comparison of the importance of board

[49] The NCCG, which is the primary subject of this thesis is designed to be a broad brush which deals with every aspect of the Nigerian economy ranging from finance, oil and gas, agro-allied industries and many more. It is therefore imperative to consider the effect of corporate governance on different sectors of the economy.

composition dimensions, size, and the presence of independent directors has been made within the Turkish and Nigerian context. Aside from the place of diversity within board composition and size, the influence of corporate board diversity on sustainability reporting on listed manufacturing companies, the role board structure plays in curtailing earnings management and the impact of women on corporate boards on financial reporting quality have been examined. Studies have also emerged on the quality of the institutional and legal framework, and societal principles including the process through which companies either fully or partially comply with the proliferated codes of corporate governance in Nigeria.

These studies have led to significant findings from which the current study draws its gap in knowledge and join the ongoing conversation within the field of corporate governance and law. Findings have shown that significant differences did not exist among the companies in the manufacturing, oil and gas, and financial sectors with low governance quotient and higher governance quotient in terms of financial performance. In the study, the governance quotient represents the level of knowledge of corporate governance codes and practices exhibited by corporate leaders or agents.[50] However, companies in the banking sector were found to have the highest level of corporate governance disclosure. In another study, a significant positive connection was discovered between the financial performance of companies investigated and corporate governance disclosure. The size of the firms was also found to connect with the corporate governance voluntary disclosure such as finance

[50] Peters, G.T., and Bagshaw, K.B., (2014) "Corporate Governance Mechanisms and Financial Performance of Listed Firms in Nigeria: A Content Analysis" Global Journal of Contemporary Research in Accounting, Auditing and Business Ethics (GJCRA) Volume 1, No. 2 Pp103-128

and intellectual capital.[51] From the results, it is clear that companies in Nigeria appropriate codes and principles of corporate governance differently across all the sectors of the country. It has also increased our understanding of corporate governance in the context that disclosing specific information to the shareholders and stakeholders is one of the means that could increase investors' and regulatory agencies' confidence in the businesses that comply with the codes of corporate governance and best practices. Board structure, composition, and size are part of the means through which companies are assessed within the corporate governance practice. The good composition of members of the board and its size have specific roles to play in the effectiveness or otherwise of the corporate governance practice in the areas of financial and non-financial activities. Evidence has shown that board size, composition meeting, and expertise displayed by the members enhanced the company's financial performance.[52] Board structure was correctly discovered to have a significant relationship with the earnings management practices of businesses.[53] When nationals of other countries are part of the owners and executives, research shows a strong connection between the structure and performance, and timeliness of financial reports.[54] Where it is clear that size, the experience of the board members

[51] Foyeke, O.I., Odianonsen, I.F., and Aanu, O.S., (2015) "Firm Size and Financial Performance: A Determinant of Corporate Governance Disclosure Practices of Nigerian Companies" Journal of Accounting and Auditing: Research & Practice, DOI: 10.5171/2015.467294 http://www.ibimapublishing.com/journals/JAARP/jaarp.html Pp1-8; Mubaraq, S., and Haji, A.A., (2014) "The impact of corporate governance attributes on intellectual capital disclosure: A longitudinal investigation of Nigerian banking sector" Journal of Banking Regulation Volume 15, Pp144–163. doi:10.1057/jbr.2013.15

[52] Kankada, M.M., Salim, B., and Chandren, M., (2017) "Corporate Governance, Risk Management Disclosure, and Firm Performance: A Theoretical and Empirical Review Perspective" Asian Economic and Financial Review DOI: 10.18488/journal.aefr.2017.79.836.845 Vol. 7, No. 9, Pp836-845

[53] Obigbemi, I.F., Omolehinwa, E.O., Mukoro, D.O, and Olusanmi, O.A., (2016) "Earnings Management and Board Structure: Evidence from Nigeria" Sage Open, Pp1-15 DOI: 10.1177/2158244016667992 sgo.sagepub.com

[54] Tsegba, I.N., Herbert, W.E., and Ene, E.E., (2014) "Corporate Ownership, Corporate Control and Corporate Performance in Sub-Saharan African: Evidence from Nigeria" International Business Research Volume 7, No. 11 Pp73-84; Uwuigbe, U., Felix, E.D., Uwuigbe, O.R., Teddy, O., and Irene,

and quality of external audit have a positive influence on the financial reporting quality,[55] in another setting, board size had a non-significant negative relationship with the timeliness of financial reports.[56] Based on gender consideration, a study shows that female director presence failed to improve the quality of financial reporting. However, the proportion of women was found to be a significant factor in the financial reporting credibility and performance. Specifically, the reporting credibility increases in line with the proportion of the women on the board,[57] while the proportion of women directors, the proportion of non-executive directors, and multiple directorships were significant.[58]

On a positive note, the combination of board size, gender, and composition was discovered to be related to earnings management and profitability. Board composition and size are related positively with profitability without strong significance.[59] This is in contrary to what Uwuigbe et al.[60] found. Based on these findings, our

F., (2018) "Corporate Governance and Quality of Financial Statements: A Study of listed Nigerian Banks. Banks and Bank Systems Volume 13, No 3, Pp12-23. doi:10.21511/bbs.13(3).2018.02

[55] Onuorah, A.C., and Friday, I.O., (2016) "Corporate Governance and Financial Reporting Quality in Selected Nigerian Company" International Journal of Management Science and Business Administration Volume 2, No. 3, Pp 7-16 Accessed on://researchleap.com/category/international-journal-of-management-science-and-business-administration

[56] Uwuigbe, U., Felix, E.D., Uwuigbe, O.R., Teddy, O., and Irene, F., (2018) "Corporate Governance and Quality of Financial Statements: A Study of listed Nigerian Banks. Banks and Bank Systems Volume 13, No 3, Pp12-23. doi:10.21511/bbs.13(3).2018.02

[57] Damagum, Y.M., Oba, V.C., Chima, E.I., and Ibikunle, J., (2014) "Women in Corporate Boards and Financial Reporting Credibility: Evidence from Nigeria" International Journal of Accounting and Financial Management Research Volume 4, No. 1, Pp1-8

[58] Anazonwu1, H.O., Egbunike, F.C., and Gunardi, A., (2018) "Corporate Board Diversity and Sustainability Reporting: A Study of Selected Listed Manufacturing Firms in Nigeria Indonesian" Journal of Sustainability Accounting and Management Volume 2, No. 1 Pp65–78 Accessed on http://unpas.id/index.php/ijsam

[59] Obigbemi, I.F., Omolehinwa, E.O., Mukoro, D.O, and Olusanmi, O.A., (2016) "Earnings Management and Board Structure: Evidence from Nigeria" Sage Open, Pp1-15 DOI: 10.1177/2158244016667992 sgo.sagepub.com; Akinyomi, O.J., and Olutoye, E.A., (2014) "Corporate Governance and Profitability of Nigerian Banks" Asian Journal of Finance & Accounting Volume 7, No. 1 Pp172-182 Accessed on http://dx.doi.org/10.5296/ajfa.v7i1.6543

[60] Uwuigbe, U., Felix, E.D., Uwuigbe, O.R., Teddy, O., and Irene, F., (2018) "Corporate Governance and Quality of Financial Statements: A Study of listed Nigerian Banks. Banks and Bank Systems Volume 13, No 3, Pp12-23. doi:10.21511/bbs.13(3).2018.02

understanding of how board structure, composition, size, and diversity contributed to the effectiveness of corporate governance has improved. The results demonstrate that there are positive and negative outcomes when the board structure, composition, and size are done in line with the existing codes of corporate governance. Like other countries in the world, codes of corporate governance exist to protect concerned stakeholders and develop a robust governance system that helps in creating sustainable businesses and economies. Among the previous studies analysed, it emerged that conflict among the various codes in Nigeria (multiplicity of codes) reduces compliance and results in ineffective enforceability by the regulatory agencies, occasioned by inadequate monitoring.[61] The inability to enforce the codes has been hinged on many factors such as weak political and regulatory establishments.[62]

Letza[63] argues that "where corruption is the pervasive, systemic and endemic ability of any scheme based on voluntary compliance and dependent on moral persuasion cannot be effective." From the available studies, we have understood that improved governance quality could help in having higher levels of investment as well as better responsiveness of investment to growth opportunities.[64]

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[61] Osemeke, L. and Adegbite, E. (2016) "Regulatory multiplicity and Conflict: Towards a Combined Code on Corporate Governance in Nigeria" Journal of Business Ethics Volume 133, No. 3 Pp431-451; Olarinoye, S. A., and Ahmad, A.C., (2016) "Corporate Governance and Financial Regulatory Framework in Nigeria: Issues and Challenges" Journal of Advanced Research in Business and Management Studies Vol. 2, No. 1. Pp50-63

[62] Isukul, A.C., and Chizea, J.J., (2015) "Environmental Factors Influencing Corporate Governance: The Nigerian Reality" Sage Open, Pp1-11 DOI: 10.1177/2158244015581380

[63] Letza, S., (2017) "Corporate Governance and the African Business Context: The Case of Nigeria" Economics and Business Review, Volume 3, No. 1, Pp184-204 DOI: 10.18559/ebr.2017.1.10

[64] Innocent Okoi, Stephen Ocheni & Sani John 'The Effects of Corporate Governance on the Performance of Commercial Banks in Nigeria' International Journal of Public Administration and Management Research (IJPAMR), Vol. 2, No 2, March, 2014 http://www.rcmss.com/2014/IJPAMR-VOl2No2/The%20Effects%20of%20Corporate%20Governance%20on%20the%20Performance%20of%20Commercial%20Banks%20in%20Nigeria.pdf accessed on 25/09/2019

Based on the current situation and existing studies, this work thus argues that Nigeria needs a robust and dynamic approach to corporate governance by learning from developed countries. The country needs a code of corporate governance that allows flexibility in its implementation and attunes with the local business environment, thereby supporting the growth and further expansion required to grow the economy.

Over the years, several attempts have been made to improve corporate governance among Nigerian companies due to many scandals recorded across corporate organisations in Nigeria. Example of these scandals are a high degree of corporate malpractices in banks, which led to the collapse of over fifty commercial banks in the country between 1994-2011, while an additional eight banks were rescued from bankruptcy.[65] Overstatement of profit and balance sheets were seen in some non-financial institutions such as Cadbury Nigeria and many others. The regulatory response to these scandals saw the Central Bank of Nigeria in 2006 formulating a set of mandatory code for banks and financial institutions in a bid to improve corporate governance. In 2009, the board of eight of 25 banks in Nigeria was sacked for a series of poor governance practices.[66] Security and Exchange Commission [SEC] code was introduced to enhance board effectiveness and many other codes which shall be discussed fully in Chapter three (3).

[65] Adekoya A. A. (2011) Corporate Governance Reforms In Nigeria Journal of Business Systems, Governance and Ethics Vol 6, No 1 pp. 30 – 50; Alli, Y., (2009) CBN Sacks Three More Major Bank Chiefs, Directors. The Nation, October 3, 2009

[66] Yakasai, G. A. (2001) "Corporate Governance in a Third World Country with particular reference to Nigeria" Corporate Governance: An International Review Volume 9, No 3, Pp239– 240; Ahunwan, B. (2002) "Corporate Governance in Nigeria" Journal of Business Ethics, Volume 3, No.3 Pp269–287.

The weak institutional context in Nigeria makes corporate governance law enforcement and self-regulatory initiatives remain idealism.[67] However, due to yearnings for a reform, in the year 2016, a body formed under the Financial Reporting Council Act NO.6 of 2011 named the Financial Reporting Council of Nigeria [FRCN] issued a National Code of Corporate Governance. The FRC issued the code based on the power given to them under section 50 of the FRC Act 2011, and is aimed at enhancing management credibility, to promote high standards of corporate practice, preserving long-term investments, encourage sound systems of internal and information systems control to safeguard shareholders' investment and assets of public interest entities. This NCCG 2016 was introduced to eliminate the problem of multiplicity of codes in Nigeria. It should be noted that prior to the release of the code, Nigeria implemented a sector-based approach to corporate governance resulting in a multiplicity of codes (all of which shall be discussed thoroughly in the thesis); the NCCG was issued to unify Corporate Governance Code in Nigeria.

It is noteworthy that the code came into effect from the 17th of October 2016 but has since been suspended for a review. The Federal Government suspended the code through the Minister of Industry, Trade and Investment due to some queries which were raised by the general public and business organisations in Nigeria. The circumstances leading to the suspension too shall be fully discussed in the course of the thesis. However, despite all the codes and regulations in place in Nigeria, there is a need for an overhaul of the system, in order to be in line with international best practices. Some of the country's biggest corporations have had to endure varying

[67] Ahunwan, B. (2002) "Corporate Governance in Nigeria" Journal of Business Ethics Volume 37, No. 3, Pp269–287; Amao, O., and Amaeshi, K. (2008) "Galvanising Shareholder Activism: A Prerequisite for Effective Corporate Governance and Accountability in Nigeria" Journal of Business Ethics Volume 82, No. 1, Pp119–130

degrees of corruption and other governance issues, calling to question the country's CG structure and practices. These problems have been occasioned by political instability, bad leadership and many others which shall be fully discussed in the course of the thesis.

Consequently, there is a need to critically examine the newly released NCCG 2016 and its suitability to address the problems of corporate governance practices in Nigeria, by comparing it to those in use in the developed countries with particular focus on UK and USA and also that put in place by the OECD as a guide for countries to follow in order to have the best practice of corporate governance and proposing reforms where needed. The reason for choosing Nigeria in this research is because; Nigeria is at the forefront of corporate governance research and development in Africa.[68] Hence, her corporate governance regulation becomes critical to the emergence of a robust corporate governance system within the Sub-Saharan African region. Secondly, the continued capacity of Nigeria and the region to attract investments is linked to the ability to make necessary improvements in corporate governance regulation.[69] Yet, it is well documented that weak corporate governance regulation and infractions mar Nigeria.[70] The Cadbury Report from the UK in 1992;[71] the Sarbanes-Oxley Act of the USA in 2002[72] as well as the OECD's principle of

[68] Adelopo, I. A., Omoteso, K., and Obalola, M. (2009) "Impact of Corporate Governance on Foreign Direct Investment in Nigeria" Available at SSRN 1514982

[69] Nakpodia, F., Adegbite, E., Amaeshi, K., and Owolabi, A., (2016) Neither Principles Nor Rules: Making Corporate Governance Work in Sub-Saharan Africa.

24 Cadbury, A., (1992) "Cadbury Report: The financial Aspects of Corporate Governance" Technical Report, HMG, London

[70] Nakpodia, F., Adegbite, E., Amaeshi, K., and Owolabi, A., (2016) Neither Principles Nor Rules: Making Corporate Governance Work in Sub-Saharan Africa.

[71] Cadbury, A., (1992) "Cadbury Report: The financial Aspects of Corporate Governance" Technical Report, HMG, London

[72] United States Code, Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745. Available at: https://www.sec.gov/about/laws/soa2002.pdf

corporate governance in 2015[73] are widely acclaimed as the first key set of contributions to the development of corporate governance. To that end, the thesis will look mainly at the UK and USA [where appropriate] provisions of the corporate governance in analysing the Nigerian Code of Corporate Governance alongside the OECD's principles of corporate governance. In the end, this thesis will seek to uphold the latest OECD principles of corporate governance [2015] to strengthen every aspect of corporate governance as the international benchmark for Best Corporate Practice and make recommendations where needed.

1.7 Conclusion

From the examination of the past and current situations within the formulation and adoption of the principles of the corporate governance to the significance of the thesis, this chapter has set up the thesis into a new perspective. Background to the thesis has established that the two reference countries and OECD countries have had the reasons to revise their corporate governance codes recently. From the conceptual and empirical perspectives, it is evident that deficiencies in the Nigeria Code of Corporate Governance have resulted in firms' low performance. It has also been established that failure to have a robust CG is the bane of the country's low status on the Ease of Doing Business ranking. The structure of the thesis has provided the paths through which the readers could understand the central focus of the whole thesis from conceptualisation to the theoretical basis and outcomes of the study to the desired recommendations to regulators and corporate establishments, concerned stakeholders

[73] Organisation for Economic Co-operation and Development (1999) "OECD Principles of Corporate Governance" Paris: Organisation for Economic Co-operation and development, OECD. Available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En

in corporate governance institutionalisation and management have insights to glean from the thesis.

CHAPTER TWO

Theoretical Framework

2.0 Introduction

Corporate governance is a broad and complex topic to study and to examine. This work has adopted a multi-theory framework approach. To this end, this chapter presents a justification for the research approach. It also offers an analysis of the theories and models that underpin corporate governance internationally and particularly in Nigeria, the United Kingdom, the United States of America, and in the OECD. These jurisdictions have been selected because the newly released code of corporate governance in Nigeria incorporates features from the UK, US, and some OECD principles. The purpose of this chapter was to establish a theoretical backbone for CG approaches in the different jurisdictions considered in the thesis, in terms of whether it is stakeholder or shareholder oriented. The contractual and stakeholder theories, as well as the nexus of contract and agency theories, are examined. Another reason for looking into the stakeholder's theory is due to the fact that it has gained prominence as a result of past corporate scandals and also received much attention as a potential rival to the prevailing doctrine of the Maximisation of shareholder value[74] as it is seen as the foundation for a much fairer means of governance., The work is also examined through the contractual and German concessionary models. The extent to which contract, agency, and stakeholder theories have helped shaped corporate governance practice is equally analysed. As this work is comparative between the

[74] Maximizing shareholder value is the idea that firms should operate in a manner in which shares will reflect higher expected future values. Shareholder value is defined as the present value of future expected cash flows, from now until infinity[https://www.insead.edu/executive-education/interviews/finance/maximising-shareholder-value accessed on 03/05/2020]

United Kingdom and Nigeria, a more detailed look was accorded to the outsider model which is the model that best encapsulates the approach to corporate governance in the UK and to a large extent Nigeria due to their common-law links.

2.1 Justification for Adopting a Multi-Theory Framework Approach

A study of CG literature suggests there is no agreement on a single theoretical perspective in CG[75]. It has been argued that the major limitation inherent in agency theory as the main underpinning theory for analysing/studying corporate governance is its inability to recognize the wider environment influence impacting an organisation and also account for all that organisations embodies[76]. It is, therefore, argued that agency theory, which primarily had its origin in economic studies, is grossly inadequate and cannot by itself fully capture the essence of corporate governance, hence the need for a multi-theoretical approach.

Attempts have also been made by governments and professional bodies to address shareholders' concerns around the governance gap resulting from agency-oriented issues by way of re-energized standards of accounting and governance. This much is reflected in the Sarbanes Oxley Act in the United States where efforts were made through the Act to increase accountability and responsibility of the board and the audit committee.[77] The accounting angle also reserves a role for external auditors and a generally greater degree of independence for internal auditors and this is expected

[75] Zattoni, A., Douglas, T., & Judge, W. (2013). Developing corporate governance theory through qualitative research. Corporate Governance: An International Review, 21(2), 119-122.

[76] Aguilera, R.V. and Jackson, G., (2003) The cross-national diversity of corporate governance: dimensions and determinants, Academy of Management Review, 28 (3), pp. 447-465
Aguilera, R.V., Filatotchev, I., Gospel, H. and Jackson, G. (2008) Costs, contingencies and complementarities in corporate governance models Organization Science, 19 (3), pp. 475-494

[77] Joe Christopher (2010) Corporate governance - A multi-theoretical approach to recognizing the wider influencing forces impacting on organizations vol 21 issue 8, Pages 683-695 DOI: https://doi.org/10.1016/j.cpa.2010.05.002

will strengthen the process.[78] A school of thought however believes that the governance gap is a lot wider than suggested so far. Also, that the agency-shareholder approach limits the relationship to a series of contracts and failed to grasp the full extent of the complexities of corporate relationships [79].

Therefore, previous studies have approached CG using a multi-theoretical approach such as stakeholder, agency, political and institutional theories, managerial power[80], among others. In line with other research, this study will adopt a multi-theory framework for the following reasons; firstly, as this research aims to address pertinent CG issues such as board composition, executive pay and shareholder treatment, only a multi-theory framework can help understand all the problems.

Secondly, CG is a complex and dynamic topic which cannot be explained by a single theory. Although agency theory has been the dominant theory[81], the complex nature of CG that relates to several disciplines like law, finance, economics ethics and political studies[82] lends it more to a multi-theoretical approach. A single-theory approach is limited in its ability to fully account for the multi-disciplinary nature of

[78] J. Roberts (2001) Trust and control in Anglo-American systems of corporate governance: the individualizing and socializing effects of processes of accountability Human Relations, 54 (12), pp. 1547-1572

[79] T. Clarke (2005) Accounting for Enron: shareholder value and stakeholder interests Corporate Governance, 13 (5), pp. 598-612

[80] Liao, L., Luo, L., & Tang, Q. (2015). Gender diversity, board independence, environmental committee and greenhouse gas disclosure. British Accounting Review, 47(4), 409-424. Ntim, C. G. (2015). Board diversity and organizational valuation: unravelling the effects of ethnicity and gender. Journal of Management & Governance, 19(1), 167-195., Zattoni, A., Douglas, T., & Judge, W. (2013). Developing corporate governance theory through qualitative research. Corporate Governance: An International Review, 21(2), 119-122.

[81] Zattoni et al. 2013, p.119 Zattoni, A., Douglas, T., & Judge, W. (2013). Developing corporate governance theory through qualitative research. Corporate Governance: An International Review, 21(2), 119-122.

[82] Letza, S., Kirkbride, J., Sun, X., & Smallman, C. (2008). Corporate governance theorising: limits, critics and alternatives. International Journal of Law and Management, 50(1), 17-32. Bebchuk, L. A., & Weisbach, M. S. (2010). The state of corporate governance research. Review of Financial Studies, 23(3), 939-961.

CG. Therefore, different theories need to be used in a complementary manner to account for the various disciplines which make up CG studies[83].

Thirdly, this study uses the nexus of contract and stakeholder theories because they are equally affected by agency issues as the agency theory[84], and in the researcher's opinion, collectively they could help to understand the relationship between agents and principals better. Fourth, there have been calls for the adoption of a multi-theoretical framework in CG research. In response, therefore[85], this study has chosen the multi-framework approach. Also, several existing studies have adopted the multi-theory framework for the purpose of setting hypotheses and interpreting their findings[86] , and in a bid to stay consistent with these studies, the current study also adopts the multi theory approach.

2.2 Conceptual Clarification

2.2.1 Corporate Governance

Corporate governance can be conceptualised in several terms one of which is the nexus of contracts and the resultant agency theory[87] that has its origin in the field of

[83] Mallin, C., Melis, A., & Gaia, S. (2015). The remuneration of independent directors in the UK and Italy: An empirical analysis based on agency theory. International Business Review, 24(2), 175-186

[84] Ntim, C. G. (2015). Board diversity and organizational valuation: unravelling the effects of ethnicity and gender. Journal of Management & Governance, 19(1), 167-195.

[85] Brown, P., Beekes, W., & Verhoeven, P. (2011). Corporate governance, accounting and finance: A review. Accounting & Finance, 51(1), 96-172.; Christopher, J. (2010). Corporate governance—A multi-theoretical approach to recognizing the wider influencing forces impacting on organizations. Critical Perspectives on Accounting, 21(8), 683-695.; Zattoni, A., Douglas, T., & Judge, W. (2013). Developing corporate governance theory through qualitative research. Corporate Governance: An International Review, 21(2), 119-122.

[86] Jackling, B., & Johl, S. (2009). Board structure and firm performance: Evidence from India's top companies. Corporate Governance: An International Review, 17(4), 492-509. Low, D. C., Roberts, H., & Whiting, R. H. (2015). Board gender diversity and firm performance: Empirical evidence from Hong Kong, South Korea, Malaysia and Singapore. Pacific-Basin Finance Journal, 35, 381-401. +Ntim, C. G. (2015). Board diversity and organizational valuation: unravelling the effects of ethnicity and gender. Journal of Management & Governance, 19(1), 167-195.

[87] Williamson, O.E., (1975) *Markets and Hierarchies: Analysis and Antitrust Implications – a Study in the*

economics and finance and thrives on the importance of shareholders[88]. Other models have a broader social-oriented perspective and view corporate governance in terms of the interest of every actor that has an impact or is impacted by the company's activities. This approach describes the stakeholder theory. Suffice it to say that while these theories propose different approaches to corporate governance, they all attempt to analyse and address the same problem albeit from different perspectives. However, the Cadbury report in the year 2000 views it as a "system by which companies are directed and controlled".[89] This definition is just one among many definitions of corporate governance which would be examined in greater details later.

In any system, corporate governance deals with the relationship among shareholders, the board of directors and the top management in determining the direction and performance of the corporation. It includes the relationship among the stakeholders and the goals for which the corporation is governed.[90] The development of corporate governance is a complex process, including legal, cultural, and political parameters. Therefore, some theories are maybe more appropriate and relevant to some countries than others, or more relevant at different times depending on an individual country's history, economy, politics and culture.[91] What is appropriate in a developed economy might not be fit for an emerging economy. For instance, due to highly unpredictable government policies in developing continents such as Africa the appropriation of a

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Economics of Internal Organization New York: Free Press; Jensen, M.C. and Meckling, W.H., (1976) "Theory of the firm, Managerial Behaviour, Agency Costs and Ownership Structure" *Journal of Financial Economics*, Volume 3 No. 4, Pp305-60.

[88]D. Collison et al., (2011) *Shareholder Primacy in UK Corporate Law: An Exploration of the Rationale and Evidence* London: Certified Accountants Educational Trust

[89]Cadbury, A., (2000) "The Corporate Governance Agenda" *Corporate Governance* Volume 8 No. 1, Pp 7-15.

[90]Kim, D., Rasiah, D. (2010). Relationship between corporate governance and corporate performance in Malaysia during the pre and post Asian financial crisis, European Journal of Economics, Finance &Administrative Sciences, (21), 40-59.

[91]Christine Mallin 'Corporate Governance' 4th edition, Oxford University Press, 2013.

system based on a particular theory might not augur well for businesses, stakeholders and shareholders.

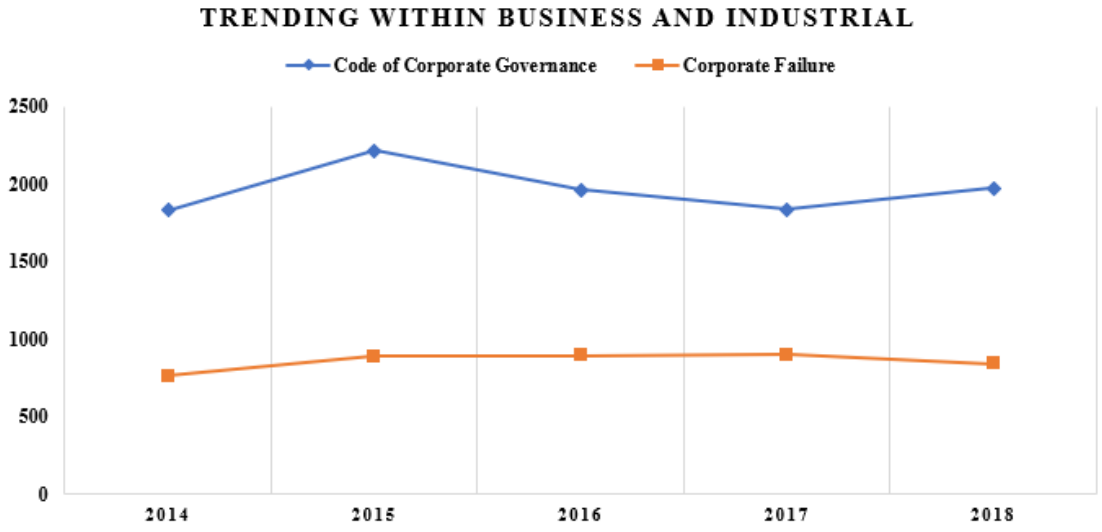
In most cases, African countries need a combination of governance systems based on a multi-theory approach for effective practice. This is imperative because social consciousness is minimal among the businesses, while profit-making is usually prioritised.[92] The ability of a robust proposition to cater for a CG approach with many defects remains the core reason for adopting a CG system based on a multi-theory approach. This is so that the flaws in one theory might be catered for by another theory. For instance, most systems on the African continent are either premised on agency theory or stakeholders among others that address causes, impacts and relationship of specific variables such as board members, independent directors, and top management executives more than regulatory frameworks.[93] The divergence of economic model, socio-cultural, and philosophical ideals in various countries of the world implies that good practices evolve. The evolutionary nature of CG largely explains why Nigeria's socio-cultural and economic dispositions must be an essential consideration for the development of a competent, result-oriented corporate governance practice.

[92] Abdullah, H., and Valentine, B., (2009) "Fundamental and Ethics Theories of Corporate Governance" Middle Eastern Finance and Economics Issue 4, Pp89-96 Accessed on https://pdfs.semanticscholar.org/886d/c63d287375c54f5143225243a5edecddbf59.pdf

[93] Abdullah, H., and Valentine, B., (2009) "Fundamental and Ethics Theories of Corporate Governance" Middle Eastern Finance and Economics Issue 4, Pp89-96 https://pdfs.semanticscholar.org/886d/c63d287375c54f5143225243a5edecddbf59.pdf accessed on 02/02/2019

2.2.2 Stakeholders' Interest in the Codes of Corporate Governance

As evidenced in the graph below, codes of corporate governance remain an essential mechanism through which corporate behaviours could be regulated. In the last five (5) years, the managers and other stakeholders' interest in the code of corporate governance has been on the increase within businesses, industrial and financial cycles. Within business and industrial cycle, there exists an ever-increasing interest in corporate governance codes due to the impact it has on business operations.[94] This is an indication that concerned stakeholders in corporate governance are seeking knowledge about the code of corporate governance throughout the world with a view of knowing the extent to which it could solve companies' collapsed due to mismanagement.[95]



[94] Google Trends (2019) "Code of Corporate Governance and Corporate Failure within Business and Industrial Categories" https://trends.google.com/trends/explore?cat=12&date=today%205-y&q=Code%20of%20Corporate%20Governance,Corporate%20Failure accessed on 23/01/2019

[95] Google Trends (2019) "Code of Corporate Governance and Corporate Failure within Finance Category" https://trends.google.com/trends/explore?cat=7&date=today%205y&q=Code%20of%20Corporate%20Governance,Corporate%20Failure accessed 02/02/2019

Fig. 2.1

Source: Google Trends, Compilation (2019)

2.3 Theoretical Framework

2.3.1 The Nexus of Contract Theory

This theory could be traced back to a publication by Berle and Mean titled *The Modern Corporation and Private Property*[96], but it has been ascribed to Jensen and Meckling's *Theory of the Firm*[97] than the Berle and Mean's book. The position of Jensen and Meckling is that the corporation needs to be seen as a legal fiction and as a central hub of series of contractual relationships or as a vehicle for contracting relations among the various entities which comprise the firm. The contractual nature of this approach means that shareholders are not in charge of the day-to-day running of their company but cede control to a management team.[98] Ceding the control to the management is imperative because of the shareholders' intent of managing the cost associated with turning day-to-day control of the firm over to self-interested corporate executives. They are also putting control in the hands of the agents because of the need to attract extracontractual investments from executives, creditors, and other prominent and significant employees.[99] The argument has also been that the

[96] James, Daniel (1933) "The Modern Corporation and Private Property, by Adolf A. Berle Jr. and Gardiner C. Means," *Indiana Law Journal*: Vol. 8 : Iss. 8 , Article 11.

[97] Jensen, M.C., and Meckling, W.H., (1976) "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" *Journal of Financial Economics*, Volume 3, No. 4, Pp305-360 https://www.sfu.ca/~wainwrig/Econ400/jensen-meckling.pdf accessed on 25/05/2017

[98] Jensen, M.C., and Meckling, W.H., (1976) "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" *Journal of Financial Economics*, Volume 3, No. 4, Pp305-360 https://www.sfu.ca/~wainwrig/Econ400/jensen-meckling.pdf accessed on 25/05/2017

[99] Stout, L.A., (2003) "The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance" *Investors' Choice* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3174&context=penn_law_review accessed on 12/06/2017

provision of raison d'etre by the principal for the sustainability of concentrated ownership (ceding control to the agents), checks managers' excesses and reduce agency cost.[100] In addition to the quantitative requirements of the principal-agent formulation and contracts enforceability, these remain the most significant sources of the problem and the thrust of the agency theory. Despite the benefits that would accrue to the shareholders having ceded control to the agents, the approach in addition to the computational requirements of the principal-agent formulation and all contracts enforceability remains the most significant sources of the problem and is thus the thrust of the agency theory.[101] It should be noted that ceding control of the business to managers emphasises the principle of separation of ownership and control within the theory, indicating the owners' readiness to allow the agents to make certain decisions for the benefits of the shareholders. As much as possible, agents must ensure the alignment of the interest of the principles with their own.[102]

Given the separation of ownership and control, various mechanisms are needed to align the interests of principals with the interests of agents[103]. The rules of contract between the principal and agent need to be designed in a way that allows a win-win situation. The element of the theory which recognises shareholders as only actors who the agents must serve diligently at the expense of the stakeholders need to be revisited

[100] Gelter, M., (2009) "The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance" *Harvard International Law Journal* Volume 50, No. 1, Pp131-1932009 Accessed on http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ_50-1_Gelter.pdf

[101] Balago, G.S., (2014) "A Conceptual Review of Agency Models of Performance Evaluation" *International Journal of Finance and Accounting* Volume 3, No. 4 Pp244-252 http://article.sapub.org/pdf/10.5923.j.ijfa.20140304.04.pdf accessed on 03/06/2018

[102] Kim, D., Rasiah, D. (2010). Relationship between corporate governance and corporate performance in Malaysia during the pre and post Asian financial crisis, European Journal of Economics, Finance &Administrative Sciences, (21), 40-59.

[103]Aguilera, R.V., and Jackson, G., (2003) "The Cross-National Diversity of Corporate Governance: Dimensions and Determinants" *Academy of Management Review* Volume 28, No. 3 Pp447–465.

since stakeholders also constitute parties to contractual agreements with organisations.[104] For instance, the field of Human Resources Management considers employees the greatest asset in an organisation with the belief that human capability and commitment distinguishes a successful organisation from others.[105] Agents as one of the internal stakeholders need to be informed of significant benefits they would get when the material and human resources are managed judiciously for the benefits of the principals. The failure to make this known would lead to aberrant activities with severe consequences on the corporation performance and bottom line in the short, medium, and long terms.[106] Also, external stakeholders such as suppliers and customers play a crucial role in the sustenance of the organisation, and so is the community within which it operates.

The agents' dysfunctional behaviour[107] is quite possible because the model connotes an outward-looking model that seeks to serve the interest of investors/shareholders over and above any other interest as they are considered owners of the firm[108]. In this type of corporate governance system, the owners undertake governance functions by engaging in monitoring and resources provision and do not generally involve themselves actively with the management of their companies. The authors noted that with the separation of ownership and control, and the wide dispersion of ownership, there was effectively little or no check upon the executive autonomy of corporate

[104] Christine Mallin 'Corporate Governance' 4th edition, Oxford University Press, 2013
[105] Storey, J (2001). Cultural Theory, Popular Culture an Introduction, Georgia University Press.
[106] Ibid 24.
[107] Balago, G.S., (2014) "A Conceptual Review of Agency Models of Performance Evaluation" *International Journal of Finance and Accounting* Volume 3, No. 4 Pp244-252 http://article.sapub.org/pdf/10.5923.j.ijfa.20140304.04.pdf accessed on 24/09/2018
[108] 'Shareholders as owners of the firm according to Julian Valasco is a view still held everywhere else except the academia' Julian Velasco, Shareholder Ownership and Primacy, 2010 U. ILL. L. REv. 897, 919

managers.[109] This is as a result of the need of the agents to vigorously pursue the interests of the shareholders and the fact that the suppliers of financial capital or shareholders hire managers through the board of directors to carry out a business venture. Managers mainly have the responsibility of maximising the firm's value[110]. However, when they own a small fraction of the firm's equity, they may be more incentivised to embark on actions that benefit them more.

On the other hand, when they own nothing, they are likely to be destructive through inefficiencies leading to significant loss to the firm. To that extent there is a need for some measure to monitor the performance of managers in order to control unexpected internal expenses, such as paying external auditors or financial forensic experts to assess the accuracy of firm's financial statements, resulting from maligned incentives. This brought into limelight the agency theory.

This theory aptly captures the approach to corporate governance in most Anglo-Saxon countries, including the United Kingdom. The theory is based on the concept of a "social contract," which focuses on the idea of dealing with each other in the absence of coercive forces. In specific terms, rational self-interested agents will choose cooperation over predation under certain objective circumstances. The theory has two application dimensions. It is descriptive and prescriptive. It is descriptive because it allows organisations to understand specific roles of shareholders,

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[109]Roberts, J.,"The Theories behind Corporate Governance" Judge Business School http://www.havingtheircake.com/content/1_Ideas%20that%20shape%20the%20world/fact%20and%20opinion/The%20theories%20behind%20corporate%20governance.lnk accessed on 16th March, 2015.

[110] Shareholders value maximization holds the idea that a firm's success is measured by how much value and wealth it creates for its shareholders
The concept of value maximization or shareholder wealth maximization (SWM) posits that maximum return to shareholders is and ought to be the objective of all corporate activity. a firm's success is measured b how much value and wealth it creates for its shareholders.
Lea, D. (2008). Shareholder wealth maximization. In R. W. Kolb (Ed.), Encyclopedia of business ethics and society (Vol. 1, pp. 1918-1922). Thousand Oaks, CA: SAGE Publications, Inc. doi: 10.4135/9781412956260.n733

stakeholders and managers, while it is prescriptive because it helps in predicting the right moral and/or legal rules that govern how stakeholders must bargain, prescribing impartial rules that must be prevailed under various competitive conditions and specific roles markets and national governments must play[111.] Nexus of contracts is anchored on two fundamental principles, one the leadership principle which suggests that directors are leaders of the organisation and secondly that the corporation is a bundle of contractual relationships between the various stakeholders within it that is the corporation and the state as well as directors and shareholders.[112] Besides, Jensen and Meckling extended these relationships to those involving employees, suppliers and creditors, among others, thereby creating an endless web of contractual relationships.

Though this notion has been widely accepted, it has also been criticised as being more of a shift in perspective rather than an ontological breakthrough.[113] However, the notion of the corporation being a nexus was dismissed as a failed attempt to prop up the market-oriented view that the corporation did not owe anything to the state and was used as a justification for maintaining the corporate law status quo.[114] Also, they are of the opinion that the corporation cannot be regarded as a contract because it is not possible for a contract to form a corporation. This has been premised on the fact that a corporation entails reciprocal arrangements and needs a bureaucratic hierarchy

[111] White, R.F., (n.d) Corporations: Descriptive and Prescriptive Dimensions Accessed on http://faculty.msj.edu/whiter/nexusofcontracts.htm 1/5/2019

[112]McGaughey, E., (2015) "Ideals of the Corporation and the Nexus of Contracts" *Modern Law Review Volume* 78, No 6 Pp1057.

[113]Bratton, William W., "The "Nexus of Contracts" Corporation: A Critical Appraisal" (1989). Faculty Scholarship. http://scholarship.law.upenn.edu/faculty_scholarship/839

[114]Hayden, G.M., and Bodie, M.T., (2011) "The Uncorporation and the Unraveling of 'Nexus of Contracts' Theory" *Michigan . Law Review* Volume 109 Pp1127

before contracts could be enforced.[115] This position has equally been advanced in the context that a corporation exists as a result of contracts among private individuals. On the other hand, the shareholders and the company as an entity are the only parties to the contract with the individuals responsible for the protection of the company and shareholders' interests against mismanagement and leaving the stakeholders off its context.[116]

The position that sees the company as an individual or a group of people is premised on the fact that permission must have been sought and secured from a state in the form of company registrations for such an organisation to be created, though such application are almost always granted and very rarely declined.[117] The theory thrives on the principle of separating ownership from control. Owners and shareholders are not part of the daily operations. The generation of capital from the stock market and other sources deem fit by the owners for the managers who are charged with the responsibility of running the organisation resulted in the emergence of the term outsider model.[118] Shareholders who are not part of the day-to-day running of the corporation are considered owners[119] while directors and managers are charged with the responsibility of running the organisation, most importantly the source of capital comes from outside of the company – the stock market hence the term outsider

[115] Eisenberg, M.A., (1998) "The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm" *Journal of Corporation Law* Volume 24 Pp820-836 Accessed on https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1546&context=facpubs 29th April, 2019

[116] Koutsias, M., "Supremacy in a Nexus of Contracts: A Nexus of Problems" Company Law Volume 38 No 4 Pp136-146 Accessed on http://repository.essex.ac.uk/20180/1/BULA-380401.pdf

[117] William W. Bratton 'The "Nexus of Contracts" Corporation: A Critical Appraisal' University of Pennsylvania Law School Penn Law: Legal Scholarship Repository

[118] Balago, G.S., (2014) "A Conceptual Review of Agency Models of Performance Evaluation" *International Journal of Finance and Accounting* Volume 3, No. 4 Pp244-252 Accessed on http://article.sapub.org/pdf/10.5923.j.ijfa.20140304.04.pdf

[119] Chartered Secretaries Australia (2006) *Expressing the Voice of Shareholders: A move to Direct Voting* Chartered Secretaries Australia Ltd, Accessed on https://www.governanceinstitute.com.au/media/35406/direct_voting_web.pdf

model. While shareholders make a financial investment in the corporation thus securing voting rights to elect a board of directors, the role of directors is mainly that of stewardship.[120] The board often headed by a CEO is either responsible for managing or overseeing the management of the corporation. Should the board feel unhappy with management performance, it acts through the CEO, and where it then feels the CEO is underperforming, the board has the power to replace its CEO. Though shareholders are not directly involved in company management, they have the power to remove directors or refuse to re-elect them if they consider the board to be underperforming or not adequately representing their interest via active participation in the annual general meeting. Shareholders are traditionally not known to participate directly in corporate decision-making, however depending on whether they are short-term institutional investors, who often provide corporations with substantial financial backing but expects equally huge returns within a short period or the traditional long-term shareholders, the board may want to know the view and wishes of shareholders and may or may not be required to seek or comply with such views or wishes. Hence, the shareholders have limited power to control the daily operations of the corporation or its long-term policies. Instead, "the corporation is controlled by its board of directors and subordinate managers, whose equity stake is often small."[121]

However because performances are measured by share value and prices, it has been found that managers are susceptible to undue influences from institutions such as

[120] Balago, G.S., (2014) "A Conceptual Review of Agency Models of Performance Evaluation" *International Journal of Finance and Accounting* Volume 3, No. 4 Pp244-252 Accessed on http://article.sapub.org/pdf/10.5923.j.ijfa.20140304.04.pdf

[121] Chartered Secretaries Australia (2006) *Expressing the Voice of Shareholders: A move to Direct Voting* Chartered Secretaries Australia Ltd, Accessed on https://www.governanceinstitute.com.au/media/35406/direct_voting_web.pdf

hedge funds, which have access to a huge cache of funds[122], by implementing myopic policies or embarking on corporate strategies which are only able to produce short term increases in stock price but undermine the long-term value of the company[123]. In other words, a short-term investment horizon from investors seeking huge returns on short-term investment only lead to a short-term governance horizon, which often produce negative results in the long run. This phenomenon was invariably linked to the notion of the primacy of shareholders by Pearlstein who argues that ascribing ownership of the corporation to shareholders have resulted in short-term institutional investors taking advantage to the detriment of long-term survival of corporations and a loss or decline in stock value to ordinary shareholders. On the other hand, long-term shareholders have been found to possess the capacity to monitor corporate managers, forcing them to make corporate decisions which are consistent with shareholder value maximisation[124] when they are adequately motivated.[125] In the same vein, the conclusion has been that companies with good governance structures such as increased shareholder engagement, effective mechanisms for equity management are likely to describe their ideal shareholders as those having long-term investment horizon and therefore prefer long-term shareholders because then they can implement long-term investment strategies without the distraction of short-term performance

[122]Pearlstein, S., (2013) "How The Cult of Shareholder Value Wrecked American Business" *Washington Post* Accessed on https://www.washingtonpost.com/news/wonk/wp/2013/09/09/how-the-cult-of-shareholder-value-wrecked-american-business/ 26/04/2016

[123]Anderson, R., (2015) "The Long and Short of Corporate Governance" *George Mason Law Review* Volume 23 Pp 19-68

[124] Contestable as this may be due to the level of shareholding involved. Institutional shareholders for instance have greater capacity for control.

[125] Harford, j., Kecskes, A., and Mansi, S., (2015) "Do Long-Term Investors Improve Corporate Decision Making? http://3we057434eye2lrosr3dcshy.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/Do-Long-Term-Investors-Improve-Corporate-Decision-Making.pdf accessed on 12/03/2016

pressure that comes with institutional investors.[126] A link has been established between the concept of shareholder primacy and a decline in investor returns, a number of public companies and a decline in life expectancy of American corporations from 75 years in the early 20th century to 15 in recent years.[127] The sequence of points raised here clearly demonstrates that there is a balance to be struck among the various interest groups (particularly shareholders and other investors) in ensuring that the interest of one does not jeopardise that of the other because these are important sources of funding for the corporation.

2.3.1.1 Support and Criticism of Nexus of Contract Theory

The discussion has largely revealed the significance of the theory in corporate governance practice. It helped the principals and agents to engage using contract principles. Like other theories and models of corporate governance, the nexus of contract theory has its shortcomings which have been the basis of the criticism from researchers, scholars, and corporate executives.[128] It has been challenged on the premise that it sees firm as the connection of contracts and represents a methodological and ontological success with radical consequences for corporate law.[129] These are preventing principals and agents from seeing corporations beyond economic value capturing.[130] Therefore, the need to "pursue a different contractual

[126]Beyer, A.,Larcker, D. F. and Tayan, B. (2014) *Study on How Investment Horizon and Expectations of Shareholder Base Impact Corporate Decision-Making* National Investor Relations Institute and The Rock Center for Corporate Governance Accessed on https://www.gsb.stanford.edu/sites/default/files/42_ShareholderComposition.pdf

[127]Stout, L. A., (2013) "The Shareholder Value Myth" *Cornell Law Faculty Publications*. Paper 771. Accessed on http://scholarship.law.cornell.edu/facpub/771 accessed on 13/03/2016

[128] Bratton, W.W., (1989) "The "Nexus of Contracts" Corporation: A Critical Appraisal" Faculty Scholarship. Paper 839 Accessed on http://scholarship.law.upenn.edu/faculty_scholarship/839 accessed on 13/03/2016

[129] Bratton, W.W., (1989) "The "Nexus of Contracts" Corporation: A Critical Appraisal" Faculty Scholarship. Paper 839 Accessed on http://scholarship.law.upenn.edu/faculty_scholarship/839

[130] Saint, D.K., (2005) "The Firm as a Nexus of Relationships: Toward a New Story of Corporate Purpose" A Dissertation submitted to Benedictine University in partial fulfillment of the requirements

theory of the firm, which offers greater positive accuracy and normative responsiveness."[131]

2.3.2 Agency Theory

In 1976, Jensen and Meckling proposed the 'principal-agent' framework within the outsider model of corporate governance. This model identifies an agency relationship where one party, the principal, delegates work to another party, the agent. This established that there is a contractual link[132] between the principals and the agents. The principals appointed the agents for the purpose of managing human and material resources for the benefits of the company [133] An agency relationship can be described as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent.[134] For the agent to carry out the specific duties and roles, the principal must provide an enabling environment and minimises his or her control in certain areas. For instance, the argument has been that the principal need to establish appropriate incentives for the agent and incurring monitoring costs in order to limit the aberrant activities of the agent.[135] The monitoring costs entail the restriction of the management's activities capable of preventing shareholders' value maximisation. Since there is a tendency for conflict of

for the degree of Doctor of Philosophy in Organization Development Accessed on http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.586.4651&rep=rep1&type=pdf

[131] Ibid

[132] In agency theory, an attempt is made to describe a relationship involving two parties, a principal and an agent, where the former delegates responsibilities for the latter under a contract. In this contract, either implicit or explicit , the agent is expected to act in the best interest of the principal.

[133]Shankman, N.A. (1999) "Refraining the Debate between Agency and Stakeholders Theories of the Firm" *Journal of Business Ethics,* Volume 19, No 4 Pp319-334.

[134] Bratton, W.W., (1989) "The "Nexus of Contracts" Corporation: A Critical Appraisal" Faculty Scholarship. Paper 839 Accessed on http://scholarship.law.upenn.edu/faculty_scholarship/839

[135]Jensen, M.C., and Meckling, W.H., (1976) "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" *Journal of Financial Economics* Volume 3, Issue 4, Pp305–360.

interest, the theory has been formulated in a way that gives the mechanism through which relationships, interests and possible conflicts that may arise in the course of these relationships between the contracting parties and how they may be resolved could be identified. Thus, in the field of finance and economics, for instance, the agency theory[136] has developed with time as a predominant theoretical support for the shareholder value orientation.

It must also be pointed out that the successful application of the agency theory is intricately linked to the size and level of development of the environment where it is being applied. Berle and Means highlighted this fact by indicating that as countries industrialised and developed their markets, the ownership and control of corporations became separated. Whilst this may not be said of countries such as Germany, France, and Japan, to name a few, it is the case in most common law countries like the USA and UK, where broad-based shareholding has led the development of legal systems capable of adequately protecting shareholders thereby encouraging further separation of ownership and control. Therefore, practice in most Anglo-Saxon countries such as the USA and UK as described by Means and Berle is to distinguish ownership from control. However, in recent years, institutional investors have come to play a significant role in the evolution and structure of ownership of corporations.

In contrast, Civil law countries operate a narrower shareholder base. Such a narrow shareholder base is a result of a preponderance of companies run as family firms or by controlling shareholders, rather than being owned by a broad shareholder base as well as being It is also due to the role that the banks play as capital providers –

[136]The introduction of limited liability companies and the market openness to the public share ownership had a dramatic impact in ways in which companies are managed. The market system in the USA and the United Kingdom and most of the Anglo –Saxon countries is organized in a way where the owners [the principal] who are the shareholders of the listed companies delegate the running of the company to the management [agent].

replacing the stock market. [137] Despite the agency theory's provision of some valuable insights into corporate governance, its applicability is to countries in the Anglo-Saxon model of governance, which is the case as Nigeria.

One key corporate governance principle is the protection of shareholders' rights, which is a rewarding corporate practice as it is crucial for attracting capital. This is applicable, not just to minority shareholders but also to big institutional investors. With companies often in need of capital, and one source is through capital investments Effective corporate governance and protection of shareholders' rights help to ensure availability of capital via this critical source. Investors are generally more willing to make funds available where their rights are clearly defined and a pathway for effective remedies exists in case violations occur. There is a need, however, for a balance between rights accorded shareholders and other stakeholders. For instance, where applicable laws grant shareholders preference or priority in terms of benefits accruable from company activities, over and above creditors, raising funds through loans may become difficult if not impossible. The same can be said of the need to balance the treatment accorded majority/institutional shareholders against minority shareholders. Therefore, fair and equitable treatment of all, a key principle of corporate governance, which should apply whenever shareholders' rights are concerned. Some of the rights that should be guaranteed to shareholders include rights to be adequately informed on the company's activities, right to receive dividends, right to purchase additional shares, right to participate in company general meeting, right to and the right to be awarded a proportionate share of the company's assets, after payment to creditors, in case of liquidation. Since the work of Berle and

[137]La Porta, R., Lopez-de-Silanes,F., and Shleifer, A., (1999) "Corporate Ownership around the World" *The Journal of Finance* Volume 54, No. 2 Pp. 471-517

Means, more CG researchers have focused more on dispersed ownership, which is the reasoning behind agency theory with particular attention on possible problems that often arise between shareholders and directors. More often, agency problems are usually found in a joint-stock type of organisation, and this could manifest in the different aspects of relationships that exist within a principal-agent type company, including issues arising in relationship between shareholders and top management, between controlling and minority shareholders, and shareholders and creditors. The most common form of conflict often cited among these parties include the externalities arising from asymmetries of information, differences in attitude towards risk, differences in decision-making rights and issues of agency contracts not costless[138] written and enforced.[139] The accusation against managers is that because they are not as invested as the shareholders, they only sometimes embark on policies which are too risky and detrimental to the long-term survival of the company. Also, managers have been accused of looking after their interest for pecuniary gains even when such interest runs contrary to those of the owners of the company.

The conflicts of interests between controlling shareholders and minority shareholders arise in a variety of forms such as; tunnelling,[140] transfer of pricing, nepotism and infighting. In this situation, non-controlling shareholders suffer because the decisions reduce the cash flow and ultimately, the value of the firm to them. Tunnelling is essentially an illegal practice where principal shareholder(s) or high-level

[138]Agency costs include the costs of structuring, monitoring, and bonding a set of contracts among agents with conflicting interests, plus the residual loss incurred because the cost of full enforcement of contracts exceeds the benefits.

[139]Jensen, M.C., and Meckling, W.H., (1976) "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" *Journal of Financial Economics* Volume 3, Issue 4, Pp305–360.

[140]An example of tunnelling is a situation where controlling shareholders diverts part of the firm's resources for their own private benefits at the expenses of non-controlling shareholders [this situation is also applicable in controlling manager's situation]. Tunnelling is particularly negative where in a company with concentrated ownership structure, the controlling shareholders' can exploit their control to expropriate minority shareholders.

management personnel embezzles company asset or funnels future business to themselves for personal gains, often at the expense of minority shareholders. When large stockholders control a corporation, the conflict of interests between management and shareholders may assume a small dimension compared to the challenge posed by the need to prevent majority shareholders from exploiting minority shareholders.[141] Moreover, as Bertrand et al.,[142] and Wurgler,[143] found, tunnelling does not only hurt minority shareholders. It poses a threat to the stability of stock markets as it has been identified as a major factor responsible for the Asian financial crises of 1997. Tunnelling is a problem which is particularly prevalent in developing economies due to weak government and regulatory controls; however, it could happen anywhere as long as the agents prioritise their interests above the owners' and shareholders' interests. Agency problems may also arise between creditors and shareholders, as they do not participate beyond the contractually agreed debt service in high-profit firms, but they share in the losses where insolvency happens.[144] As owners/investors, shareholders provide the funds to enable managers to implement strategies and investments that keep the corporation in business. However, when these business strategies and investment result in a loss, shareholders who are primary investors bear the full brunt of such failed policy and investment options, while creditors have to be paid, even when the enterprise goes into liquidation.

[141]Shleifer, A., Vishny, R.W., (1986) "Large Shareholders and Corporate Control" *Journal of Political Economy* Volume 94 Pp461–488.
[142]Bertrand, M., Mehta, P., and Mullainathan, S., (2002) "Ferreting out tunneling: An Application to Indian Business Groups" *The Quarterly Journal of Economics* Volume 117 Pp121–148
[143]Wurgler, J., (2000) "Financial Markets and the Allocation of Capital" *Journal of Financial Economics* Volume 58 Pp187–214;
[144]Biswas, P.K."Agency Problem and the Role of Corporate Governance Revisited" Accessed on http://www.scribd.com/doc/34013436/Agency-Problem-and-the-Role-of-Corporate-Governance#scribd 23/03/2015

The nexus of contract's core feature of separating ownership from management remains a major reason why agency problems exist and has been largely blamed for the instability of the Anglo-American governance mechanism.[145] On the one hand, it promotes investments, market competition, and development of the firm, while on the other, it generates conflicts between principal and agents.

Two assumptions are often generally associated with the agency theory; one is the oversimplification of organisational structure, in which it is reduced to just two participants (principals and agents), whose interests are assumed to be clear as well as consistent. The consistency does not mean that the shareholders cannot have contrary views on individual decisions.

A second assumption is that humans are self-interested and disinclined to sacrifice their interests for the interests of others, which is also supported by extant law.[146] As argued earlier, one of the means the principal can use to reduce divergences from his interest is the formulation of an appropriate reward and incentives system for the agent. For instance, the incentives system must be able to cater for the monitoring costs designed to limit the aberrant activities of the agent who may not want to act in the best interest of the principal.[147] Directors under this theory are believed to be tempted to be involved in opportunistic behaviour for their benefit, rather than undertake proper risk management for the benefit of their principals who prefers to

[145]Wen, S., (2010) "Corporate Governance and the Financial Crisis: Did the Theories Stand the Test?" *Journal of International Business and Finance Law* Volume 10 Pp 612.

[146] Daily, C. M., and Dalton, D. R. (1994) "Bankruptcy and Corporate Governance: The Impact of Board Composition and Structure" *Academy of Management Journal* Volume 37, No 6 Pp1603-1617.

[147]Jensen, M.C., and Meckling, W.H., (1976) "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" *Journal of Financial Economics* Volume 3, Issue 4, Pp305–360.

maximise their returns through the taking of rational corporate risk and focusing on high dividends and stock prices.[148]

The focus of the theory has created uncertainty due to various information asymmetries[149] which restricts shareholder's ability to make qualified decisions in response to agents' decisions. The separation of ownership from control can lead to managers of firms taking action that may not maximise shareholders' wealth, due to their firm-specific knowledge and expertise, which would benefit them and not the owners; hence a monitoring mechanism is needed to protect the shareholder interest. Many problems have arisen where the company managers prefer to pursue their objectives, such as attempting to gain the highest bonuses possible or situation where managers are likely to display a tendency towards 'egoism' [i.e., behaviour that leads them to maximise their own perceived self-interest].[150]

Agency problems can affect firm value and performance via expected cash flows for investors and the cost of capital. Some have a rather narrow view of corporate governance as a linear relationship between a company and its shareholders. Agency makes investors pessimistic about future cash flows being diverted. Good governance increases investor's trust and renders managers' actions costly and expropriation less likely.[151] It also means that "more of the firm's profit would come back to investors

[148]Wen, S., (2010) "Corporate Governance and the Financial Crisis: Did the Theories Stand the Test?" *Journal of International Business and Finance Law* Volume 10 Pp 612.
[149]Deegan, C., (2004) *Financial Accounting Theory* NSW: McGraw-Hill Australia Pty Ltd
[150] Feizizadeh, A., (2012) "Corporate Governance: Frameworks" *Indian Journal of Science and Technology* Volume 5 No.9 Accessed on http://www.indjst.org/index.php/indjst/article/view/30687/26581 14/03/2015
[151]Krafft, J., Qu, Y., Quatraroy, F., and Ravix, J., "Corporate Governance, Value and Performance of Firms: New Empirical Results on Convergence from a large International Database" *Industrial and Corporate Change* Volume 23, No 2 Pp361–397

as interest or dividends as opposed to being expropriated by the entrepreneur who controls the firm.[152]

2.3.2.1 Agency Cost

Jensen and Meckling defined agency cost as the 'sum of *monitoring expenditure* by the principal aimed at limiting the aberrant activities of agents; *bonding expenditure* by the agent which will guarantee that certain actions of the agent will not harm the principal or to ensure the principal is compensated if such action occurs and *the residual loss* which is the dollar equivalent to the reduction of welfare as a result of the divergence between the agent's decisions and those decisions that would maximize the welfare of the principal'.[153] Agency cost can be incurred in several ways such as; creating incentives, or sanctions or monitoring of executive conducts in order to constrain their opportunism. When this cost[154] is incurred, the managers of the company bear the entire cost of failing to pursue their own goals.[155]

Three categories of agency cost have been identified including monitoring expenditure, bonding expenditure and residual loss; all cost which according to McColgan,[156] are essential and necessitated by the ownership structure of corporations prevalent in Anglo-Saxon economies. Monitoring expenditure may

[152]LaPorta, R., F. Lopez-de-Silanes, A. Shleifer and R. Vishny (2002) "Investor protection and corporate valuation" *The Journal of Finance* Volume 57 Pp1147–1170; Krafft, J., Qu, Y., Quatraroy, F., and Ravix, J., "Corporate Governance, Value and Performance of Firms: New Empirical Results on Convergence from a large International Database" *Industrial and Corporate Change* Volume 23, No 2 Pp361–397

[153] Jensen, M.C., and Meckling, W.H., (1976) "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" *Journal of Financial Economics* Volume 3, Issue 4, Pp305–360.

[154]The agency cost incurred can be seen as the value loss to shareholders, arising from divergences of interest between them and the corporate managers

[155]McColgan, P., (2001) "Agency Theory and Corporate Governance: A Review of the Literature from a UK Perspective" Accessed on http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.286&rep=rep1&type=pdf 20/03/2015.

[156] McColgan, P., (2001) "Agency Theory and Corporate Governance: A Review of the Literature from a UK Perspective" Accessed on http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.286&rep=rep1&type=pdf 20/03/2015.

include the cost of audits, writing executive compensation contracts and ultimately, the cost of firing managers. Monitoring of the corporate managers can be of legislative practice or that of non-legislative. In the UK, for example, the Cadbury[157] and the Greenbury[158] codes of Governance encourage the corporate managers to provide a statement of compliance to show they practise good corporate governance. In the situation of non-compliance with the code, they disclose and explain the reasons why they did not. While some writers have written in support of effective monitoring of managers, others have argued against it. Burkart et al. demonstrated that the adequate supervision of managers constrain managerial initiative.[159] Likewise, the critics of the Cadbury report felt that the increased level of supervision might act as a deterrent to managerial entrepreneurship.

However, Demsetz et al. and Jensen suggest that the primary monitoring of managers comes not from the owners but the managerial labour market[160] , i.e. a director of a poorly performing firms, who may be perceived to have done a poor job overseeing management, are less likely to become directors at other firms.[161] The previous associations of a manager with success and failure are information about his talents. The manager of a firm, like the coach of any sports team, may not suffer any sudden gain or loss in current wages from the current performance of his team, but the

[157]Cadbury, A. (1992) *Codes of Best Practice: Report from the Committee on Financial Aspects of Corporate Governance* London: Gee Publishing.

[158]Greenbury, R. (1995) *Directors' Remuneration: Report of a Study Group chaired by SirRichard Greenbury* London: Gee Publishing

[159]Burkart, M., D. Gromb and F. Panunzi. (1997) "Large Shareholders, Monitoring, and the Value of the Firm" *Quarterly Journal of Economics* Volume 112 No 3, 693-728.; McColgan, P., (2001) "Agency Theory and Corporate Governance: A Review of the Literature from a UK Perspective" Accessed on http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.286&rep=rep1&type=pdf 20/03/2015.

[160]Demesetz, H. and Lehn, K. (1985) "The Structure of Corporate Ownership: Causes and Consequences" *Journal of Political Economy* Volume 93, Pp1155-77; Jensen, M.C., (1986) "Agency Costs of Free Cash Flow, Corporate Finance and Takeovers" *American Economic Review*, Volume 76, Pp323-9; Sardar, L.B., and Islam, M.N., (2007) "Agency Theory and Corporate Governance" *Journal of Modelling in Management*, Volume 2 Issue 1 Pp7 - 23

[161]Sardar, L.B., and Islam, M.N., (2007) "Agency Theory and Corporate Governance" *Journal of Modelling in Management*, Volume 2 Issue 1 Pp7 - 23

performance of the team impacts his future wages, and this gives the manager a stake in the success of the team.[162] On the other hand, bonding expenditure is the cost of setting up structures that will see the manager's act in shareholders' best interests or compensates them accordingly if they do not. It has been argued that the optimal bonding contract should aim to entice managers into making all decisions that are in shareholder's best interests. However, since they cannot always be compelled to do everything their shareholders wishes for, bonding compels managers to do things that shareholders would like by preparing a complete contract.[163] Preparing a shareholder's contract can be challenging as most future contingencies are hard to envisage and prepare ahead, and as a result, complete contracts are technologically not feasible.[164]

Despite the preceding, the principal may yet incur what is known as a residual loss provided that the agents make decisions that are different from those that could advance the principals' interest. This is the agency losses arising from conflict of interest. Where the cost of fully enforcing principal-agent contracts by far outweighs the benefits derived from implementing it. This loss is likely to be common in principal-agent type of corporations as not all the actions of agents can be controlled by monitoring or contractual arrangements as there will always be some extra costs

[162] Fama, E.F., (1980) "Agency Problems and the Theory of the Firm Author(s)" *The Journal of Political Economy*, Volume 88, No. 2 Pp288-307

[163]A complete contract is the contract which specifies exactly what the manager does n all states of the work, and how the profits are allocated. Denis, D.J. and Kruse, T.A., (2000) "Managerial Discipline and Corporate Restructuring Following Performance Declines" *Journal of Financial Economics*, Volume 55 Pp391-424.

[164] Shleifer, A., and Vishny, R.W., (1997) "A Survey of Corporate Governance" *The Journal of Finance*, Volume 52, No. 2 Pp737-783

associated with appointing agents.[165] Williamson argues that principals might seek to minimise remaining cost since it is considered a key cost.[166]

Furthermore, in containing management excesses, certain measures of control could be adopted either internally or externally. Internal control involves the introduction of a three-tier hierarchical governance mechanism, namely shareholders' general meeting, the board of directors, and executive managers.[167] The board of directors is a vital monitoring component charged with ensuring that any problem that may be brought about by the principal-agent relationship is minimised.[168] For the principal-agent arrangement to work as planned, the Anglo-Saxon countries in their codes suggest that boards must be populated with 'independent' non-executives who are willing and able to monitor executive performance, particularly where there are potential conflicts of interest. The growth and development of the numbers of non-executives on boards as well as the increased specification of their role and conditions of 'independence has characterised board reform around the world.[169] This internal control mechanism is purported to integrate the interests of common stockholders and the executive managers of a corporation by rewarding good corporate performance.[170] The external control requirement includes that of the OECD principle of transparency and disclosure which has also been mentioned in many corporate governance code of

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[165] Craig, D., (2010) *Australian Financial Accounting* (6th Edition) New York: McGraw-Hill

[166] Williamson, O.E., (1988) "Corporate Finance and Cvernance," *Journal of Finance* Volume 43, No. 3, Pp. 567-591.

[167]Letza, S., Smallman, C. and Sun, X. (2004b) "Reframing Privatisation: Deconstructing the Myth of Efficiency" *Policy Sciences* Volume 37 Pp159-183.

[168]Fauziah, W., Yusoff, W., and Alhaji, I. A., (2012) "Insight of Corporate Governance Theories" *Journal of Business and Management* Volume 1, Issue 1 Pp52-63 Accessed on http://www.academia.edu/2381859/Insight_of_Corporate_Governance_Theories ; Mallin, C.,(2013) *Corporate Governance* (4th edition) Oxford University Press

[169]Roberts, J., (2004) "Agency Theory, Ethics and Corporate Governance" A Paper prepared for the Corporate Governance and Ethics Conference, Maquarie Graduate School of Management, Sydney, Australia. June 28-30 2004. Accessed on http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.6327&rep=rep1&type=pdf 20/03/2015.

[170] Lashgari, M"Corporate Governance: Theory and Practice" Accessed on http://tharcisio.com.br/arquivos/textos/13200724.pdf 26/03/2015

best practice. One advantage of the OECD approach to transparency and disclosure is that unlike others (for instance the Cadbury's approach), it seeks to broaden governance consideration beyond non-financial stakeholders to include all stakeholders like employees, customers, communities and environment. This, according to Jiao, increases the value of the organisation in addition to greater goodwill amongst stakeholders.[171] In line with this, Becks and Brown found that organisation with the better practice of information disclosure also have a sound governance structure[172] which eliminates "information risk"[173] where managers refuse to share full information on risks associated with a particular loan or investment decision.

Another means of internal control adopted by large firms in order to attain efficient monitoring of the way a firm constructs corporate governance aiming to control agency cost is by establishing an effective internal mechanism in response to competitor firms or competition from other firms.[174] It has been argued that individuals within a firm are also controlled by the discipline of the market and opportunities for their services both within and outside the firm.[175] Segregation of decision-making process and decision control at the top level and lower level of the firm hierarchy is also another means of preventing the agency problem. This method of contrasting decision management and decision control has been argued to be a

[171]Jiao, Y., (2010) "Stakeholder Welfare and Firm Value" *Journal of Banking & Finance* Volume 34 Pp2549–2561

[172]Beeks, W. and Brown, P., (2006) "Do better-governed Australian Firms make more Informative Disclosures?" *Journal of Business Finance and Accounting* Volume 33 No 34, Pp 422 - 450

[173]Harford, Kecskes and Mansi (see footnote 12) contend that only good governance mechanism can reduce or eliminate information risks by inducing managers to not only disclose information but do so in a timely manner.

[174] Jensen, M.C., (1976) "Theory Agency Costs and Ownership Structure," *Journal of Financial Economics* Volume 3, No. 4, Pp 305-360

[175] Fama, E.F., (1980) "Agency Problems and the Theory of the Firm" *Journal of Political Economy* Volume 88, No. 2, Pp 288-307; Al Mamun, A., Yasser, Q.R., and Rahman, A., (2013) "A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance" *Modern Economy* Volume 4 Pp 37-48

means of avoiding situations where agent without ownership of firm intending to maximise own wealth by making decisions which may not be in the best interest of the principal.[176] For instance, investment decisions based on short term appreciation of share values may lead to bumper bonus pay for managers but may be detrimental to shareholder interests in the long run.

The shareholder's perspective of governance also includes some safeguards within the law to help shareholders monitor the managers. These rights include the right to vote at the Annual General meeting[177] on important matters such as; hostile takeovers, mergers, and acquisitions as well as in the election of the board of directors. The threat of takeover clearly, particularly hostile takeovers, serves as a means of discipline the managers as they will not want to lose their jobs. A hostile takeover is an important tool which may be deployed to whip managers of the under-performing or non-performing company in line.[178] This may be achieved, according to Anderson, through the aggregation of shares in a small group of shareholders who having acquired controlling stakes also acquire the right to determine the fate of current directors. Voting rights, however, proves to be expensive to exercise and to enforce. For instance, in a developing country such as Nigeria, shareholders cannot vote via mail; instead, they are required to be present at the meeting to vote. In terms of enforcement, the only court can be relied on to ensure that voting takes place, but

[176] Fama, E.F., and Jensen, M.C., (1983) "Separation of Owners and Control" *Journal of Law and Economics* Volume 26, No. 2, Pp301-325; Al Mamun, A., Yasser, Q.R., and Rahman, A., (2013) "A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance" *Modern Economy* Volume 4 Pp 37-48

[177]This right serves as a means of discipline company management through take over mechanism i.e. when shareholders are dissatisfied with a company's management structure, they vote in favour of a takeover.

[178]Anderson, R., (2015) "The Long and Short of Corporate Governance" *George Mason Law Review* Accessed on http://www.georgemasonlawreview.org/wp-content/uploads/Anderson_231.pdf 12/03/16

in countries where their legal system is weak, shareholder voting rights are violated more flagrantly.[179]

In recent years, there has been pressure on shareholders and particularly institutional shareholders (e.g. hedge funds) who hold shares for or on behalf of many to act more like owners[180] than holders of shares in order to protect the interest of shareowners through exercising proper scrutiny and influence both publicly and through their private contacts with investors.[181] This is to prevent another corporate collapse as was witnessed by big corporations in the past. Also, the call for improved transparency and disclosure, embodied in corporate governance codes and International Accounting Standards (IASs), should improve the information asymmetry situation so that investors are better informed about the company's activities and strategies.[182]

2.3.2.2 Support and Criticism of Agency Theory

Many scholars have written in support of the Agency theory. The works of Berle and Means, Jenson and Meckling, and, Fama and Jensen are some of the pioneering that brought the potential of agency theory to light, and since then researchers have done extensive analysis of ownership structure, board practices, agency conflicts, corporate governance reform, capital structure, and debt to gain further understanding of the agency issue. Also, in a developing nation like Nigeria, several other authors have used agency theory to examine corporate governance structures, and issues to suggest possible solutions for ensuring better governance.

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[179]Shleifer, A., and Vishny, R.W., (1997) "A Survey of Corporate Governance" *The Journal of Finance*, Volume 52, No. 2 Pp737-783

[180] See footnote 61

[181]Barker, R., Sanderson, P., and Hendry, J. (2003) "In the Mirror of the Market; the Disciplinary Effects of Company Shareholder Meetings" A paper presented at IPA conference, Madrid.

[182]Mallin, C., (2013) *Corporate Governance* (4th edition) Oxford University Press

Because it derives from the ownership structure, agency conflicts remain a constant feature of the Anglo-Saxon model. However, comparative corporate governance avails an opportunity for minimizing these conflicts for instance measures such as contractual incentives and legal regulation are important governance mechanisms in Anglo-Saxon jurisdictions which is characterised by dispersed ownership as opposed to much of continental Europe and Japan, where stockholders such as families and banks retain a higher capacity for direct control and operate in a context with fewer market-oriented rules for disclosure, weaker managerial incentives, and a greater supply of debt.[183]

The agency theory is therefore unable to fully account for cross-jurisdictional differences in its operationalization. This is particularly relevant to comparative discourse on national systems of corporate governance, and for the corporate governance of international businesses.[184] The agency theory also suffers from another critical limitation in international business governance research. As it presupposes the operation of an efficient and competitive market environment, where corporate ownership is dispersed, information asymmetries are minimal and competitive pressures are maximal.[185] In many developing economies, however, these presumptions about the agency are mainly invalid. For instance, one of the consequences of Nigeria's independence from Britain in 1960 is the adoption of an

[183]Aguilera, R.V., and Jackson, G., (2003) "The Cross-National Diversity of Corporate Governance: Dimensions and Determinants" *Academy of Management Review* Volume 28, No. 3, Pp447–465 Accessed on https://business.illinois.edu/aguilera/pdf/Aguilera_Jackson_AMR_2003.pdf 20/10/15

[184]Fama, E.F., and Jensen, M.C., (1983) "Agency Problems and Residual Claims" *The Journal of Law and Economics* Volume 26, No. 2, Corporations and Private Property: A Conference Sponsored by the Hoover Institution Pp327-349

[185]Udayasankar, K., Das, S., and Krishnamurti, C. (2005) "Integrating Multiple Theories of Corporate Governance: A Multi-Country Empirical Study" *Academy of Management Proceedings* Pp 01–06; Adegbite, E.,(2015) "Good Corporate Governance in Nigeria: Antecedents, Propositions and Peculiarities" *International Business Review* Volume 24 Pp319–330.

indigenisation programme which resulted in majority ownership (by government, individuals, and families) in corporate Nigeria.[186] As a result, there is no single best institutional arrangement for organising economic systems and corporate governance. International business (corporate) governance scholarship is thus enriched by the appreciation of local institutionalism which shape the configuration and dynamics of corporate governance in varieties of capitalism.[187] For instance, it overlooks important interdependencies among other stakeholders in the firm[188] because of its exclusive focus on the bilateral contracts between principals and agents—a type of dyadic reductionism.[189]

Within this context, the argument has been that people are self-interested, not altruistic, they cannot be expected to look after the interests, an assumption that has been disregard by the basis of stewardship theory;[190] others argued that the monitoring of the managers constrains managerial initiative;[191] some recent studies suggested that corporate governance practices based on shareholder's perspective needs to be modified in line with new economy.[192] Most of the critics based their argument against agency theory on the fact that the theory has been erected on a

[186]Nmehielle, V., and Nwauche, E. (2004) "External-internal Standards in Corporate Governance in Nigeria" *The George Washington University Law School Public Law and Legal Theory Working Paper* Volume 115 Pp1-50; Adegbite, E.,(2015) "Good Corporate Governance in Nigeria: Antecedents, Propositions and Peculiarities" *International Business Review* Volume 24 Pp319–330.

[187]Emmanuel Adegbite 'Good corporate governance in Nigeria: Antecedents, propositions and peculiarities' International Business Review 24 (2015) 319–330.

[188] Freeman, R. E. 1984. Strategic management: A stakeholder approach. Boston: Pitman;

[189]Emirbayer, M., and Goodwin, J., (1994) "Network Analysis, Culture, and the Problem of Agency" *American Journal of Sociology* Volume 6 Pp1411–1454; Aguilera, R.V., and Jackson, G., (2003) "The Cross-National Diversity of Corporate Governance: Dimensions and Determinants" *Academy of Management Review* Volume 28, No. 3, Pp447–465 Accessed on https://business.illinois.edu/aguilera/pdf/Aguilera_Jackson_AMR_2003.pdf 20/10/15

[190]Daily, C., Dalton, D. and Canella, A. (2003b) "Corporate Governance: decades of Dialogue and Data" *Academy of Management Review* Volume 28 No. 3 Pp371–382

[191]Burkart, M., Gromb, D., and Panunzi, F., (1997) "Large Shareholders, Monitoring, and the Value of the Firm" Quarterly *Journal of Economics* Volume 112, No. 3 Pp693-728; Tricker, B., (2012) *Corporate Governance Principles, Policies, and Practices* (2nd Edition)

[192]Chancharat, N., Krishnamurti, C. and Tian, G. (2012) "Board Structure and Survival of New Economy IPO Firms Corporate Governance" *An International Review* Volume 20, No. 2 Pp144–163.

single questionable abstraction that governance involves a contract between two parties and is based on a dubious conjectural morality that people maximise their personal utility.[193]

Nevertheless, despite all the lapses and criticism of Agency theory, its practice in the Anglo-Saxon countries have helped to highlight the difficult nature of the ownership structure, the resultant agency problems, with a view to providing better monitoring mechanism for the protection of shareholder interests. It has also highlighted the plight of minority shareholders and the need to protect their rights against abuse from controlling shareholders. Applying the agency's theoretical insight of economics to the legal contact of the corporation has helped in deepen understanding in the area of company and contract law.

2.3.3 The Stakeholder Theory

The theory was imbibed in the management discipline in 1970 and was later developed in 1984 by Freeman in his seminar work which incorporated corporate accountability to a broad range of stakeholders.[194] Donald and Preston,[195] in their work, identified that several books and articles primarily concerned with the concept of stakeholder theory had been written.

Stakeholder theory is one of the theories that give the managers of material and human resources towards value creation and capturing for the shareholder's

[193]Tricker, B., (2012) *Corporate Governance Principles, Policies, and Practices* (2nd Edition) Oxford University Press page 62.

[194]Abdullah, H., and Valentine, B., (2009) "Fundamental and Ethics Theories of Corporate Governance" *Middle Eastern Finance and Economics* Volume 4 Pp1450-2889
Accessed on http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.320.6482&rep=rep1&type=pdf 26/02/2015.

[195]Donnald, T. and Preston, L. E. (1995) "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" *Academy of Management Review* Volume 20, No 1 Pp65–91.

opportunity of balancing the multiple claims of conflicting stakeholders. Shareholders want higher financial returns, while customers want more money spent on research and development. The customers' insistence on spending on research and development is premised on the basis that more innovative solutions could be discovered to solve numerous problems.[196] And at the same time, the discovery of new solutions will increase the company's bottom line because of the new products that will emerge. Employees demand higher wages and better benefits, while the local community wants better parks and day care facilities. The management must keep the relationships between stakeholders in balance because when the relationship becomes imbalanced, the survival of the firm faces grave threats.

Like the Nexus of Contracts theory, stakeholder theory is also descriptive. It describes what the corporation is. Specifically, it explains company characteristics and behaviours. Through it, one can quickly pinpoint the corporate governance practices in any economy. Being instrumental and normative are the two elements that separate it from the Nexus of Contracts theory.[197] Its instrumentality enables managers and shareholders to examine the connection between the practice of stakeholder management and the achievement of several corporate performance goals.[198] By being normative, it has a similar element (prescriptive) of Nexus of Contracts theory which prescribes the possible moral and/or laws that must exist for the successful management of available resources. Basically, stakeholder theory helps in

[196] Hosono K., Tomiyama M. & Miyagawa T., (2003) Corporate governance and research and development: Evidence from Japan. Found at doi.org/10.1080/10438590410001628125
[197] Donnald, T. and Preston, L. E. (1995) "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" *Academy of Management Review* Volume 20, No 1 Pp65–91.
[198] Wan Fauziah Wan Yusoff & Idris Adamu Alhaji 'Insight of Corporate Governance Theories'Journal of Business & Management Volume 1, Issue 1 (2012), 52-63 http://www.todayscience.org/JBM/article/jbm.v1i1p52.pdf accessed on 25/05/2016

interpreting the function of the company having spelt out the specific roles and duties of each stakeholder.[199]

Stakeholder's theory of the firm claims that the purpose of the firm is to maximise the welfare of the stockholders, perhaps subject to some moral or social constraints either because such maximisation leads to the greatest good or because profitability is enhanced when all corporate actors are profiting from corporate activities.[200] The theory stipulates that a firm invariably seeks to provide a balance between the interests of its diverse stakeholders in order to ensure that each interest base receives some degree of satisfaction.[201] It is borne out of a broad research tradition, incorporating philosophy, ethics, political theory, economics, law, and organisational science.

The key idea around which the theory revolves that organisations that are able to effectively manage relations with their stakeholders will survive for much longer than those who cannot. The theory presents a view of capitalism which emphasizes the relationship between an organisation and not just its shareholders but also, it is customers, suppliers, employees, communities, and others who may affect or may be affected by its activities. The theory argues that a firm's long-term sustainability can only be guaranteed if it is able to create value for all stakeholders, not just shareholders.

The stakeholders' theory has been identified as the most fundamental challenge to the nexus of contract theory since it emphasises that the purpose of a corporate organisation should be broader than the mere maximisation of shareholder's welfare,

[199] Fontaine, C., Haarman, A., and Schmid, S., (2006) The Stakeholder Theory of Multi-National Companies Accessed on https://pdfs.semanticscholar.org/606a/828294dafd62aeda92a77bd7e5d0a39af56f.pdf 1/5/2019

[200]Freeman, E., (n.d) "Stakeholder Theory of The Modern Corporation" Accessed on http://academic.udayton.edu/lawrenceulrich/Stakeholder%20Theory.pdf 14/05/15

[201] Ibid 198

purpose such as corporate profitability, which is best guaranteed when stakeholders' interests are appropriately aligned. This theory has been referred to as the main alternative to the maximisation of shareholder value promoted by agency theory. The theory suggests that companies should design their corporate strategies considering the interests of their stakeholders (groups and individuals) who can affect or are affected by the organisation's purpose.[202] In contrast to the grounding of value maximisation in economics, stakeholder theory has its roots in sociology, organizational behaviour, the politics of special interest, and managerial self-interest.[203]

Unlike the agency theory in which the managers are expected to work in the interest of shareholders of the company, but in practice, this remains elusive in almost corporate governance systems, stakeholder theorists suggest that managers in organisations have a network of relationships to serve – this includes the suppliers, employees, and company. This network has been seen as imperative than shareholder-manager-employee that exists in the agency theory.[204] Therefore, the stakeholder theory defines a firm as a system of stakeholders operating within the more extensive system of the host society that provides the necessary legal and market infrastructure for the firm's activities.[205] This point was further buttressed by Blair in his work where he proposed that 'the goal of directors and management

[202] Freeman, R. E., (1984) *Strategic Management: A Stakeholder Approach* Boston: Pitnam; Ayuso, S., and Antonio, A., "Responsible Corporate Governance: Towards A Stakeholder Board of Directors"

[203] Jensen, M.C., (2001) "Value Maximization, Stakeholder Theory, and the Corporate Objective Function" JACF Volume 14, No. 3 Pp8-21

[204] Freeman, R.E. (1999) "Response: Divergent Stakeholder Theory". *Academy of Management Review*, Volume 24, No. 2, Pp233-236; Abdullah, H., and Valentine, B., (2009) "Fundamental and Ethics Theories of Corporate Governance" *Middle Eastern Finance and Economics* Volume 4 Pp1450-2889
Accessed on http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.320.6482&rep=rep1&type=pdf 26/02/2015.

[205] Clarkson, M.B.E., (1994) *A Risk Based Model of Stakeholder Theory* University of Toronto: The Centre for Corporate Social Performance & Ethics; Turnbull, S., (1997) "Corporate Governance: Its Scope, Concerns and Theories" *Scholarly Research and Theory Papers* Volume Number 4, Pp

should be maximising the total wealth created by the firm. The key to achieving this is to enhance the voice of and provide ownership-like incentives to the participants in the firm who contribute to control critical, specialised inputs [firm specific human capital] and to align the interest of these critical stakeholders with the interests of outside, passive shareholders'.[206] This is imperative because the view of stakeholder theory is that all the stakeholders have the right to be provided with information about how the organisation is impacting them (perhaps through pollution, community sponsorship, provision of employment, safety initiatives, among others), even if they choose not to use the information and even if they cannot directly affect the survival of the organisation.[207]

This has been the basis for many academic writers and has prompted a long-running argument as to the interest of those who are to be protected in a corporation. The model has argued for institutions to convert the inputs of investors, employees, and suppliers into forms that are saleable to customers hence return to its shareholders.[208] This is to replace the shareholding's view that the board has a fiduciary duty to maximise their returns first and put their needs first.

[206] Blair, M.M. (1995) *Ownership and Control, Rethinking Corporate Governance for 21st Century* Washington, DC: The Brookings Institution; Turnbull, S., (1997) "Corporate Governance: Its Scope, Concerns and theories" *Scholarly Research and Theory Papers* Volume 5, Number 4, Pp

[207] Al Mamun, A., Yasser, Q.R., and Rahman, A.,(2013) "A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance" *Modern Economy* Volume 4, Pp37-48

[208] Fauziah, W., Yusoff, W., and Alhaji, I .A., (2012) "Insight of Corporate Governance Theories" *Journal of Business & Management* Volume 1, Issue 1 Pp52-63 Accessed on http://www.academia.edu/2381859/Insight_of_Corporate_Governance_Theories

2.3.3.1 Contextualizing Stakeholders within the Theory

A stakeholder in an organisation is any group or individual who can affect or is affected by the achievement of the organisation's objectives.[209] This stakeholder must be managed by the agents in most cases and principals when it is necessary. In some scenarios, prospective clients can be regarded as stakeholders to help improve business efficiency in the market place.[210] Many academics have argued that employees are key stakeholder, they as much as the shareholders are residual risk-takers in the firm. So, in return for their loyalty, the corporation is expected to provide for them and carry them through difficult times.[211] Alongside the employees, it has been recommended that other groups such as suppliers,[212] financial advisers, creditors, and customers[213] of the firm have strong direct interests in the company's performance while local communities, the environment as well as society at large have legitimate indirect interests. Advocates of this theory believe that the ethical treatment of stakeholders will benefit the firm because trust relationships are built with stakeholders. Therefore, in order to achieve the maximum efficiency in the costs of social association, the long-term contractual associations between a firm and its stakeholders are necessary, likewise the significant representation of the groups at the board of directors.[214]

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[209]Freeman, R.E., (1984) *Strategic Management: A Stakeholder Approach* Boston: Pitman MApg 46.

[210] Fauziah, W., Yusoff, W., and Alhaji, I .A., (2012) "Insight of Corporate Governance Theories" *Journal of Business & Management* Volume 1, Issue 1 Pp52-63 Accessed on http://www.academia.edu/2381859/Insight_of_Corporate_Governance_Theories

[211] Freeman, R.E. (1999) "Response: Divergent Stakeholder Theory". *Academy of Management Review*, Volume 24, No. 2, Pp 233-236; Abdullah, H., and Valentine, B., (2009) "Fundamental and Ethics Theories of Corporate Governance" *Middle Eastern Finance and Economics* Volume No. 4 Pp1450-2889

[212] They are vital to the success of the firm, for raw materials will determine the final product's quality and price. However, the supplier relationships will depend on a number of variables such as the number of suppliers and whether the supplies are finished goods or raw materials

[213] they grants the firm the right to build facilities and, in turn, it benefits from the tax base and economic and social contributions to the firm

[214] Porter, M.E., (1992) *Capital Choices: Changing The Way America Invests in Industry* A research Report Presented to the Council on Competitiveness and Co-sponsored by the Harvard Business

However, the stakeholder theory has been widely and formally endorsed by professional organisations, special interest groups, and governments. Since the widely acceptance of the theories by the managerial circle, numerous definitions have been set to identify stakeholders ranging from broad conceptualisation that regard stakeholders as any individual or group having an interest in or being affected by the corporation[215] to mid-range theories that define stakeholders as those groups or individuals who assume some degree of risk-bearing activity with the corporation,[216] to narrow views which only recognize stakeholders whose relationship to the firm is primarily economic.[217] Freeman identified the distinction between stakeholders by virtue of their importance to the survival of the firm. In doing this, he categorised stakeholders by classifying them into two categories which are primary and secondary stakeholders.

Primary stakeholders[218] are those stakeholders or actors without whose continuing participation the corporation could not survive and is typically comprised of shareholders and other investors, employees, customers, and suppliers, together with

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School, Boston; Turnbull, S., (1997) "Corporate Governance: Its Scope, Concerns and theories" *Scholarly Research and Theory Papers* Volume 5, Number 4, Pp

[215] Freeman, R.E., (1984) *Strategic Management: A Stakeholder Approach* Boston: Pitman MApg 46; Carroll, A. B., (1989) *Business and Society: Ethics and Stakeholder Management* (South-Western, Cincinnati, OH).

[216] Clarkson, M., (1995) "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance" *Academy of Management Review* Volume 20 Accessed on http://download.springer.com/static/pdf/814/art%253A10.1023%252FA%253A1005880031427.pdf?auth66=1427388788_f7e7dd45e758edcfcf44f55756109e43&ext=.pdf

[217] Friedman, M., (1970) "The Social Responsibility of Business is to Increase its Profits" *New York Times Magazine* (September 13); Shankman, N.A., (n.d) "Reframing the Debate Between Agency and Stakeholder Theories of the Firm" Accessed on http://download.springer.com/static/pdf/814/art%253A10.1023%252FA%253A1005880031427.pdf?auth66=1427388788_f7e7dd45e758edcfcf44f55756109e43&ext=.pdf 26/03/2015

[218] Stakeholders that hold a direct interest in a business or organization and its dealings are known as primary stakeholders. These stakeholders usually invest their financial capital directly into the business. Examples of primary stakeholders include shareholders, employees, customers, suppliers, vendors and business partners. [https://www.termscompared.com/difference-between-primary-and-secondary-stakeholders/] accessed on 05/04/2020

what is defined as the public interest group: government and the communities that provide the legal and environmental infrastructures within which the corporation operates.[219] On the other hand, secondary stakeholder consists of actors who are situated at the borders of a firm and who may be impacted by its actions without having any contractual connection to it.[220] They are actors who can influence or affect or are influenced or affected by, the corporation, but who are not engaged in transactions with the corporation and are not essential for its survival. Special interest groups are examples of secondary stakeholders who have the capacity to mobilise public opinion in favour of, or against, the corporation and to inflict significant damage if it is judged that the corporation has acted contrary to the public interest, or if the corporation has failed to satisfy the needs and expectations of a particular primary stakeholder group.[221]

2.3.3.2 Approaches within the Theory

Donaldson and Preston,[222] in their work, extended the understanding of the theory by identifying that the stakeholder approach of governance can be categorised into two groups which are; the normative approach and the instrumental approach. The normative path continues in the tradition of a view of the firm in relation to its various stakeholders that their demands have intrinsic value to whom the company has a responsibility to meet their legitimate claims, but no one's interest should be

[219] Clarkson, M., (1995) "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance" *Academy of Management Review* Volume 20 Accessed on http://download.springer.com/static/pdf/814/art%253A10.1023%252FA%253A1005880031427.pdf?auth66=1427388788_f7e7dd45e758edcfcf44f55756109e43&ext=.pdf

[220] Mainardes, E.W., Alves, H., and Raposo, M., (2011) "Stakeholder Theory: Issues to Resolve" *Management Decision*, Volume 49 No. 2 Pp226-252

[221] Clarkson, M., (1995) "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance" *Academy of Management Review* 20;

[222] Donaldson, T. and Preston, L.E., (1995) The Stakeholder Theory of the Corporation: concepts, Evidence and Implications" *Academy of Management Review* Volume 20, No 1 Pp65-91.

able to dominate all of the others. Some academic writers who followed this approach suggested a diverse representation of stakeholders on corporations' boards in order to legitimise and safeguard the interests of corporate stakeholders and also to ensure that that their fears Governance in corporate decision-making. It has been proposed that the representation of diverse stakeholders on corporations.[223] Blair in his work described normative part by comparing it to the notion of Human capital which gives legitimacy to the unprotected rights of employees as an analogy to the rights enjoyed by shareholders from their invested financial capital.[224]

The main idea of the instrumental path is that everything else being equal, firms that practice stakeholder management will perform better in profitability, stability, growth, and so on. It attempts to connect the interest of stakeholders who are perceived to have influence that can improve the company's profitability.[225] This makes the instrumental approach a subset of the shareholding theory.

2.3.3.3 Support and Criticism of Stakeholder Theory

As several contributions of stakeholder concepts have grown, they have also become diffuse especially on the categorisation of stakeholders, what they should do and how they should capture values while devising strategies to mitigate possible conflicts of

[223] Freeman, R.E. and Evan, W.M., (1990) "Corporate Governance: A Stakeholder Interpretation" *Journal of Behavioural Economics* Volume 194 Pp337-359; Jones, T. and L.D. Goldberg (1982), "Governing the Arge Corporation: More Arguments for Public Director" *Academy of Management Review* Volume 7, No 4,Pp 603-611.

[224] Blair, M.M., (1995) *Ownership and Control, Rethinking Corporate Governance for 21st Century* Washington, DC: The Brookings Institution

[225] Ayuso, S., and Argandona, A., (2007) Responsible Corporate Governance: Towards A Stakeholder Board of Directors IESE Business School Accessed on http://www.iese.edu/research/pdfs/DI-0701-E.pdf 26/03/2015

interest.[226] In the stakeholders' theory, it is an issue that all stakeholders are bundled in a group based on common stake, but the theory has failed to establish an individual objective.[227] A typical instance is a situation where people that constitute agents have diverse responsibilities and educational status. There is a likelihood of conflicting interests. Both personal and group interests will clash while pursuing different agendas and priorities.[228] Beyond these, the integration of separate methodological strands of stakeholder theory to achieve a convergent theory has been identified as the main problem of stakeholder theory.[229]

Many scholars have come to criticise the theory. Jensen critiques the theory for assuming a single-valued objective which talks about the gains which accrue to a firm's constituency. His argument suggests that the performance of a firm is not and should not be measured only by gains to its stakeholders. Other key issues such as stream of information from senior management to lower ranks, interpersonal relations, working environment, among others are all critical issues that should be considered.[230] Another argument against the theory is that meeting stakeholders' interest opens up a path for corruption, as it offers agents the opportunity to divert the corporation's wealth away from the shareholders to others.[231] But Deegan described the moral perspective of the theory that stakeholders all have the right to be treated fairly by an organisation, and managers should manage the organisation for the

[226] Fassin, Y., (2008) "Imperfections and Shortcomings of the Stakeholder Model's Graphical Representation" *University of Gent Working Paper* Volume 504 Accessed on http://wps-feb.ugent.be/Papers/wp_08_504.pdf accessed on 12/06/2016

[227] Ibid

[228] Fassin, Y., (2008) "Imperfections and Shortcomings of the Stakeholder Model's Graphical Representation" *University of Gent Working Paper* Volume 504 Accessed on http://wps-feb.ugent.be/Papers/wp_08_504.pdf accessed on 14/08/2016

[229] Friedman, A.L., and Miles, S., (2002) "Developing Stakeholder Theory" *Journal of Management Studies* Volume 39, No 1 Pp

[230] Jensen, M. C, (2001) "Value Maximisation, Stakeholder Theory and the Corporate Objective Function" *European Financial Management,* Volume 7 No. 3 Pp297-317

[231]Smallman, C. (2004). Exploring Theoretical Paradigm in Corporate Governance. International Journal of Business Governance and Ethics,1(1), 78-94.

advantage of all stakeholders, regardless of whether the stakeholder management leads to better financial performance or not.[232] Others argued that the theory is incomplete in terms of setting specific mechanisms for sound governance as stakeholder's interest varies from group to group, which may create a conflict of interest.[233]

The theory has been said to leave managers of corporations in confusion as it does not specify who shall have property rights or how to distribute the residual claims.[234] It has also not specified what to do if the status of stakeholder changes. Since the theory does not have a unified method for identifying who a stakeholder is, scholars have argued that it will be challenging for a manager to decide a method for whose interest should be prioritised and to what extent; what to do if the status changes.[235] On the other hand, Freeman argues in support of the theory that it gives managers more resources and a greater capacity to deal with companies' internal problems.[236]

Some of these issues provide a platform for other arguments. An extension of the theory called an enlightened stakeholder theory was proposed. However, problems relating to empirical testing of the extension have limited its relevance.[237] The stakeholder theory, as presented by Freeman and further expounded upon by subsequent scholars is grossly inadequate and has not been sufficiently developed to

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[232] Deegan, C., (2004) *Financial Accounting Theory* NSW: McGraw-Hill Australia Pty Ltd

[233] Eric W. O., and Strudler, A., (2009) "Putting a Stake in Stakeholder Theory" *Journal of Business Ethics* Volume 88 No.4 Pp605-61; Letza, S., Smallman, C. and Sun, X. (2004b) "Reframing Privatisation: Deconstructing the Myth of Efficiency" *Policy Sciences*, Volume 37 Pp159-183

[234]Letza, S., Smallman, C. and Sun, X. (2004b) "Reframing Privatisation: Deconstructing the Myth of Efficiency" *Policy Sciences*, Volume 37 Pp159-183

[235] Antonacopoulou, E.P., and JérômeMéric, (2005) "A Critique of Stakeholder Theory: Management Science or a Sophisticated Ideology of Control?" *Corporate Governance: The International Journal of Business in Society*, Volume 5 No. 2 Pp22 – 33

[236] Freeman, R.E., (2004) "A Stakeholder Theory of Modern Corporations" in…..(eds.) *Ethical Theory and Business*, Upper Saddle River: Prentice Hall Pp56-65.

[237]Sanda, A. U., Mikailu, A. S., and Garba, T., (2005) "Corporate Governance Mechanisms and Firm Financial Performance in Nigeria" *AERC Research Paper*, 149, Nairobi.

be referred to as a theory.[238] Key suggests that while the theory identified important actors within a firm which in turn provide management with a useful strategic tools to work with, it fails to provide an adequate theoretical basis to explain the firm's behaviour or the behaviour of stakeholders, both internally and externally. The criticism further states that the stakeholder theory merely succeeded in portraying the firm as a "resource conversion entity"[239] whose sole purpose is to impact and be impacted by internal and external actors. As a result, Key identified inadequate explanation of the process, incomplete linkage of internal and external variables, insufficient attention to the system within which business operates and the level of analysis with the system, and inadequate environmental assessment as four areas in which the stakeholder theory can be criticised.

One implication of these shortcomings is that it makes it possible for an entity with any sort of connection to lay claim to being a stakeholder as the line has not been properly drawn in the theory. In addition, the stakeholder theory has presented the firm as though it merely exists to make a profit and distribute such profits among its variously identified stakeholders. In the process, some sort of competition emerges among these stakeholders as to who deserves to take what percentage of the firm's profit. Suffice it to say that the firm has a life of its own and never a sole purpose entity. Roles are quite distinguished based on the nature of the relationship the different groups have with the company and often expressly stated on contracts.

[238] Key, S., (1999) "Toward a New Theory of the Firm: A Critique of Stakeholder Theory" *Management Decision* Volume 37 No. 4 Pp317 - 328
[239] Ibid.

2.4 Models of Corporate Governance from Developed Markets

In addition to what have been examined under the theoretical propositions, models of corporate governance from developed markets are discussed in this section. As it would be discussed in the subsequent chapter, corporate governance practice evolves and maintains throughout the world based on specific legal and regulatory mechanisms of countries. Such mechanisms must itemise what expected of all parties in terms of the rights and responsibilities while creating and sustaining values for the benefits of the key players.

2.4.1 Model Categorization

The categorisation of a corporate governance model as insider or outsider depends on a number of factors. Such factors need to be identified within the context of the network of the people who will involve in capital creation, utilisation, and value delivery including capturing. For instance, what is the ownership structure like (is there a widely dispersed shareholder base or are shares held in large blocks by groups), what role are employees accorded in the corporation, what roles do banks play, do they just provide capital or are they as a result involved in decision making within the organisation. These are fundamental questions in determining how outward or inward leaning a corporate governance approach is.

2.4.1.1 Outsider Model

The outsider system is one "in which corporate governance functions are undertaken by external owners and source of capital is also external to the company ".[240] The outsider model is known to be characterised by widespread ownership of shares, however, in jurisdictions such as the USA and UK, institutional investors with no

[240] Baker, R.M., (2006) "Insiders, Outsiders, and Change in European Corporate Governance" A Paper presented at the Council for European Studies Conference, Chicago, March 31, 2006

prior affiliation to the corporation are increasingly investing in corporations within the outsider model jurisdictions. Institutional investors, like traditional shareholders, undertake governance functions from outside of the organisation. They are not actively involved in management but can exercise influence through "exit rather than voice", in other words, by "selling their equity stakes rather than through hierarchical control".[241] The involvement of institutional investors has resulted in more sources of financing for corporate organisations, in addition to funds from core investors and creditors. In terms of financing, one common method of raising capital is via equity financing, particularly in the USA and the United Kingdom. This perhaps explains why the two countries are the largest in terms of market capitalisation in the world. While in other systems outside of the Anglo-Saxon jurisdiction, most stock exchange-listed firms have fewer shareholders that have a substantial degree of control over the firm's affairs.[242] As a result of this, while the main corporate governance problem in most corporations within the insider model framework is the potential for exploitation of minority shareholders by controlling shareholders, the Anglo Saxon outsider model have a mechanism which provides better protection for minority shareholders

This model is heavily reliant on regulations as a means of keeping managers in check and advancing the interest of shareholders, particularly minority shareholders, who have little or no direct control over the affairs and decision making of the corporation. Where large block holders can get involved from the inside by virtue of having seats on the supervisory board and or majority voting rights on shareholders' assembly to unseat and replace a poor performing management team, minority shareholders have limited opportunities to carry out such actions. Also with regards to takeover

[241] Ibid.
[242]

regulations, the interests of shareholders and management are often diametrically opposed[243]. Whilst shareholders may be in support of takeover rules that encourage managers to maximise shareholder values; managers often oppose such rules as they are seen as impediments on them from acting as they consider fit. However, large block holders are less bothered as they have more direct control of managers. The Anglo-American model has sort of become consistent with the narrow definition of corporate governance due to its seeming bias towards shareholders. It is generally believed that while other stakeholders have recourse to contractual agreements to protect their interest, shareholders do not enjoy any such protection. The bias is therefore justified on the premise that if shareholders carry the biggest risk arising from investment decisions taken by the corporation, they should have the biggest say in corporate governance and enjoy whatever protection it has to offer however in practice such protections are not accorded to shareholders. Further justification of this approach rest in the primary function of the corporation as a wealth creator and the view of Hansmann and Reinier[244], there is an increasing consensus in favour of the shareholders-oriented model. They contend that 'ultimate control over the corporation should rest with the shareholder' as well as argue the primacy of the shareholder focused approach which is at the forefront of a worldwide convergence towards a unitary approach to corporate governance based on a shareholder-centred ideology.

In evaluating the outsider system, Bearl and Means described how the diffuse ownership structure could create what they referred to as the agency problem because

[243] Callaghan, H., (2007) *Insiders, Outsiders and the Politics of Corporate Governance: How Ownership Shapes Party Positions in Britain, Germany and France* Cologne: Max Planck Institute for the Study of Societies Accessed on http://www.mpifg.de/pu/mpifg_dp/dp07-9.pdf 01/08/2016

[244] Hansmann, H., and Kraakman, R., (2000) *The End of History for Corporate Law* The Center for Law, Economics, and Business Accessed on http://law.harvard.edu/programs/olin_center/papers/pdf/280.pdf 23/07/2016

of the separation of ownership from control.[245] To compensate for the risks associated with the outsider approach, Chandler 1990 observed that the model is imbued with a range of institutional features to safeguard oversight, information and control of company outsiders[246]. These include a shareholder elected non-executive board, as well as important role for 'reputational intermediaries' (like auditors, stock market analysts, stock exchanges, and bond-rating agencies).

2.4.1.2 Insider Model

This model of corporate governance is characterised by owners holding large stakes in a company, thereby allowing such stakeholders to monitor, oversee, and control the company from within the organisation. As a result, such investors are able to retain direct control over management and thus avoid agency problems and minimise agency cost. In varied economic models. It is entrenched that an investor holds large stakes typically greater than 10% - 20%, with which comes effective control in the company. In jurisdictions such as Japan and Germany, block holding investors such as families and banks have a greater capacity for direct hierarchical control in a weak market-oriented environment, weak rules for disclosure and openness.

Another common trend with the insider approach is the preponderance of privately-owned companies, including large firms. According to Baker,[247] the legal system tends to be skewed in favour of large block holders, thereby leaving minority

[245] Berle and Means((1932) *The Modern Corporation and Private Property* New York: Macmillan Publishers; Mallin, C., (2013) *Corporate Governance* (4th edition) Oxford: Oxford University Press
[246] Chandler, A. D., and Hikino, T., (1990) *Scale and Scope: The Dynamics of Industrial Capitalism* Cambridge, Mass; London: Belknap Press of Harvard University Press

[247] Baker, R.M., (2006) "Insiders, Outsiders, and Change in European Corporate Governance" A Paper presented at the Council for European Studies Conference, Chicago, March 31, 2006

shareholders poorly protected. The insider model, particularly as it relates to Germany, prescribes a two-tier board system consisting of separate members namely the management board and the supervisory board. The management board comprises insiders, mainly executives of the corporation, while the supervisory board consists of representatives of labour/employees as well as representatives of shareholders. In this insider system, voting right restrictions are allowed by law such that a shareholder may be limited to voting a certain percentage of the company's total votes, regardless of share ownership position.[248]

In Germany, most corporations are known to traditionally prefer bank financing to equity financing, which is almost a complete opposite of what obtains in the outsider leaning jurisdictions such as the US and UK, and it also explains why stock capitalization in Germany is small relative to the size of the economy when compared to those two economies. In other systems outside of the Anglo-Saxon jurisdiction, most stock exchange-listed firms have fewer shareholders that have a substantial degree of control over the firm's affairs.[249] As a result of this, whilst the main corporate governance problem in most corporations within the insider model framework (and to a much lesser degree in the outsider model) is the potential for exploitation of minority shareholders by controlling shareholders; however, the Anglo-Saxon outsider model has a mechanism which provides better protection for minority shareholders. Such mechanism such as the right to vote and fully participate in the general meeting. Unlike the insider model, under no account can the voting rights of a shareholder be limited way beyond their share of ownership, with this shareholders are given the power and voice to play an active role in the company's

[248] Assar Lindbeck and Dennis J. Snower "Insiders versus Outsiders" Journal of Economic Perspectives—Volume 15, Number 1—Winter 2001—Pages 165–188
[249] George, M., (2012) *International Corporate Governance* (1st Edition) Pearson Publishers

affairs. Insider and outsider models differ in a few other ways. Whilst the outsider model prioritizes market regulation, the priority for the insider model is stakeholder control. It has also been argued that with the outside model, owners tend to have a transitory interest in the firm, on the other hand, owners in an insider modelled jurisdiction tend to have a more enduring interest in the company. Another feature identified with the outsider model is the absence of close relationships between shareholders and management, by contrast, the relation between management and shareholders is much closer and stable.

In assessing and evaluating the insider/outsider categorization, a distinction must be made between corporate governance considered as a description of power dynamics among actors (such as labour/ employee involvement and management, outcome of distribution model of contestations between management, owners and labour) within an organisation, and that which concerned technical activities pertaining to monitoring, oversight, regulation and control of management activities[250], particularly where it affects the interest and welfare of minority shareholder – which is a significant part of this work. Both the insider and outsider models contain elements that can be combined and adopted as a disciplined and dynamic approach to corporate governance

2.4.2 Concessionary Model

The German corporate governance model has attracted significant interests from scholars over the past several decades. This has been linked with the phenomenal growth recorded by the German economy since the 2nd world war as well as the fail-safe mechanism that has ensured that German firms can ride the storm of global

[250] Shinn, J.,(2001) *Private Profit or Public Purpose? Shallow Convergence on the Shareholder Model* Princeton: Princeton University

economic downturns and avoid corporate scandals. Whereas in literature replete with international corporate governance systems, the UK and US are considered to operate the so-called "outsider system" characterised by a large number of quoted companies, high liquidity and large equity markets, highly dispersed ownership and frequent hostile takeovers,[251] the German model is considered to operate an "insider system" where a relatively small number of firms are listed, share ownership is highly concentrated and low level of take over activities.[252]

The German model is reputed for its relationship-based insider approach, which enables employees to play deeper roles in the running of the organisation. This model operates a proxy system of voting where banks are allowed to cast votes on behalf of other shareholders, who deposit their shares with the bank.[253] This allows banks to acquire a considerable level of control, even in companies with fairly widely held share ownership[254]. There is widespread cross-holding[255] of shares, as a result, and in addition to the significant role of banks in shareholding, the roles of portfolio investors such as pension and investment funds are marginal[256].

Generally regarded as a two-tier model, the German model consist of a two-board structure namely the Supervisory [the Aufichsrat] and the management boards [the

[251]Berle and Means (1932) *The Modern Corporation and Private Property*, New York: Macmillan; Mallin, C., (2013) *Corporate Governance* (4th edition), Oxford University Press

[252]Owtscharov, A., (2007) "The German System of Finance and Corporate Governance: Gateways to Change and Implications for Firm Performance" A Dissertation submitted to the University of St. Gallen, Graduate School of Business Administration, Economics, Law and Social Sciences (HSG) to obtain the title of Doctor of Business Administration Accessed on http://www1.unisg.ch/www/edis.nsf/SysLkpByIdentifier/3306/$FILE/dis3306.pdf

[253]Edwards J, and Fischer K, (1994) *Banks, Finance and Investment in Germany* Cambridge: Cambridge University Press

[254]Franks J, and Mayer C., (2001) "Ownership and control of German corporations" DP 2898, Centre for Economic and Policy Research, London, forthcoming in *Review of Financial Studies*

[255] crossholding or cross ownership of shares refers to a system of share ownership. Harford et al. considers this to be one of the major distinguishing feature of the German Model.
Harford, J., Jenter, D., and Li, K. (2011) "Institutional Cross-holdings and Their Effect on Acquisition Decisions" *Journal of Financial Economics* Volume 99, No. 1 Pp27-39

[256]Blommenstein H J, and Funke N., (1998) "Institutional Investors in the New Financial Landscape" *OECD Proceedings*, Paris

Vorstand- the appointment of this members are done by the Supervisory tier]. There is a clear separation of these two boards as no one person is allowed to be a member of both bodies simultaneously. One of the underlying reasons for this clear separation is that the stronger the management is, the less safe it is to assume that its interests coincide with those of the owners of the business.[257] These two boards in addition to an annual general meeting are responsible for the overall running of most large corporations under the German model and their various responsibilities are clearly detailed in the German corporate governance code. According to this code, the management board is the board with a massive concentration of power, because among other functions they are responsible for independently managing the enterprise and for the day-to-day running of the company. In doing so, it is obliged to act in the enterprise's best interest and undertake to increase the sustainable value of the enterprise.[258] Their duty in a corporation depends on the size and structure of the company. It is composed of several persons and have a chairman or spokesperson who shall allocate areas of responsibilities and the cooperation in the board. The management board is obliged to report to the supervisory board on many issues including those concerning company strategy, profitability, big transactions, and general state of affairs in the organisation.[259]

The *Supervisory Board*, on the other hand, is for strategic decisions like merger and acquisition, dividend policy, major investments, the firm's capital structure, and appointment of top managers. The size of this board is only determined by law. As

[257] Charkham, J.P., (2005) *Keeping Better Company- Corporate Governance Ten Years On* Oxford University Press.
[258]German Corporate Governance Code 2015 Accessed on http://www.dcgk.de//files/dcgk/usercontent/en/download/code/2015-05-05_Corporate_Governance_Code_EN.pdf 27/11/15
[259]Peck, S.I. and W. Ruigrok (2000) "Hiding behind the Flag? Prospects for Change in German Corporate Governance, *European Management Journal*, Volume 18, Pp420-430.

opposed to the Anglo-Saxon model, the supervisory board and not shareholders are responsible for selecting the management board; consequently, it is also imbued with the power to monitor, sanction, and where necessary dismiss the management board[260]. The composition of the supervisory board is dependent on the number of employees within the corporation. Half of the seats on the supervisory board is reserved for employees in organisations with at least 2000 employees, while those with a smaller number of employees occupy one-third of the seats.

However, *the annual general meeting* provides an outlet for shareholders to exercise their rights with regards to the running of the company's affairs and their voting rights in particular, on the resolution on the appropriation of net retained profits, the election of the auditor, the discharge of the board of management and the supervisory board, amendments to the Articles of Incorporation, the issue of new stock and convertible bonds and bonds with warrants, the authorization to acquire own stock, structural changes like transformations or enterprise contracts and the election of the shareholders' representatives to the supervisory board.

Banks play a central role in this model and occupy the head of most holdings so as to implement multilevel control in the governance pyramid, and this pyramid include up to two-third of all large firms in German. This is because banks are often the main source of funding for companies in Germany. The phenomenon of personal union between financing banks and corporations is also associated with the German model,[261] which follows the practice of having cxzahigh ranking bank officials

[260]Hopt, K J, (1998) "The German Two-tier Board: Experience, Theories, Reforms" (eds.) in Hopt, K.J., Kanda, H.,Roe, M.J.,Wymeersch, E., and Prigge, S., (eds.) *Comparative Corporate Governance: the State of the Art and Emerging Research* Pp227 – 259 Oxford: Clarendon Press

[261]Onetti, A., and Pisoni, A., (2009) "Ownership and Control in Germany: Do Cross-Shareholdings Reflect Bank Control on Large Companies?" *Corporate Ownership & Control* Volume 6, No. 4, Pp54-77.

notably as directors on the supervisor and possibly management boards of companies that are being financed by the banks. On the other hand, high ranking officials of such large firms are also allowed supervisory roles in banks where they have close ties. One criticism against this phenomenon is that an unhealthy relationship can develop between the parties.

It has also been widely heralded for its long-term view on investments occasioned by long-term relationships between companies and financiers, allowing German companies to invest in long-term projects, thereby enjoying a more secure financial environment. This contrasts sharply with the Anglo-Saxon model, which is famous for its short-termism, forcing managers to take unnecessary risks at the expense of their investors or shareholder. It must be established at this point that the Anglo-Saxon model increasingly suffers the effect of short-termism as a result of the influence of institutional investors with hedge funds who are more often in short term investment with huge returns. Recently, however, what was once a source of strength have now become a source of weakness as German firms have struggled and mostly unable to attract investments from large institutional investors across the world due to what Monks and Minow[262] describes as "a parochial governance practice", which may limit or inhibits the rights of shareholders. But this characterisation appears too harsh when compared to shareholder rights and privileges under the Anglo-Saxon model. In an attempt to improve the situation, an initiative to enhance transparency was launched through the *Deutsche Bondestag* publication of 1998. In addition, a corporate governance best practice586 code was introduced in 2000 and updated a year on in 2001. The aim of these codes is to state clearly the acceptable national and

[262]Robert A. G., and Monks, N.M., (2011) *Corporate Governance* (5th Edition), Wiley Chichester

international standard for responsible corporate governance as well as present essential statutory regulations for governing and managing German listed companies. The thinking behind these reforms is an attempt to align German corporate practices with international standards in governance.

In addition, Owtscharov[263] found that the German model is and will continue to go through changes mainly as a result of what he termed external stimuli, which originates from continued internationalisation of its firms as well as a continued internationalisation of the financial sphere leading to a convergence with other corporate governance models, particularly the Anglo-Saxon model. However, reality suggests otherwise as this conclusion has been proven wrong, while some view these changes as a challenge to the continued growth of the German model[264] others like Streeck[265] view such changes as the internationalisation of production and finance as a source of destabilisation. This is because as German firms internationalise, they become increasingly exposed and need to respond to the pressures inherent in their international environment. In other words, as they increase their international investor base and involvement in international product markets, interactions with domestic institutional environment diminishes and thus generate a conflict of interests.

[263]Owtscharov, A., (2007) "The German System of Finance and Corporate Governance: Gateways to Change and Implications for Firm Performance" A Dissertation submitted to the University of St. Gallen, Graduate School of Business Administration, Economics, Law and Social Sciences (HSG) to obtain the title of Doctor of Business Administration Accessed on http://www1.unisg.ch/www/edis.nsf/SysLkpByIdentifier/3306/$FILE/dis3306.pdf 14/10/15

[264]Vitols, S., (2000) "The Reconstruction of German Corporate Governance: Reassessing the Role of Capital Market Pressures" A paper for the 1st Annual Meeting of the Research Network on Corporate Governance, Wissenschaftszentrum Berlin fürSozialforschung (WZB), Berlin, Germany, 23-24 June 2000; Lane, C. (2000) "Globalization and the German Model of Capitalism – Erosion or Survival?" *British Journal of Sociology* Volume 51, Pp207-234.

[265]Streeck W., (1997) "German capitalism: Does it Exist? Can it Survive?", in Crouch, C., and Streeck, W., (eds) *Political Economy of Modern Capitalism: Mapping Convergence and Diversity* London: Sage Publications Pp33 – 54

Corporate governance is not only significant for helping to protect investors' interests; it also plays a crucial role in employees' welfare and job security. These are major cornerstone of the German model such that whilst there has been some strong attempt by the German government to protect workers' welfare, for instance blocking the introduction of European take-over code, partly in an attempt to prevent labour unrest, there have also been several attempts at other reforms aimed at creating a friendlier environment for investors.[266] To that end, one major economic policy in Germany since late 1990s is known as *Standortwettbewerb*, a policy which among others assume that immobile factors within the economy, in this case, labour, should compete for mobile factors mainly capital.[267]

Critics, however, consider these reforms inadequate, with the view that the changes are rather shallow. On the one hand, a stream of researchers who would like to see far-reaching changes happen more rapidly often cite the theory of congruence which foresees that corporate governance in continental Europe will converge with the Anglo-Saxon model because of its higher effectiveness and efficiency.[268] On the other, a body of research have argued in favour of stability even when the process appears slow. These studies often back their argument with the theory of path

[266]Jürgens, U., and Rupp, J., (2002) in Wissenschaftszentrum Berlin fürSozialforschunggGmbH (eds..) The German System of Corporate Governance: Characteristics and Changes. Berlin, 2002 (Veröffentlichungsreihe / Wissenschaftszentrum Berlin fürSozialforschung, ForschungsschwerpunktTechnik - Arbeit - Umwelt, AbteilungRegulierung von Arbeit 02-203). URN: Accessed on http://nbn-resolving.de/urn:nbn:de:0168-ssoar-112370

[267]Streeck W., (1997) "German Capitalism: Does it Exist? Can it Survive?" in Crouch, C., and Streeck, W., (eds.) Political Economy of Modern Capitalism: Mapping Convergence and Diversity London: Sage Publications pp 33–54; Jürgens, U., and Rupp, J., (2002) in Wissenschaftszentrum Berlin fürSozialforschunggGmbH (eds..) The German System of Corporate Governance: Characteristics and Changes. Berlin, 2002 (Veröffentlichungsreihe / Wissenschaftszentrum Berlin fürSozialforschung, ForschungsschwerpunktTechnik - Arbeit - Umwelt, AbteilungRegulierung von Arbeit 02-203). URN: Accessed on http://nbn-resolving.de/urn:nbn:de:0168-ssoar-112370

[268]Wójcik, D., (2002) "Change in the German Model of Corporate Governance: Evidence from Blockholdings 1997 – 2001" Accessed on http://cep.lse.ac.uk/seminarpapers/02-12-02-WOJ.pdf 25/09/15; Rajan, R. G., and Zingales, L., (2003) "The Great Reversals: The Politics of Financial Development in the 20th Century" *Journal of Financial Economics* Volume 69, No. 1 Pp5-50 Accessed on http://cep.lse.ac.uk/seminarpapers/02-12-02-WOJ.pdf 25/09/15

dependence[269], which supports the notion that quick systemic changes could be counter-productive and that such changes are desirable only when the benefits it delivers are large enough.[270]

2.5 Conclusion.

In this chapter, an attempt has been made to examine in detail the distinguishing features of the different corporate governance models as adopted in the various jurisdictions where they are in operation. In the course of the discussion, it became apparent that different models accord a different degree of importance to the different constituents or interest groups that often compete for significance in an organisation. Therefore, while the outsider model purports to focus on the interest of the shareholder over and above other interests, the stakeholder model (by extension stakeholder theory) presents a broader spectrum of interest constituents to be served by the management team of an organisation and the German concessionary model presents a more collaborative approach that involves all interest groups having a stake and taking part in the decision-making process.

For the purpose of this work, the Outsider model is considered the best model as well as the most appropriate to Nigeria because it relies heavily on regulation to keep managers in check and advance the interest of the shareholder, as against the insider which is prone to the exploitation of minority shareholders.

In this chapter conflicts among the various components of an organisation as inherent in the models have equally been examined. Hence, the principal-agent problem

[269]Ibid.
[270]Bebchuk L, and Roe, M., (1999) "A Theory of Path Dependence in Corporate Governance and Ownership" *Stanford Law Review* Volume 52 Pp121 – 17

arising from the ownership structure was considered under the nexus of contract theory, the challenge of satisfying every single-interest group under the stakeholder theory as well as the cumbersome decision-making process under the concessionary model were all examined.

CHAPTER 3

LEGAL AND REGULATORY ENVIRONMENT IN NIGERIA

3.0 Introduction

This chapter aims to examine corporate governance in Nigeria by focusing upon the relevant developments from independence in 1960 to the recent code of corporate governance. This will help in proffering a clearer understanding as to the Nigerian corporate system in place and the steps which has been taken in introducing good corporate practice in Nigeria both legal and voluntary aspects. As explained in Chapter 2, the contractual model of corporate governance is dominant in Nigeria. This is also the dominant model in an Anglo-Saxon jurisdiction where Nigeria often looks to for ideas on legal issues. It is therefore essential to examine how this governance mechanism has been deployed with a view to establishing an effective regulatory environment in the Country.

In addition to that, an in-depth analysis of the challenges which overtime prevented effective implementation of the various codes and other challenges will be done. The first section examines the evolution of the various codes that have been in operation at different times in various sectors of the economy. The second part deals with the historical background of corporate governance in Nigeria. The third section highlights the challenges facing corporate governance in Nigeria. Finally, the analysis of the new code will take place. Some of the issues and challenges identified in this chapter will help in making proper recommendations needed for improving the practice of corporate governance in Nigeria. The thesis argues that there is a need to draw vital lessons from past experience and reflect such lessons going forward, starting from the new NCCG.

3.1 Business Ownership and Operations

There are three main forms of doing business in Nigeria. They are sole proprietorship, partnership, and the formation of a limited liability company registered under the Companies and Allied Matters Act. As regards limited liability companies, CAMA places larger responsibilities in the hand of board members, to effectively manage and control the company to ensure corporate accountability, transparency, and responsibility to shareholders.[271] This thesis will mainly focus on the public listed companies and would, therefore, examine the position of CAMA and the Codes put in place which affects public companies in Nigeria either listed or non-listed.

Corporate governance[272] continues to attract considerable national and international attention and has again appeared at the top of the agenda with the financial meltdown in the recent past. A series of corporate mismanagements as evidenced with the Enron scandal in the United States in 2001 and the global financial meltdown of 2008 which began with the crash in the United States mortgage industry and later affected all other parts of the world[273]. There were also several scandals in Nigeria, the most prominent of which was the Cadbury scandal of 2006 in Nigeria.[274] These scandals exposed failures in corporate governance that shook the economies of developing countries and have drawn attention to the weak corporate governance in emerging economies. The major implication of these crises resulted in changes towards the

[271] B.J., Inyang (2009) "Nurturing Corporate Governance System: The Emerging Trends in Nigeria" *Journal of Business Systems, Governance and Ethics* Vol 4, No 2, 2009. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.452.1367&rep=rep1&type=pdf accessed on 5/04/17.

[272] Corporate governance is about decision making process that holds individuals accountable, encourages stakeholder participation and facilitates the flow of information

[273] C. Osisioma, (2012) "Regulatory Development: Financial Reporting Council and IFAC Requirements" A Paper Presented on July, 17 Nnamdi Azikwe University, Awka, Anambara State; V.G Maurer (2007), "Corporate Governance as a Failsafe Mechanism against Corporate Crime" Volume 28 No.4, *Comp. Law*. 99-105

[274]Adegbite, E. and Nakajima, C. (2011) Corporate governance and responsibility in Nigeria International Journal of Disclosure and Governance Volume 8, Issue 3, pp 252–271

regulatory policies concerning the accounting, auditing, and legal professionals worldwide; more particularly the accounting profession.[275]

The massive fraudulent accounting and mismanagement in companies, a notable example of which is Cadbury,[276] not to mention insider dealings and compromised boards in many companies, as well as powerless shareholders' associations' audit committees and rubber stamp of Annual General Meetings, suggest the collapse of corporate governance in Nigeria.[277] Nigeria's unrealised economic potentials point to much of its unrealised market capacities due to a range of significant impediments to the development of the business environment. Impediments such as pervasive corruption, inadequate power and transportation infrastructure, high energy costs, an inconsistent regulatory and legal environment, insecurity, a slow and ineffective judicial system, insufficient intellectual property rights protections and enforcement, an inefficient property registration system are the main impediments.[278] However, it should be noted that despite the weak business environment, Nigeria remains one of Africa's most important investment destinations, mostly in the oil sector.[279]

In 2006, corporate governance in Nigeria was regarded to be in its rudimentary stage of the Central Bank of Nigeria, with only about 40% of companies quoted on the

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[275] Junaidu Bello MARSHALL 'CORPORATE GOVERNANCE PRACTICES: AN OVERVIEW OF THE
EVOLUTION OF CORPORATE GOVERNANCE CODES IN NIGERIA' International Journal of Business & Law Research 3(3):49-65, July-Sept 2015 http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf accessed on 06/09/2017.

[276] Analysis follows later in the chapter

[277] Oyebode, A., (2009): The Imperative of Corporate Governance in Nigeria' http://www.nigeriavillagesquare.com/articles/the-imperative-of-corporate-governance-in-nigeria.html accessed on 22/08/16

[278] The Heritage Foundation, Economic freedon score Nigeria. 2015. http://www.heritage.org/index/country/nigeria Accessed on 14/11/17

[279] https://www.afcgn.org/wp-content/uploads/2016/03/ACGN-Corporate-Governance-Report-Feb-2016.pdf accessed 14/11/17

Nigerian Stock Exchange having corporate governance codes in place[280]. Thirteen years after, poor corporate governance still constitutes a significant factor in almost all instances of corporate failures in Nigeria, and the worst hit are financial institutions where bank directors can take advantage of the weakness in the law. The state of corporate governance in Nigeria is notably unimposing across all groups, despite some achievements in the past decade.[281] Whilst there has been some improvement in the banking sector, other sectors of the economy still lack a coherent strategic approach to deal with the epidemic of fraud and maladministration in a lot of organisations. The history of corporate enterprising and governance in the country has been blemished with several high-profile corporate failures[282] and corruption in various sectors of the economy.[283] This unwholesome situation has mostly attracted attention so much that multiple initiatives have been put up by among others, the World Bank, International Monetary Fund (IMF), United Nations Development Programme (UNDP), Central Banks, Organisation for Economic Cooperative Development (OECD), Commonwealth Association for Corporate Programme (CACG), Financial Institute Training Centre (FITC), Pan-African Consultative Forum on Corporate Governance (PACFCG), Bank for International Settlements (BIS), Nigerian Stock Exchange, Nigerian Security and Exchange Commission [SEC]

[280] Wilson I., (2006) "Regulatory and Institutional Challenges of Corporate Governance In Nigeria Post Banking Consolidation" Nigerian Economic Summit Group (NESG) Economic Indicators, April – June 2006, Vol. 12 No.

[281] Adegbite, E. (2015) 'Good corporate governance in Nigeria : antecedents, propositions and peculiarities.',
International business review., 24 (2). pp. 319-330.

[282] For instance many bank failures were recorded in the past due to large number of unsecured loans and fraudulent accounting. This is discussed in more detail under the Central Bank of Nigeria (CBN) Act of 2007

[283] Emmanuel Adegbite 'Good corporate governance in Nigeria: Antecedents, propositions and peculiarities' International Business Review 24 (2015) 319–330.

to practically raise the awareness and the practice of good corporate governance in Nigeria and around the world.[284]

3.2 Challenges to Corporate Governance in Nigeria

It has been broadly approved that good corporate governance helps most developing countries and emerging markets to attract domestic and foreign direct investments, build their market competitiveness, restore investor confidence, promote economic growth, and boost national development.[285] But there are many challenges to ensuring good corporate governance in these developing countries especially when the corporations need to be convinced that they are not independent of the society, host community, or the natural environment in which they operate.[286] The absence of a universal corporate governance code applicable to developing and developed countries has posed some challenges. Countries have different corporate governance codes explicitly created to suit their peculiar purpose.[287] This is not surprising given the difference in the corporate environment of different countries. The presence of these particular challenges confronting nations in their corporate environment must necessarily occasion the presence of different corporate governance codes in different countries.[288]

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[284] Lai Oso and Bello Semiu "The Concept and Practice of Corporate Governance in Nigeria: The Need for Public Relations and Effective Corporate Communication" *Journal of Communication*, 3(1): 1-16 (2012) http://www.krepublishers.com/02-Journals/JC/JC-03-0-000-12-Web/JC-03-1-000-12-Abst-PDF/JC-03-1-001-12-039-Oso-L/JC-03-1-001-12-039-Oso-L-Tt.pdf accessed on 22/08/16

[285] Armstrong, P. (2003) Status report on corporate governance reform in Africa, paper Presented at the Pan Africa Consultative Forum on Corporate Governance; Okeahalam C.C. and Akinboade O.A. (2003). A review of Corporate governance in Africa: Literature issues and challenges. A Paper presented to the Global Corporate Governance Forum 15 June 2003. pp 1-34

[286] Ngwakwe C.C. (2009) "Environmental Responsibility and Firm Performance: Evidence from Nigeria" *International Journal of Humanities and Social Sciences* 3(2) Pp 97-103

[287] Opara, L.C., and Alade, A.J., (2014) "The Legal Regime of Corporate Governance in Nigeria: A Critical
Analysis" *Journal of Law, Policy and Globalization* Vol.26, 2014.

[288] Ibid.

It has been affirmed that the mechanisms for ensuring good corporate governance exist in Nigeria but the will and capacity to enforce the laws, monitor and ensure compliance need to be strengthened because the Corporate Affairs Commission [CAC] as the main agency for regulating and supervising all corporation related matters in Nigeria is not only weak but also in some quarters considered perfunctory and unsuitable in performing its duties.[289] As noted by Okike, the role of CAC has remained perfunctory and ineffective as some companies and auditors are known to have flouted company legislation without being punished.[290] The greatest challenge to effective corporate governance practice in Nigeria remains inadequate or non-existent laws as well as the weak regulatory framework. Whilst laws alone cannot ensure ethical governance practices it remains the most effective way of checking director and management excesses, hence the need for an extensive review of existing laws and codes in response to current challenges. There is a need for CAC to improve its enforcement mechanism by putting in place effective monitoring strategies and develop mechanisms to eliminate corrupt practices in the commission.

The below are the core factors militating against the effectiveness of corporate governance practice in Nigeria;

[289] Okike E.N.M. (2007) "Corporate Governance in Nigeria: The Status quo", *Corporate Governance* (15) 2 173-193

[290] Ibid; Inyang, B.J., (2009) "Nurturing Corporate Governance System: The Emerging Trends in Nigeria *Journal of Business Systems, Governance and Ethics* Vol 4, No 2, 2009. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.452.1367&rep=rep1&type=pdf accessed on 5/04/17.

3.2.1 Endemic and Institutionalised Corruption

Endemic corruption[291] has meant that the practice of good corporate behaviour continues to be absent in most corporate organisations in Nigeria. Section 2 of the ICPC act defined corruption to include vices like bribery, fraud, and other related offences.[292] The military and civilian regimes institutionalised corruption in Nigeria by creating an atmosphere that they are above the law; they appointed their cronies as a board of members' government agencies and private business organisations. This leads to persistent failures of corporations where there is a lack of proper accountability and as a result of institutionalised corruption in the country.[293] The entrenchment of institutionalised corruption is enormous to the extent that law enforcement is done alongside a culture of political patronage resulting in weak and ineffectual governance mechanisms which persists as politicians continue relying on corporate executives and vice versa for survival and patronage.[294] It has been widely stated that corporations cannot be divorced from the corruption that exists in the society in which they are operating especially if they are operating in a weakened corporate governance environment like Nigeria.[295] Corruption remains key factors preventing the regulatory bodies from carrying out adequate monitoring of compliance of Codes. There has been an instance where the CAC [Corporate Affairs Commission] are not able to effectively monitor the Small and Medium Enterprises.

[291] The English Oxford Dictionary defined corruption as dishonest or illegal behaviour, especially of people in authority. In addition, it views corruption as the act or effect of making change from moral to immoral standard of behaviour

[292] ICPC Money laundering Act 1995, Nigeria.

[293] Afolabi, A.A., (2015) "Examining Corporate Governance Practices in Nigerian and South African Firms" *European Journal of Accounting Auditing and Finance Research* Vol.3, No.1, pp.10-29, February 2015.

[294] Adekoya A. A. (2011) Corporate Governance Reforms in Nigeria *Journal of Business Systems, Governance and Ethics* Vol 6, No 1 pp. 30 - 50

[295] Wilson, I. (2006), ―Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation.‖ Economic Indicators Nigerian Economic Summit Group (NESG) April – June 2006

When they make an effort to investigate compliance matters, the politicians and businesses who appointed the Board members of the CAC will frustrate such efforts. However, the Nigerian government in a bid to put an end to the endemic institutionalise corruption going on in the country set up two anti-corruption agencies names; the Independent Corrupt Practices Corruption (ICPC) and the Economic and Financial Crime Commission (EFCC) but the effectiveness of these agencies in fighting corruption is being influenced by the ruling politicians.[296]

3.2.2 Multiplicity of the Codes of Governance

It has also been identified as another challenge been faced by corporations in Nigeria. While it can be argued that the multiplicity of codes enable industries to fashion out a corporate governance code suited to the peculiar needs and requirements of the industries concerned, the multiplicity of corporate governance codes could occasion confusion, hardship and uncertainty.[297] Closely related to the inadequacy of governance laws and codes is the inadequacies of the Nigerian Judicial system in enforcing formal rights and limitation of judicial remedies.[298] This is made worse by the fact that the primary avenue for remedies for shareholders in Nigeria remains the courts, as prescribed by CAMA. However, Nigerian courts remain notoriously slow, ineffective and expensive in resolving commercial disputes. This according to

[296] Ayodele A.A., (2011) "Corporate Governance Reforms in Nigeria: Challenges and Suggested Solutions" *Journal of Business Systems, Governance and Ethics* Volume 6, No 1

[297] Leonard C. O., Ayodele J.A., (2014) "The Legal Regime of Corporate Governance in Nigeria: A Critical
Analysis" *Journal of Law, Policy and Globalization* Vol.26,

[298] Adewale, A., (2013) "Corporate Governance: a Comparative Study of the Corporate Governance Codes of a Developing Economy with Developed Economies" *Research Journal of Finance and Accounting* Vol.4, No.1,

Wilson[299] discourages shareholders from approaching the courts for remedies and encourages directors and management impunity. While the courts remain slow, inefficient and expensive, shareholders are hesitant to use the courts, and as a result, the directors continue to act with impunity, corruption; inadequate judicial personnel; weak rules of procedure; poor facilities; undue regard for technicalities, ineffective use of ADR processes and poor case flow management.[300]

Consequent to the aforementioned point, it is clear that the effectiveness of current legislation is just as problematic as the voluntariness of the codes. The nature of the Nigerian business environment is such that the voluntariness of most codes allows people sometimes to ignore the codes and only act for personal gains. The effectiveness of legislation is thus weakened or completely rendered ineffective. However, the NCCG 2016 has gone with the rule-based approach which is in practice in the USA under the Sarbanes-Oxley Act of 2002 which directs that compliance is mandatory. Under a rule-based approach, the companies are required to either comply with the legal requirement as stated in the Code or risk penalties. The rule-based regulations are not only clear and certain, thereby limiting potential ambiguities; they are generally more operational than principles.[301] The question then is with Nigeria adopting this approach of compliance, can the rules be said to be clear of ambiguities and will it be as effective as envisaged. The Answer will be a No based on what has

[299] Wilson I., (2006) "Regulatory and Institutional Challenges of Corporate Governance In Nigeria Post Banking Consolidation" Nigerian Economic Summit Group (NESG) Economic Indicators, April – June 2006, Vol. 12 No.

[300] Wilson I., (2006) "Regulatory and Institutional Challenges of Corporate Governance In Nigeria Post Banking Consolidation" Nigerian Economic Summit Group (NESG) Economic Indicators, April – June 2006, Vol. 12 No

[301] Burgemeestre, B., Hulstijn, J., and Tan, Y.-H. (2009). Rule-based versus principle-based regulatory compliance. In G. Governatori (Ed.), Proceedings of JURIX (pp. 37–46). Amsterdam: IOS Press; Nakpodia, Franklin, Adegbite, Emmanuel, Amaeshi, Kenneth and Owolabi, Akintola (2016) Neither Principles Nor Rules: Making Corporate Governance Work in Sub-Saharan Africa. *Journal of Business Ethics*.

been discussed so far in this thesis. The new Code of corporate governance which will be highlighted in chapter 4 of this thesis will show it has been inconsistent in some areas with the provision of CAMA which is the main company law in practice in Nigeria. With these conflicting provisions, operators will be forced to go with the provisions of CAMA. Where there is conflict between an Act of the National Assembly and a regulation made by a body created pursuant to an Act of the National Assembly, the provisions of the Act shall prevail.

3.2.3 Lack of Openness and Transparency

This is another major challenge been faced in Nigeria as annual reports and accounts of companies do not contain sufficient information to keep shareholders adequately informed about their companies.[302] Also, in the *Global Corruption Report* produced by Transparency International between 2003 and 2017, Nigeria was ranked continuously towards the bottom of the list of corrupt countries with the worst ranking recorded in 2003, the year the country became the second most corrupt nation in the world, after Bangladesh.[303] These suggest that the investment climate in Nigeria needs to be more reassuring, especially to foreign investors, if Nigeria is to tap its full investment potential.[304]

[302] Opara, L.C., and Alade, A.J., (2014) The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis. *Journal of Law, Policy and Globalization* Vol.26, 2014.
[303] https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table Accessed on 24/06/18
[304] Okike, E.N.M., (2007) "Corporate Governance in Nigeria: the status quo" *Corporate Governance* Volume 15, Issue 2 March 2007 Pages 173–193

3.2.4 Deliberate Accounting Fraud

Another problem working against sustainable corporate governance practice in Nigeria is deliberate accounting fraud perpetrate by the top finance executives. Cases of "inaccurate reporting and non-compliance with regulatory requirements"[305] and the "prevailing incidences of false and misleading financial reporting"[306] by some corporate organisations lead to corporate failures. A case in point is that of Cadbury Nigeria Plc when in 2006 the company falsified its audited financial statements. The CEO and the directors of the company who were found guilty by SEC were accordingly sanctioned.[307]

The level of identified institutionalised corruption; voice and accountability; political stability, government effectiveness; regulatory quality; the rule of law in Nigeria has placed the country as one of the weakest and most corrupt institution.[308] It has also been argued that the various measure taken by the government to improve the investment climate and corporate governance, meant to help attract foreign investment, is commendable with the investment potential in Nigeria.[309] However, the government's effort cannot yield good results because of corruption in the entire

[305] Ibru, C. (2008) "Measuring corporate governance and risk in Africa" A paper presented at the Africa Investor Index Summit, New York Stock Exchange; Akanbi, P.A., (2012) "An examination of the link between corporate governance and organizational performance in the Nigerian banking sector" *Elixir Mgmt. Arts* 43 (2012) 6564-6573 http://www.elixirpublishers.com/articles/1350290079_43%20(2012)%206564-6573.pdf accessed on 02/01/2018

[306] Alfaki, M. (2007) "The incidence of inaccurate corporate financial reporting in Nigeria capital market: the role of Securities and Exchange Commission in preventing future references"; Akanbi, P.A., (2012) "An examination of the link between corporate governance and organizational performance in the Nigerian banking sector" *Elixir Mgmt. Arts* 43 (2012) 6564-6573 http://www.elixirpublishers.com/articles/1350290079_43%20(2012)%206564-6573.pdf accessed on 29/06/2017

[307] Onwuamaeze, D. (2008) "Cadbury fraudulent directors punished" *Newswatch Magazine* (Nigeria). pp58-59; Akanbi, P.A., (2012) "An examination of the link between corporate governance and organizational performance in the Nigerian banking sector" *Elixir Mgmt. Arts* 43 (2012) 6564-6573 http://www.elixirpublishers.com/articles/1350290079_43%20(2012)%206564-6573.pdf accessed on 05/08/2018

[308] Adegbite, E., (2015) "Good corporate governance in Nigeria: Antecedents, propositions and peculiarities" *International Business Review* Volume 24, Issue 2, April 2015, Pages 319–330

[309] Okike E.N.M. (2007) "Corporate Governance in Nigeria: The Status quo", *Corporate Governance* (15) 2 173-193

sectors in the county. The Global Corruption Report produced by Transparency International ranks Nigeria as the second most corrupt country in the world after Bangladesh. Report on the Observance of Standards and Codes [ROSC 2004] revealed that corruption is the main obstacle to enforcement of standards, and this affects the financial reporting when the auditors conspire with management to defraud companies.[310] However, corruption alone cannot be liable for the persistent corporate governance failures in Nigeria. These include socio-political, economic, and cultural factors which create the dismal corporate governance environment. Major scandals such as that of Cadbury Nigeria have brought corporate governance discussions to a high point in academic, practice and policy debates.[311] In 2009, the Nigerian Capital Market Report reported that because of poor corporate governance, the Nigerian Capital Market ranked among the worst in 2008. In Africa, apart from Egypt which lost 56.43%, Nigeria ranked below South Africa which lost 25.72% and Kenya with a loss of 31.33% Ghana, Tanzania and Tunisia, however, gained 40.68%, 21.26% and 10.65% respectively, probably reflecting their level of exposure to global event. Nigeria also performed below other matured market such as the United States of America (USA), Japan and the UK which lost 34.34%, 42.12% and 31.4% respectively.[312]

[310] https://www.worldbank.org/ifa/rosc_aa_nga.pdf

[311] Adewale, A., (2013) "An evaluation of the limitations of the corporate governance codes in preventing corporate collapses in Nigeria" *Journal of Business and Management* Volume 7, Issue 2 (Jan. - Feb. 2013), PP 110-118

[312] http://www.proshareng.com ; Aina, K., and Adejugbe, B., (2015) "A Review of Corporate Governance Codes and Best Practices in Nigeria" *Journal of Law, Policy and Globalization* Vol.38, 2015 file:///C:/Users/Bliss%20Up/Downloads/23517-25927-1-PB%20(2).pdf accessed 23/02/17

3.2.5 Pervasive Poverty and High Unemployment

These two factors allow unethical practices and misconducts to go largely unreported[313]. This has led to widespread and consistent practices of non-transparent disclosure, corrupt dealings and a general environment of weak regulation and enforcement. Alongside these, the economy has been characterised by undeveloped market institutions, high level of information asymmetries and general disregard to the rule of law.[314] Economic factor such as high level of poverty, inflation, unfavourable foreign exchange rate, and increase in the cost of doing business is also one of the main challenges to corporate governance structure. Burton stated that economic and financial developments have more influence on a nation's corporate governance than firm characteristics.[315]

3.2.6 Lack of Protection of Minority Shareholders' Rights

Another major issue of corporate governance in Nigeria is the lack of protection of minority shareholders' rights. Although there are laws in Nigeria that were intended to protect minority shareholders' rights, these laws are not strictly enforced and are frequently violated.[316] Furthermore, the strict rights and entitlements that come with the ownership of shares in listed companies are not fully exploited by shareholders largely because they are uninformed of these rights, and top management and boards

[313] Komolafe, B. (2008) "Corruption: ICAN Call For Whistle-Blowing Act; Reduced Regulation"
[314] Ahunwan, B., (2002) "Corporate Governance in Nigeria" *Journal of Business Ethics*, Vol. 37, No. 3, Corporate Governance Reforms in Developing Countries (May, 2002), pp. 269-287
[315] Burton, B.,Wanyama, S. and Helliar, C., (2009) "Framework Underpinning Corporate Governance: Evidence on Uganda Perceptions" *Journal of Corporate Governance: An International Review* Vol. 17.
[316] Okpara, J.O., (2011),"Corporate governance in a developing economy: barriers, issues, and implications for firms", *Corporate Governance: The International Journal of Business in Society*, Vol. 11 Iss 2 pp. 184 - 199

of directors abuse this fact[317]. Although, there are legal and regulatory systems in place to protect the rights and obligations of shareholders, rules, and regulations for conducting business, and penalties for violations of these regulations, however, the problem of supervision and enforcement of such laws and processes remains a major issue hindering effective implementation of corporate governance. However, it has become evident, not only in Nigeria but worldwide that there have been various challenges in the process of implementing these codes. The Nigerian experience was aptly summarised by the Central Bank of Nigeria in its code of corporate governance for banks in Nigeria.[318]

3.3 The Evolution of Corporate Governance in Nigeria

Nigeria is regarded as one of the most important countries in Sub-Saharan African; it has the biggest economy in Africa. The World Bank predicted that Nigeria would grow by 2.5% in 2018 from 1% in 2017.[319] The evolution of corporate governance in Nigeria can be traced to the colonial days. Prior to independence, the term 'corporation' was alien to the local business practices of Nigeria before British colonisation;[320] and the external influences on corporate governance in most sub-Saharan African countries dated back to many decades. Before the colonial era in Nigeria, the local trades in goods were what was in existence where there is exchange of goods between communities and villages. During this period, villages had markets

[317] Adenike Adewale "An evaluation of the limitations of the corporate governance codes in preventing corporate collapses in Nigeria" *Journal of Business and Management* Volume 7, Issue 2 (Jan. - Feb. 2013), PP 110-118

[318]Central Bank of Nigeria: Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006. http://www.ecgi.org/codes/documents/cg_code_nigeria_2006_en.pdf accessed on 21/08/16.

[319] Quartz Africa (2018) Africa's economic outlook is promising for 2018, but there are clouds on the horizon Accessed on https://qz.com/africa/1179387/africas-economic-outlook-is-promising-for-2018-but-there-clouds-on-the-horizon/ accessed on 16/12/2017

[320] Ahunwan, B. (2002). Corporate governance in Nigeria. *Journal of Business Ethics*, 37(3), 269–287

which operate on specific days where people go to exchange their goods.[321] The only international trade in existence during this period was the slave trade, and during the peak of this trade, slavers bought other items aside from the slaves such as Ivor and food commodities.[322] However, after the abolishment of the slave trade, there was a shift in focus to the export of palm oil, which then became the main export item.[323]

Before independence, the British colonial government imposed an Anglo-Saxon[324] system of corporate law and regulation on the country. A system based largely on the outsider approach to governance (which was extensively discussed in the previous chapter) and evidently demonstrates the influence of its colonial heritage.[325] Despite recommending widespread ownership of shares for Nigerians and foreigners, most profitable corporate entities were solely reserved for foreigners based on the reasons best known by the business owners and public officials, thereby denying Nigerians an opportunity to participate in company ownership and benefit from the gains. This however made Nigerians view the foreign companies with suspicion due to their ties with colonialists.[326] The government at the time came with the proposal of remedying this by ensuring indigenous ownership and control of the key sectors of the economy.[327]

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[321] R.O Ekundare, An Economic History of Nigeria 1860-1960 (Methuen & co ltd 1973) 50

[322] E Isichei, A History of Nigeria (Longman 1983) Ch. 3. Page 97

[323] E Isichei, A History of Nigeria (Longman 1983) Ch. 3 page 98

[324] The interest of shareholders is paramount in the day-to-day activities of management, and their priority is the maximisation of shareholders' wealth; There is a functioning capital market, which helps to align the interests of management and shareholders, through the right to buy and sell shares at prices which reflect their value as perceived by investors; There is a chain of accountability. Company executives are accountable to the board of directors, who are in turn accountable to shareholders; The rights and responsibilities of key players in the corporate governance framework are embedded in statute

[325] Adegbite, E., Amaeshi, K., and Nakajima, G., (2013) "Multiple influences on corporate governance practice in Nigeria: Agents, strategies and implications" *International Business Review* Volume 22 Pp524–538.

[326] Amao, O., (2008) "Corporate Social Responsibility, Multinational Corporations and The Law in Nigeria: Controlling Multinationals in Host States" Volume 52 No 1 *Journal of African Law* Pp89-113.

[327] B Ahunwan, "Corporate Governance in Nigeria" [2002] *Journal of Business Ethics* 269, 270

3.4 Regulatory Framework

At independence in 1960, Nigeria inherited many rules and regulations of corporate laws left behind by the colonial government[328] , i.e. the Companies Ordinance of 1922. After attaining political independence, a review of company legislation began based partly on the need to put in place a corporate governance system which not only suits the country's economic realities–as a newly independent nation–but it also expresses the country's economic freedom and independence from the UK.

Consequently, the Companies Ordinance of 1922, which was enacted by the British colonialists, was repealed and replaced by the 1968 Companies Act, which was modelled on the UK Companies Act of 1948.[329] Meaning whilst the British Act had been reformed in 1948, the Nigeria Companies Ordinance of 1922 remained in place. The new 1968 Companies Act served as the principal Company law statute in Nigeria until the end of 1989.[330] Suffice to say that whilst there was a lot of noise about this law, it did not offer much by way of radical reforms, and as Okike[331] observed, it was important mostly in that it was the first indigenously enacted piece of legislation aimed at regulating the establishment operation of companies in Nigeria. It nevertheless contained elaborate provisions regarding the running of companies in relation to the roles of the board of directors and the members in general meeting.[332] During this period, a lot of criticisms were raised by stakeholders as to the

[328] Okike, E. N.M., (2007) "Corporate Governance in Nigeria: the status quo" *Corporate Governance An international Review* Volume 15 Number 2

[329] The reason for this was because priorto the indigenisation exercise of 1972, foreigners, mostly British, con-trolled the activities of business enterprisesand along with their economic interestsbrought with them their company legislation.

[330] Emiola, A., (2007) *Nigerian Company Law* Ogbomoso: Emiola publishers

[331] Okike, E. N.M., (2007) "Corporate Governance in Nigeria: the status quo" *Corporate Governance An international Review* Volume 15 Number 2

[332] O. Orojo, Company Law and Practice in Nigeria (3rd Edition, Mbeyi and Associates Nig Ltd., 1992) 13

effectiveness of the Companies Act of 1968 because it was fashioned after the Anglo-Saxon model and the Nigerian legal operating framework for corporations was not developed based on the country business environment as it mainly mirrored that of the British system. Another major problem with the 1968 Companies Act had to do with the companies' registry system which was thought to obstruct rather than facilitate the registration and operation of new businesses. Business owners willing to register their businesses had to go through a cumbersome process of filling and contacts with different government departments not to mention the length of time it took to get through the registration process.

Because the 1968 Act was modelled after the UK Companies Act of 1948, it failed to deal with corporate problems that were specific to Nigeria's socio-cultural and political environment such as company sizes, ownership types, and general level of development of the business environment. By 1968, the Nigerian economy had started to witness enormous changes as a result of rapid economic growth and increases in population. More industrial activities were beginning to take off locally, the banking system was witnessing huge expansion, and the export base of the country was also expanding massively. Although the political landscape was perpetually in a state of flux and new investment opportunities keep springing up for both local and foreign investors[333]. These changes meant that the country needed a dynamic approach to corporate governance to cope with the changes effectively. However, the 1968 Companies Act did not consider the nascent nature of the business environment, having been modelled after the UK Act of 1948, and was not robust enough to cope with the constant changes, particularly in the ownership structure and

[333] Usman, A.A., (2010) "Government Expenditure and Economic Growth In Nigeria, 1970-2008: A Disaggregated Analysis" *Business and Economics Journal*, Volume 2010: BEJ-4

pattern of most companies, which mainly consist of foreign ownership. It also did not address the rapid economic and commercial developments of the country.[334]

In 1972, the Federal Government promulgated the Nigerian Enterprises Promotion Decree No 4 of 1972 commonly referred to as the indigenisation Decree which primarily sought to encourage indigenous ownership and participation in the economy in a bid to curtail foreign dominance of corporations and assert more control on their activities.[335] The Decree restricted foreign ownership by creating three different schedules of enterprises: first, enterprises exclusively reserved for Nigerians; secondly, enterprises in respect of which foreigners cannot hold more than 40% of shares; and those enterprises in respect of which foreigners cannot hold more than 60%.[336] Massive loopholes and grey areas in this badly crafted law were exploited leading to widespread cronyism and proxy ownership became rampant. Foreign investors in connivance with willing Nigerian collaborators were able to fully own companies that were either fully reserved for Nigerians or had restricted foreign ownership through the help of Nigerian fronts. This did not only defeat the primary purpose of the decree, it also meant that companies could perpetrate all kinds of unlawful acts including poor or falsified bookkeeping while the real culprits (mainly foreigners) went without been punished. This does not only point to inadequacies in the act; it also demonstrates a significant flaw in the law-making process.

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[334] Okike, E. N.M., (2007)"Corporate Governance in Nigeria: the status quo" *Corporate Governance An international Review* Volume 15 Number 2

[335] Junaidu Bello MARSHALL 'CORPORATE GOVERNANCE PRACTICES: AN OVERVIEW OF THE
EVOLUTION OF CORPORATE GOVERNANCE CODES IN NIGERIA' International Journal of Business & Law Research 3(3):49-65, July-Sept 2015 http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf

[336] Marshall, J.B., (2015) "Corporate Governance Practices: An Overview Of The Evolution Of Corporate Governance Codes In Nigeria" *International Journal of Business & Law Research* 3(3):49-65, July-Sept 2015.

The 1968 Act was repealed and replaced in 1990 by the then Companies and Allied Matters Decree No.1. (that is the Companies and Allied Matters Act Cap, C20, Laws of the Federation of Nigeria 1990, amended in 2004 CAMA).[337] As of the time, this Decree was promulgated in 1990, the issue of corporate governance had become a matter of importance in Nigeria; much more than it used to be. The introduction of CAMA was born out of the desire to create a competitive business environment in Nigeria, based on international development in the corporate governance area.[338] Therefore, the decree makes provisions which are fundamental to corporate governance practice in Nigeria: it required companies to adhere to proper accounting and auditing standards, full equity ownership disclosure, protection of minority shareholders' rights and equality of members, oversight management where Corporate Affairs Commission [CAC] and other regulators are predictable to regulate the activities of the companies.[339] Besides CAMA, there are other general and industry-specific legislation which companies must comply with, such as the provisions of Central Bank of Nigeria Act No 7 of 2007, applicable to Banks and Discounts Houses in Nigeria[340] among others.

[337] Momoh, O.A., and Ukpong, M.S., (2013) "Corporate Governance and its effects on the Nigerian Insurance Industry" *European Journal of Globalization and Development Research,* Vol. 8, No. 1, 2013.

[338] Inyang, B. J. (2009) "Nurturing corporate governance system: the emerging trends in Nigeria" *Journal of Business Systems, Governance and Ethics*, 4(2), 1-13

[339] Marshall, J.B., (2015) "Corporate Governance Practices: An Overview Of The Evolution Of Corporate Governance Codes In Nigeria" *International Journal of Business & Law Research* 3(3):49-65, July-Sept 2015.

[340] BOFIA Cap B3 Laws of the Federation of Nigeria (LFN) 2004, applicable to Bank and other financial institutions in Nigeria] , NAICOM Act [Cap 117 LFN 2004,], PENCOM Act 4 of 2014 which repealed the Pension Reform Act No. 2, 2004, applicable to Pension Industry in Nigeria], FRC Act No 6 2011, NDIC Act[No 16 2006, applicable to Banking Industry in Nigeria], NCC Act [2003, applicable to Telecommunications Industry in Nigeria] and ISA No 29 0f 2007; Investment and Securities Act 1999; the Securities and exchange Commission Act [SECA] 1988

3.4.1 Corporate Failures and the Need for Corporate Governance Codes Reform

The most distinctive method for ensuring good corporate governance reforms in most countries is through the issuance of corporate governance codes which supplement existing corporate laws. Corporate governance codes are documents which state the rules and procedures for governing and managing corporations.[341]

The importance of corporate governance is further emphasised by the adoption of corporate governance codes by many countries. Also, these codes are frequently revised to keep them contemporary and suited to meet the demands of the ever-changing corporate environment. The absence of a universal corporate governance code applicable in all countries has posed some challenges. Countries have different corporate governance codes explicitly created to suit their distinctive purpose. This is not surprising given the difference in the corporate environment of different countries. The presence of these unique challenges confronting nations in their corporate environment must necessarily occasion the presence of different corporate governance codes in different countries.[342]

The issues of corporate governance have attracted the attention of scholars on a broad scale over the last three decades. In Nigeria, the topic gained importance in the post SAP (Structural Adjustment Programme) era, a period of around eight (8) years between the mid-1980s to early 1990s when Nigeria was forced to adopt a Structural Adjustment Programme (SAP) introduced by the IMF; as a result a severe economic downturn. The government introduced the SAP due to its economy been at the verge

[341] Adekoya, A.A., (2011) "Corporate Governance Reforms in Nigeria: Challenges and Suggested Solutions" *Journal of Business Systems, Governance and Ethics* Volume 6, No 1 2011 http://jbsge.vu.edu.au/article/view/198/248 accessed 23/07/16

[342] Opara, L.C.,and Alade, J.A., (2014) "The Legal Regime of Corporate Governance in Nigeria: A Critical
Analysis" *Journal of Law, Policy and Globalization* Vol.26, 2014

of crisis. This programme was introduced to address the underlying malaise and the new challenges posed by further collapse of oil revenues.[343] SAP's objectives were to help restructure and diversify the productive base of Nigeria's economy, achieve fiscal stability and positive balance of payment as well as limit the dominance of unproductive investments in the public sector mainly through privatisation and encouragement of greater private sector participation in the economy. This era witnessed massive growth in private ownership of businesses and financial institutions.[344] However, despite the introduction of these regulations, the fundamental corporate governance problems that is principal-agency conflicts were still on the increase in the system, particularly with the increase in the number of private companies.[345] There persists a weak corporate culture in these institutions, occasioned by persistent corruption, financial collapses, inability to attract investment, failed attempts at privatisation. The nation witnessed a very high occurrence of corporate failures. Company directors were able to get away with all manners of infractions ranging from fraudulent accounting, fraudulent enrichment, wrong application of company resources for the benefit of the directors to the detriment of investors as demonstrated in the cases cited below. This highly showed the need for a reform of corporate governance codes and also the company law legislation in Nigeria alongside its enforcement practice.

[343] Nigeria Structural Adjustment Program Policies, Implementation, and Impact May 13, 1994 Country Operations Division Report No. 13053-UNI. http://documents.worldbank.org/curated/en/959091468775569769/pdf/multi0page.pdf accessed on 13/06/18

[344] Nigeria Structural Adjustment Program Policies, Implementation, and Impact May 13, 1994 Country Operations Division Report No. 13053-UNI. http://documents.worldbank.org/curated/en/959091468775569769/pdf/multi0page.pdf accessed on 13/06/18

[345] Amao, O., & Amaeshi, K. (2008). Galvanising shareholder activism: A prerequisite for effective corporate governance and accountability in Nigeria. Journal of Business Ethics, 82(1), 119-130

3.4.2 The Cadbury Case

This case is one of the examples of corporate failures and accounting fraud carried out by top companies in Nigeria

The Cadbury Nigeria PLC could probably be considered Nigeria's Enron. On suspicion of irregular accounting, the Board commissioned the accounting firm of PricewaterhouseCoopers to consider the company's books. The investigation revealed that there had been consistent, deliberate overstatement of the company's financial position for years in the region of around N15 billion (£31,072,400) in a bid to strengthen the company's value on the stock exchange. Although the CEO and the directors of the company who were found guilty by the Stock Exchange Commission were accordingly sanctioned,[346] it did not prevent the resultant crises that rocked the stock exchange as Cadbury was one of the biggest companies listed on the stock exchange; this meant that the ripple effect was felt on the broader economy.

Prior to the year, 2006 Cadbury Nigeria Limited was a reputable company with an excellent corporate image. It had operated successfully for many decades without scandals, however, on November 16, 2006, Mr. Uduimo Itsueli, the Chairman of Cadbury stunned the public by announcing discrepancies in the company's financial account and the suspension of the Managing Director, Mr. Bunmi Oni. After a due investigation by the PWC, it was discovered that there had been a significant and deliberate overstatement of the company's financial position over several years in a bid to strengthen the company's value on the stock exchange. Thus, the company was projected to lose billions of dollars. The investigation also found that Mr. Oni had

[346] Onwuamaeze, D. (2008) Cadbury fraudulent directors punished. Newswatch Magazine (Nigeria). pp58-59; Akanbi, Paul Ayobami 'An examination of the link between corporate governance and organizational performance in the Nigerian banking sector' Elixir Mgmt. Arts 43 (2012) 6564-6573 http://www.elixirpublishers.com/articles/1350290079_43%20(2012)%206564-6573.pdf accessed on 13/06/2018

allowed himself to be pressured to meeting and exceeding self-imposed deliverables through the deliberate breaching of the accounting system and control. Based on the false accounting statements Cadbury Schweppes UK, one of the main shareholders, had earlier in February 2006 increased its holdings in Cadbury Nigeria Plc from 46.4% to 50.02% to effectively become the majority shareholder. Apart from the loss the company expect to record, investors also reacted by dumping their shares on the stock exchange plunging the market into a state of panic, while Cadbury's shares suffered rapid depreciation in value.[347]

It must be noted, however, that despite this monumental breach of trust and huge losses sustained by investors and the shock to the Stock Exchange, not one of the people involved in this saga was duly sanctioned. Rather all those who were temporarily disciplined in some pending investigation headed to court to absolve themselves of any blame. Mr. Bunmi Oni who was suspended and later sacked approached the court and his challenge against his sack was successful and was absolved of all blames. Even the auditors were able to successfully challenge the imposition of 20 million naira fine for playing a part in falsifying Cadbury's accounts.

3.4.3 Other Cases

The Cadbury Nigeria Plc case is not an isolated case. There been the Lever Brothers Nigeria Plc case of fraudulent accounting which went on for years and was only discovered in 1997. It cost the company and its investors in excess of N1.2 billion.

[347]Adegbite, E. and Nakajima, C. (2011) Corporate governance and responsibility in Nigeria International Journal of Disclosure and Governance Volume 8, Issue 3, pp 252–271

There are several others such as the $100 million National Identity Card Fraud involving SAGEM in 2003,[348] $180 million bribery scandal involving Kellog Brown and Root, a subsidiary of Halliburton in 2005,[349] not to mention the 17.5 Euros Siemens contract fraud for the 8th All African Games held in Abuja Nigeria also discovered in 2005.

In effect, these cases demonstrate that governance issues do not only lead to corruption in the private sector. It is also a significant source of corruption in the public sector. Worst still, the combined effect of a corrupt conspiracy between private and public sector mean that the populace, particularly in a developing country like Nigeria, bear the burden of impropriety and fraudulent practices. These cases of fraudulent accounting and breach of trust exposed the severe weakness of the regulatory process and institutions for failing to uncover some of the creative accounting that led to these corporate fraud and grand deceptions.

These scandals further strengthen the argument for a reformed, more robust approach to corporate governance. Indeed, whilst corporate governance rules need to encourage and not burden businesses, there is a need to formulate adequately robust rules not only capable of improving corporate governance standards but also offering greater transparency.

Therefore, regulatory bodies will do well to adopt a collaborative approach to rules formulation to guarantee a flourishing business atmosphere as well as engender greater participation among stakeholders. For many years Nigeria's corporate governance mechanisms were enforced through military decrees, one such order was

[348] Nigerian Muse (2004) Running News on Identity Card / Sagem / Afolabi & Co. Corruption Saga Accessed on https://www.nigerianmuse.com/important_documents/?u=ID_corruption_saga.htm

[349] Sahara Reporters (2010) Obasanjo shared $74 million Halliburton bribe says Okiro Panel Accessed on http://saharareporters.com/2010/05/18/obasanjo-shared-74million-halliburton-bribe-okiro-panel-says-%E2%80%A2-obj-also-pocketed-another

the Corporate Allied Matter Decree (CAMD 1990) which had the aim of deepening transparency and accountability in the business environment within a general government policy of attracting new sustainable foreign direct investments. This decree in 2004 morphed into the Companies and Allied Matters Act, Cap 20, Laws of the Federation (CAMA 2004) to bring it in line with the relatively new democratic experience. However, due to insufficient stakeholder inputs and inadequate parliamentary debates in the law-making process,[350] the decree failed spectacularly in its stated objectives, and the system, therefore, needed to be reformed due to the many corporate failures in the country. The most apparent evidence of the failure of CAMA 2004 was the massive case of fraud at Cadburys Nigeria, as stated above which left a huge dent in the stock exchange. A similar code was released by the Central Bank of Nigeria (2006) to address corporate governance practices in Nigerian Banks.[351] The effect and shortcomings of these laws and others will be discussed in detail in the following sections of the thesis.

3.4.4 Modifying Nigeria Regulatory Framework of Corporate Governance

Regulation in Nigeria is notoriously weak and for the most part, ineffective. This in part, can be traced to inadequacies and inefficiencies inherent in the main regulatory framework; the Companies and Allied Matters Act (CAMA). As stated earlier, due to insufficient stakeholder's input and lack of parliamentary debates into the law-making process of CAMA as it was a promulgated decree of the military rule it did not receive much support from the corporate world, beyond what was necessary and as

[350] Chiejina, A. (2009). Ensuring credibility and Corporate Governance in the Banking industry. Business Day Monday 24, August.

[351] Okpara, J.O., (2011),"Corporate governance in a developing economy: barriers, issues, and implications for firms", Corporate Governance: The International Journal of Business in Society, Vol. 11 Issue 2 pp. 184 - 199

such could not achieve most of its objectives. Notwithstanding, CAMA was only able to address some of the lapses and loopholes observed in the 1968 Companies Act.[352] It established a commission to review the adequacy and relevance of corporate governance codes and frameworks in Nigeria relative to international best practices in response to the New International Economic Order (NIEO).[353] In view of the importance attached to the institution for effective corporate governance, the Federal Government of Nigeria through its various agencies, came up with different institutional arrangements to protect investors' hard-earned investment from unscrupulous management/directors of listed firms in Nigeria.[354]

One of such attempts was by the Security and Exchange Commission [SEC] corporate governance code in 2003 which was introduced to supplement the effectiveness of CAMA[355] and, Central Bank of Nigeria mandatory code in 2006 for banks and financial institutions in a bid to improve corporate governance. However, just three years after in 2009, the board of eight of the 25 banks in Nigeria was sacked for a series of poor governance practices.[356] The CBN Governor identified the inter-dependent factors as responsible for the failures in corporate governance in the banks; lack of investor and consumer sophistication, inadequate disclosure and transparency as to the financial position of the banks, critical gaps in the regulatory framework and

[352] Amaeshi, K., and Amao, O., (2008) "Corporate Social Responsibility (CSR) in Transnational Spaces: An Institutionalist Deconstruction of MNC CSR Practices in the Nigeria Oil and Gas Sector", CSGR Working Paper 248/08

[353] The NIEO is a group of proposals advanced in the 1970s by some developing countries via the United Nations Conference on Trade and Development (UNCTAD) to among others improve trade terms and promote their interest in international trade; Afolabi, A.A., (2015) "Corporate Governance Practices in Nigerian and South African Firms" European Journal of Accounting Auditing and Finance Research Vol.3, No.1, pp.10-29, February 2015.

[354] Aganga Olusegun (2011) article published by Guardian Newspaper on March 21st 2011 title corporate governance in Nigeria, Stock watch in association with Lead Capital; Afolabi, A.A., (2015) "Corporate Governance Practices in Nigerian and South African Firms" European Journal of Accounting Auditing and Finance Research Vol.3, No.1, pp.10-29, February 2015.

[355] Adekoya, A.A., (2011) "Corporate Governance Reforms in Nigeria: Challenges and Suggested Solutions" Journal of Business Systems, Governance and Ethics Volume 6, No 1 2011 http://jbsge.vu.edu.au/article/view/198/248 accessed 23/07/16

[356] Ibid.

regulations, uneven supervision and enforcement, unstructured governance, and management processes at the CBN and weaknesses within the business environment.[357] However, Emmanuel[358] argues that the failure of some Nigerian banks was due to the fraudulent practices committed by bank owners and managers who had granted unsecured loans to their friends and themselves. This resulted in high levels of bad debts and a loss of liquidity. He also identified the failure to maintain a strong capital base and the unconcealed embezzlement of funds in some cases. In relation to the failures in the Nigerian banking system, the CBN confirmed that the management of the failed banks conducted their affairs in ways detrimental to the interests of their depositors and creditors. The weak institutional context in Nigeria makes corporate governance law enforcement and self-regulatory initiatives remain in idealism.[359] To this end, there is a clear and urgent need for reforms. Such reforms must be able to block these identified gaps, while regulatory frameworks should be strengthened to provide better supervision and enforcement regimes that engenders more effective corporate governance.

Besides the statute regulating corporate organisations in Nigeria,[360] there are several other corporate governance codes in force to ensure good corporate governance is practiced, which, unfortunately, are yet to be streamlined. Therefore, different codes

[357] Adewale, A., (2013) "An evaluation of the limitations of the corporate governance codes in preventing corporate collapses in Nigeria" Journal of Business and Management Volume 7, Issue 2 (Jan. - Feb. 2013), PP 110-118

[358] Emmanuel, A. N., (2011) "Corporate governance and responsibility in Nigeria" International Journal of Disclosure and Governance 8(3) 2011 pp (252 – 271).[2]

[359] Yakasai, G. A. (2001). Corporate governance in a Third World country with particular reference to Nigeria. Corporate Governance: An International Review, 9(3), 239– 240; Ahunwan, B. (2002). Corporate governance in Nigeria. Journal of Business Ethics, 37(3), 269–287.

[360] Companies and allied matters act 1990 [for companies generally], the SEC Code of Best practices on Corporate Governance 2003 [for public quoted companies], the code of corporate governance for banks and other financial institutions 2003 issued by the Bankers committee [in a bid to self-regulate], the code of conduct of directors of licensed banks and financial institutions issued by the Central Bank of Nigeria in 2006 etc.

apply to various sectors of the economy.[361] In Nigeria, as in most developed countries, observance of the principles of corporate governance has been secured through a combination of voluntary and mandatory mechanisms.[362] Self-regulating professional bodies institute most corporate governance codes with the consent of the relevant government regulating agencies, but the responsibility for adopting and implementing the code lies on a corporation's board of directors[363](e.g. the codes formulated by the Atedo Peterside Committee analysed below).

The high incidences of corporate failures in Nigeria due to poor governance culture necessitated the development and promotion of good ethical corporate practices. There exist different codes for different sectors of the economy, but these corporate governance codes are mostly fraught with loopholes and sometimes inconsistencies that allow people to get away with malpractices until a significant corporate collapse occur. These issues, coupled with international scandals and global developments, heightened calls for a dedicated corporate governance regulation in Nigeria. Realising the importance of having a good corporate practice as a definite link to national growth and development; and to regain the confidence of the public, the Security and Exchange Commission [SEC] in conjunction with the Corporate Affairs Commission [CAC] set up a 17-members in June 2000 on corporate governance of public companies in Nigeria. The committee was mainly required to identify the weakness in the current corporate governance practices in Nigeria with respect to

[361] Kunle Aina 'Board of directors and corporate governance in Nigeria' Int. J. Bus. Financ. Manage. Res. 1 (2013) 21-34 http://www.bluepenjournals.org/ijbfmr/pdf/2013/October/Aina.pdf accessed on 20/07/16

[362] Wilson, I. (2006). Regulatory and Institutional Challenges of Corporate Governance in Nigeria-Post Consolidation. Nigeria Economic Summit Group. http://www.templars-law.com/wp-content/uploads/2015/05/regulatory-and-intitutional-challenges.pdf accessed on 21/08/2016

[363] Inyang B.J. (2009) "Nurturing Corporate Governance System: The Emerging Trends in Nigeria" *Journal of Business Systems, Governance and Ethics*; 4 (2) 1-13

public companies; to examine practices in other jurisdiction with a view to the adoption of international best practices in corporate governance in Nigeria; make recommendations on necessary changes to current practices and examine other issues relating to corporate governance in Nigeria. At the end of the deliberation in 2001, the committee's recommendation focused on the issue of transparency and accountability as well as ensuring compliance to codes of corporate governance by management and boards of public companies.[364] Therefore, in response to the need for better corporate governance practices in Nigeria, the Securities and Exchange Commission (SEC) and Corporate Affairs Commission (CAC) attempted to align corporate governance in Nigeria with international corporate governance best practices, spelt out the code of best practices on corporate governance in Nigeria in 2003 for firms that are incorporated and or listed in Nigeria, and underscored the importance of board structure and compositions. This was an attempt to regain the confidence of the public.

The 2003 Code of Best Practices on Corporate Governance in Nigeria issued by the Atedo Peterside Committee set up by SEC. This code of best practice was developed based on the UK combined Code and the Sarbanes Oxley in the United States with emphasises the role of the board of directors and management, shareholder rights and privileges, and the audit committee most especially in listed companies. The code was divided into five sections Part A [the board of directors], Part B [The Shareholders], Part C [The Audit Committee] were the central part which discussed the core aspects of corporate governance while Part D [Interpretation] and Part E [Schedules] contained the basic requirements for the Code. This code is voluntary and is designed

[364]Okike, E.N.M., (2007) "Corporate Governance in Nigeria: the status quo" http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8683.2007.00553.x/epdf

to entrench good business practices and standards for Boards of Directors, CEOs, Auditors among others of listed companies, including banks. However, the Securities Exchange Commission in 2006, revealed that despite all these provisions, there are corporate failures in financial and non-financial sectors in the country. Meaning the new SEC had not been able to gain adequate support from managers and business owners across the country. Many banks and other firms were collapsed in numbers, leaving a trail of woes for investors, shareholders, suppliers, depositors, employees, and other stakeholders, in addition to causing a drastic loss of value in the stock market and a downturn in general economic activities in the country.[365] This contributed in no small measure to the general economic downturn in the nation's economy and led the government to take a bold step in initiating the corporate governance evolution.[366] In light of the foregoing, it is fair to argue that so far attempts over several years to entrench transparent business practices through an effective corporate governance framework has fallen far short of the required and desired standard, hence the urgent need to rethink and reform the current approach.

The following section sheds more light of the various instruments, both legal and non-legal, that have been employed over the years to enhance corporate governance in Nigeria.

3.5 Governance features in CAMA

CAMA is the Company and Allied Matters Act. This Act was born in 1990 out of the desire to create a competitive environment for corporate organisations in Nigeria, in

[365] Afolabi, A.A., (2015) "Corporate Governance Practices in Nigerian and South African Firms" *European Journal of Accounting Auditing and Finance Research* Vol.3, No.1, pp.10-29, February 2015.

[366] Aganga Olusegun (2011) article published by Guardian Newspaper on March 21st 2011 title corporate governance in Nigeria, Stock watch in association with Lead Capital.

reaction to international developments.[367]It should be noted that the Act may not have contained the expression "corporate governance", it has provisions dealing with issues thrown up by the corporate governance debate, it laid the basic framework for effective corporate governance: highlights the responsibilities of the board of directors; makes disclosure and transparency in accounting mandatory; stresses the importance and rights of shareholders and essential ownership functions; gives prominence to equitable treatment of shareholders and emphasizes the role of the regulatory body and corporate affairs commission. Despite the attempts of the governing bodies in Nigeria to make CAMA a comprehensive document, the Act has been criticised for its weak enforcement mechanism which has ensured that corporate breach and violations remain widespread.[368]

3.5.1 Corporate Personalities and Interests

The main attribute of company law from which other consequences derive is that a corporation is a distinct legal entity from those who constitute it.[369] It thus enjoys rights and can be subjected to duties that are distinct and cannot be borne by its members. Therefore, in Nigeria, as in many other countries, a company is a legal entity that has the powers of a natural person to execute all the objects in the company's articles. However, because it is an artificial human, it can only operate

[367] B.J., Inyang (2009) "Nurturing Corporate Governance System: The Emerging Trends in Nigeria" *Journal of Business Systems, Governance and Ethics* Vol 4, No 2, 2009. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.452.1367&rep=rep1&type=pdf accessed on 5/04/17.

[368] Okpala, K.E., (2012) "Fiscal Accountability Dilemma in Nigeria Public Sector: A Warning Model for Economic Retrogression" *Research Journal of Finance and Accounting* Vol 3, No 6, 2012. http://pakacademicsearch.com/pdf-files/ech/519/113-131%20Vol%203,%20No%206%20(2012).pdf accessed on 04/05/18

[369] LCB Gower (1979), Gower's Principles Of Modern Company Law, (4th ed.) Stevens & Sons, London, p.57

through the instrumentality of its human organs: mainly shareholders and the board of directors. For instance, in *Trenco (Nig) Ltd. V. African Real Estate Ltd'*[370] it was affirmed that "A company, though having a corporate personality is deemed to have human personality through its officers and agents."

Consequently, officers of a company may be regarded as the company for the purpose of its mind and action, and as such the actions of the managing director, whilst representing the company, will be construed as the act of the company itself. One challenge, however, is how to determine or which exact text can be applied as to which Act of individual or individuals to be attributed to or construed as that of the company. The legal principle of corporate personality cited in the above case has been codified and now constitute a significant legal principle as enshrined in CAMA and in line with the statutory provision that:

As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with liability on the part of the members to contribute to the assets of the company in the event of it is being wound up as in this act.[371]

The corporate personality principle is a significant issue in corporate governance, particularly on the issue of ownership and control. As discussed earlier in chapter 2 of this work, the separation of ownership and control is the main source of crises in

[370] (1978) All N.L.R 124

[371] Section 37 of the Company and Allied Matters Act

corporate governance in Nigeria, as it is in most part of the world. The delegation of authority that exist within the system creates the principal-agent problem between shareholders and the board and therefore highlights the effect of internal corporate governance on directors.[372]

3.5.2 Appointment of Directors under CAMA

The vital position of company directors cannot be

overemphasised under CAMA because the law saddles the occupant of that position]/*with many responsibilities. Where aspects of the law do not relate directly to him, he is still depended upon for operation and actualisation, because as a director he is the operating mind and soul of the artificial entity, known as the company. In CAMA, special attention is given to the company director by setting out the manner of his appointment, functions, powers, and powers so as to achieve high-level efficiency and effectiveness. Section 224 of CAMA thus answers the question of who a director is: a person duly appointed by the company to manage its business, either in an executive or non-executive capacity.[373] Thus, the director also includes anyone on whose instruction and the direction the directors are bound to act.

About the appointment of directors, CAMA requires every registered company at the time of registration to have at least two directors.[374] CAMA also made it mandatory for any company whose number of directors falls below two to appoint a new

[372] Hopt, K.J., (2002) "Modern Company and Capital Market Problems: Improving European Corporate Governance after Enron" *European Corporate Governance Institute Law Working Paper* No 05/2002, November 2002 p.5.
[373] Section 224 (1) and (2) of the CAMA Act.
[374] See section 246 (1) of CAMA

director(s) or it shall cease to operate at the expiration of one month from when the number fell below two.[375] To ensure compliance, a director or other members of the company who carries on with the business sixty days after the number of directors has fallen below two shall be liable for all debts and liabilities incurred during the period the company is in default.[376] The number and names of directors shall be indicated in writing by subscriber(s) of the memorandum of association, or the directors may be named in the articles.[377] At a company's annual general meeting, CAMA empowers members to re-elect or reject existing directors and elect new ones. In the case of *Longe v First Bank of Nigeria* (2010) (Pt. 1189) 1 SC, the Nigerian Supreme Court held that further to Section 266 of the CAMA, the removal of a Managing Director of the Bank was unlawful because he was not given notice of the Board meeting in which he was removed.[378] Under CAMA, contingencies such as the death of all director and shareholders are also taken care of; in which case, any identified personal representatives will be able to apply to the court to convene a meeting of all personal representative of the shareholders to elect new directors to run the company, and if they fail to do so, the creditors, if any shall be able to carry out this function.

In summary, CAMA allows shareholders the opportunity to contribute to the appointment of directors of their companies. However, the problem is how many shareholders in Nigeria avail themselves of these opportunities.[379] Besides, CAMA did not adequately empower shareholders to deal with the board or any member of

[375] See section 246 (2) of CAMA
[376] See section 246 (3) of CAMA
[377] See section 247 of CAMA
[378] See section 248 (1) of CAMA; Mondaq (2010) "Nigeria: Legal Test For A Valid Board Of Director's Resolution Under Nigerian Law" Accessed on http://www.mondaq.com/Nigeria/x/704958/Corporate+Governance/Legal+Test+For+A+Valid+Board+Of+Directors+Resolution+Under+Nigerian+Law
[379] Olusola A. Akinpelu (2012) Corporate Governance Framework in Nigeria: An International Review. *iUniverse.*

management found to be acting contrary to the interest of the shareholders or the organisation they are meant to serve.

CAMA recognises the principal organs in a corporation, namely the board of directors and the shareholders in general meeting. It also assigns rights and responsibilities broadly in line with modern corporate governance principles of distinguishing management from ownership and which as identified earlier, generate conflict among the key stakeholders. Ultimately this conflict has also resulted in shareholders' fear and suspicion of domination and marginalisation by the management. This is one area in which CAMA failed woefully. Rather than address this issue the fear of marginalisation and domination has inadvertently strengthened the provision of Section 63(4) which stipulates that:

> *subject to the provisions of the Articles, the Board of Directors when acting within the powers conferred upon them by the Decree or the Articles should not be bound to obey the directions or instructions of the members in general meeting provided the directors acted in good faith and with due diligence.*

This provision is the single most counterproductive of all the provisions regardless of the possible positive intention of its drafters. The provision has been a subject of much debate as it has provided managers and boards a cheap legal loophole exploited to implement unpopular policies. Indeed, in *Artra Industries (Nig) Ltd v. NBCI*[380] the Supreme Court held that management in the exercise of its powers and duties in line with Section 63(4), Directors should only do so in favour of the company and not in

[380] Some of the best practices include building a competent board, aligning strategies with goals, being accountable, having a high level of ethics and integrity, defining roles and responsibilities, and managing risk effectively.
Artra Industries (Nig) Ltd v. NBCI (1998) 4 NWLR (Pt.546)357

support any person. Therefore, any reform embarked upon must carefully consider this section as it has led to and continues to be a source of management mismanagement in Nigerian companies by providing a perfect excuse for managers to implement unpopular decisions, even when such decisions are not in the general interest of the organisation.

3.6 Codes of Corporate Governance in Nigeria

3.6.1 The Atedo Peterside Committee 2003

In recognition, only companies who operate with principles of international best practices[381] will be more attractive to investors (both local and foreign) and will be able to attract more investments, the Securities and Exchange Commission, the body charged with the regulating the Nigerian Capital Market set up the CG of Public Companies in Nigeria (the Committee) also known as the Atedo Peterside Committee, in June 2000. practised. The committee had the following terms of reference:

(a) To identify weaknesses in the current corporate governance practices in Nigeria with respect to public companies.

(b) To examine practices in other jurisdiction with a view to the adoption of international best practices in corporate governance.

(c) To make recommendations on necessary changes to current practices.

[381] International best practices as enumerated in the G20-OECD Principles of Corporate Governance. Some of the best practices include building a competent board, aligning strategies with goals, being accountable, having a high level of ethics and integrity, defining roles and responsibilities, and managing risk effectively.

(d) To examine any other issues relating to corporate governance in Nigeria.

In its report, the committee made recommendations along with a model code to guide directors of companies and increase their effectiveness in internal governance. The code provided Nigerian companies with laid out best practices to be employed by quoted companies as well as others with multiple stakeholders with regards to the exercise of executive powers supervision and direction of the enterprise in ensuring transparency and accountability in governance. It follows a similar pattern to the Cadbury Code of Best Practice formulates in the United Kingdom, though not as elaborate.

In Part A, the codes dealt with sundry issues relating to the Board of Directors, including responsibilities, how values created from the performance of these responsibilities are to be shared, performance appraisal, compensation of executives, succession planning, and communication with shareholders. Also, issues such as integrity in financial control and reporting and maintaining a high ethical standard in accordance with the law were extensively covered. One major feature of the Code is the provision for remuneration committee, which consists mainly of non-executive directors to determine the remuneration of directors, their pension contribution, and stock options for those earning above five hundred thousand naira. In other words, the codes are against executives playing a part in determining their remunerations.[382] With regards to company and board meetings, the code incorporates all the provisions

[382] Code of Corporate Governance in Nigeria OCTOBER, 2003 http://www.ecgi.org/codes/documents/cg_code_nigeria_oct2003_en.pdf Accessed on 18/06/2018

and requirements as stipulated under CAMA[383] particularly on notices and conducts of such meetings. The code also provides for adequate protection of investor interests, prescribing that shareholders with more than twenty per cent of a company's capital should be represented on the board unless where such investor(s) have a conflict of interest or interest in a competing business to warrant their exclusion.[384] Besides, the code provided that minority shareholders be represented on the board by at least one director.[385] It also has provisions encouraging activism among shareholders so that they can apply pressure on boards and management where necessary; consequently, the code recommended that the board must act in a manner that discourages shareholder activism.[386] In a bid to reassure transparency and accountability, the code prescribes that companies establish an audit committee, whose sole objective must be to maintain a high standard of corporate governance.[387] The committee must consist of persons who are independent and must not constitute a stumbling block between external auditors and executive directors on the main board or lead to the main board seeding its fundamental responsibility of reviewing and approving financial statements.[388]

The Atedo Peterside committee did extensive work which led to the compilation of the 2003 Corporate Code of Governance. However, despite its best intentions the codes formulate by the committee were at best voluntary and persuasive and as observed lacked any legal teeth as it cannot be enforced,[389] its implementation and enforcement were not sufficiently provided for. In addition, it fails to provide that

[383] See section 211-243 of CAMA Act regarding the composition, notices and conduct of company meetings. Analysis provided above under the discussion on the CAMA act
[384] Part B 10 (i) of the Nigeria Code, 2003.
[385] Part B 10 (j) of the Nigeria Code, 2003.
[386] Part B 11 (a) of the Nigeria Code, 2003.
[387] Part C 12 (a) of the Nigeria Code, 2003.
[388] Part C 12 (b) of the Nigeria Code, 2003.
[389] Olusola A. Akinpelu (2012) Corporate Governance Framework in Nigeria: An International Review. *iUniverse*.

remunerations be in line with corporate performance.[390] Adegbite also observes that the code relied mainly on numerous inputs from codes of other countries as it didn't look at the issues that were generic to Nigeria as a country.[391] Okike also argued that adopting corporate governance practices which are best suited to western and less corrupt countries could constitute significant challenges during its implementations,[392] which explains why businesses continued to experience failures as a result of the ineffectiveness of the implementation mechanism for the code.[393]

Despite the shortcomings of the 2003 Code by SEC, it was in existence in Nigeria until it was replaced by the Code of Corporate Governance in Nigeria in 2011. This code was initiated in 2008 when SEC inaugurated a national committee chaired by Mr. M.B. Mahmoud for the review of the 2003 code of Corporate Governance for public companies in Nigeria to address its weakness and to improve the mechanism for its applicability. The committee was given the mandate to identify weaknesses in, and constraints to, good corporate governance and to examine and recommend ways of effecting greater compliance and to advice on other issues that are relevant to promoting good corporate governance practices by public companies in Nigeria, and for aligning the code with international best practice. The code was to ensure the highest standards of transparency, accountability, and good corporate governance, without unduly inhibiting enterprise and innovation. This code was to be applicable to public companies[394]and encourage other companies not covered by the code to use

[390] Olusola A. Akinpelu (2012) Corporate Governance Framework in Nigeria: An International Review. *iUniverse* p. 285

[391] Adegbite, E. (2012) "Corporate governance regulation in Nigeria" Corporate Governance, 12(2), 257-276.

[392] Okike, E. N. (2007) "Corporate governance in Nigeria: the status quo" *Corporate Governance: An International Review*, 15(2), 173-193

[393] Soludo, C. C. (2006) "Beyond banking sector consolidation in Nigeria" A Paper presented at the Global Banking Conference on Nigerian Banking Reforms, The Dorchester Hotel, London.

[394] The 2011 SEC code applies to all public entities whose securities are listed on a recognised securities exchange in Nigeria, which shall comply with the principles and provisions of the code and

the principle set out in the code where appropriate, to guide them in the conduct of their affairs.[395]

3.6.2 The Failed Banks and Financial Malpractices in Banks Act 2004

The fact that this act was enacted is an indication of corruption that existed in the banking sector, particularly in the decade leading up to 2004. Particularly between 1998 and 2004, no fewer than 36 banks failed. The case of Mrs. Olajumoke Akinwale Oguntimehin (substituted for late Mr Benjamin Onilari), Olaoni Nigeria Limited, Mrs. Hannah T.Onilari vs Trade Bank Plc readily come to mind,[396] establishing how depositors losing most of their deposit and investors losing their investments. The fact of the case is that;

The original plaintiff (now deceased and substituted with 1st appellant) filed an action in the Lagos State High Court against the respondent, seeking the release of his title documents that were used to guarantee a loan granted to the 2nd appellant's by the respondent, on grounds that the 2nd appellant's account with the respondent was not properly managed. The respondent counterclaimed for the sum of N87,253,331.11 (eighty-seven million, two hundred and fifty-three thousand, three hundred and thirty-one Naira, eleven kobo) being the money owed it by the 2nd appellant on loan facilities granted to the 2nd appellant and guaranteed by the 1st and 3rd appellants. The trial court dismissed the 1st appellant's claims and granted

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it should serve as the basis of the minimum standard of their corporate behaviour. Other entities covered by the 2011 SEC code are all companies seeking to raise funds from the capital market, through the issuance of securities or seeking listing by introduction will be expected to demonstrate sufficient compliance with the principles and provisions of the code appropriate to their size, circumstances or operating environment [Section 1 SEC Code 2011]

[395] http://www.sec.gov.ng/files/CODE%20OF%20CORPORATE%20GOVERNANCE_web%20optimized.pdf accessed on 16th October, 2014

[396] National Deposit Insurance Company (NDIC) : the government institution charged with liquidating failed companies [http://ndic.gov.ng/closed-financial-institutions/]

the counterclaim. Aggrieved, the 1st appellant appealed to the Court of Appeal, contending that the respondent lacked the locus standi to prosecute the counterclaim after its banking licence had been withdrawn. [397] **Akinwale-Oguntimehin v. Trade Bank Plc**

This Act, however, was enacted to establish order and criminalises certain practices which were largely responsible for the collapse of the banks. The Act in Section 15 (1), for instance, provides that a director, manager, employee, officer of the bank who (a) knowingly, recklessly or wilfully grants or approve the granting or connected with the granting of a loan, guarantee or an advance or other credit facility to any person (i) without adequate security or collateral contrary to accepted bank practices and regulation or (ii) with no security or collateral where such is usually required (iii) with defective security (iv) without perfecting through this negligence or otherwise, a security or collateral obtained; (b)grants of approved a grant or is connected with the grant or approval of a loan, advance a guarantee or other credit facility which is above his limit or as allowed by the law (c) grants, approves the grant or is connected with the grant or approval of a loan, advance or guarantee to any person in contravention of any law for the time being in operation, any regulation, circular, procedure as laid down, from time to time by regulatory agencies or by the bank or, (d) receives or participate in sharing, for personal gratification, any money, profit, or financial benefit towards or after the procurement of a loan, an advance, a guarantee or any other facility from any person, whether or not the person is a customer of the bank; or

[397] Akinwale-Oguntimehin v. Trade Bank Plc CA/L/340M/2011 WEDNESDAY, 30 MARCH 2016 accessed on http://www.allfwlr.com/index.php/cases/detail?tokz=2459960b3729992656344975

(e) recklessly grant or approves a loan, or interest waiver where the borrower is known to have the capacity to repay the loan and interest is guilty under the Act.

Under this Act, any attempt successful or otherwise, to commit any offence outlined in section 15 (1) as laid down above will also have committed an offence. This is the thrust of Section 17, (1) a person who attempts to commit any of the offences specified in Section 15 is guilty of an offence and liable on conviction, to the same punishment as is prescribed for the full offence under Section 16 of this Act (2) where a person is charged with any of the offences specified in the Act, but the evidence establish an attempt to commit that offence, he may be convicted of having attempted to commit that offence although the attempt is not separately charged and shall be liable to the same punishment as is prescribed for the offence. It goes further in Section 16 (3) that where a person is charged with an attempt to commit an offence under this Act, but the evidence establishes the commission of the full offence, the person shall not be acquitted but be convicted of the offence and be liable to the same punishment as prescribed under Section 16 of this Act, (4) where, in respect of an act which is an offence under this Act, the Court is satisfied, that a person, not being a person charged, under this act (a) acted in concert or conspired with any person, or (b) knowingly took part to any extent whatsoever in the commission of an act constituting an offence specified in this Act, the court shall have the power to treat the person in like manner as a person charged with an offence under the Act and shall proceed against him accordingly notwithstanding anything to the contrary in any other enactment.

The Act also established the Failed Bank and Financial Malpractices Tribunal for the trial of offenders and recovery of debts where a bank has failed. It must be pointed out that the majority of the cases prosecuted at the tribunal bear striking abuse of the

principles of corporate governance. For example, in *Federal Republic of Nigerian v. Ajayi*,[398] the accused who founded a failed bank (Republic Bank Limited) was arraigned found guilty on a 17-count charge, one of which bordered on him not declaring his interest soon enough to the Board of Republic Bank Limited while serving as a director in same bank in respect of a loan to five of his own companies in contravention of Section 18 (3) of the BOFIA Act.[399] This was the case with several other failed banks[400] where directors exploited their position to grant themselves huge sums in unsecured loans leading to the collapse of their banks.

3.6.3 The CBN Code 2006

Another major development in the history of corporate governance in Nigeria is the intervention by the Central Bank of Nigeria (CBN) in 2006. The continuous collapse experienced in the banking sector due to poor corporate governance (poor corporate governance culture in Nigeria derive mostly from either partial or total lack of compliance with the codes arising from the multiplicity of laws which allow people to hide under loopholes or implement aspects of the codes which favour them; inefficient judicial system also contribute to the poor practice of corporate governance in the country.) and the recent bank consolidation exercise forced the CBN to issue new corporate governance outlines to all banks operating in the country

[398] (1998) 3 F.B.T.L 32.
[399] BOFIA is The Bank And Other Financial Institutions Act (2004), which is an act to regulate the operation of banks and other financial institution in Nigeria. It deals with issues ranging from establishing a bank to the relationship with the Central Bank of Nigeria. In addition, it stipulates offences and punishments to be meted out when such offences have been committed
[400] See *Federal Republic of Nigerian v. Mohammed Sheriff & Two Others, Federal Republic of Nigerian v. Abule; Federal Republic of Nigerian v. Alhaji Murnai*

in February 2006.[401] Code of corporate governance for banks in Nigeria Post Consolidation was put together by the Central Bank of Nigeria and effective from the 3rd of April, 2006.[402] Compliance with this code is made mandatory for all companies regulated by the agency. This code was introduced to ensure the accountability of bank CEOs. This was made to enhance the effectiveness of other policies in the Nigerian Banking Sector. It also specifies; the accountability structure within the organisation; fines and penalties including jail term for erring CEOs, risk management measures within the organisation emphasising on the roles and qualifications of corporations' internal auditor. It also describes board composition and qualifications of no-executive directors.[403] The code seeks to address the issue of poor corporate governance and create a sound banking system in Nigeria. The code introduced more stringent requirements in industry transparency, equity ownership, criteria for the appointment of directors, board structure and composition, accounting and auditing, risk management, and financial reporting.

In all the code failed in its primary objective, which was to address the corporate governance challenges that were expected to confront banks post-consolidation.[404]

[401] Akanbi, P.A., (2012) "An examination of the link between corporate governance and organizational performance in the Nigerian banking sector" *Elixir Mgmt. Arts* 43 (2012) 6564-6573 http://www.elixirpublishers.com/articles/1350290079_43%20(2012)%206564-6573.pdf

[402] http://www.cenbank.org/OUT/PUBLICATIONS/BSD/2006/CORPGOV-POSTCONSO.PDF accessed on 16th October 2014.

[403] Adewale, A., (2013) 'An evaluation of the limitations of the corporate governance codes in preventing corporate collapses in Nigeria' Journal of Business and Management Volume 7, Issue 2 (Jan. - Feb. 2013), PP 110-118

[404] Ofo, Nat, Code of Corporate Governance for Banks in Nigeria Post-Consolidation 2006: Revision Required (January 30, 2011). Available at SSRN: https://ssrn.com/abstract=1751460 or http://dx.doi.org/10.2139/ssrn.1751460

3.6.4 Central Bank of Nigeria Act No 7 of 2007

The Central Bank of Nigeria (CBN) in performing its regulatory duties, repealed and replaced the CBN Act of 1991 with the CBN Act 2007. In accordance with section 42 (1) of the 2007 CBN Act, the CBN is empowered to work with other banks to (a) promote and maintain adequate and reasonable financial services to the public (b) ensure a high standard of conduct and management throughout the banking system (c) further such policies not inconsistent with the act as shall in the opinion of the CBN be in the /national interest. Section 43(2) provides for the establishment of the Financial Services Regulation Co-ordination Committee in order to empower the CBN to monitor the banking sector effectively.

The act also empowers the CBN to enforce compliance with the provision therein as it can (a) require banks at any point in time to prepare and make available to the CBN within a specified time, a true and correct statement showing the position of the deposit liabilities of the bank (b) requires a bank to furnish it with information and statistics in any form and at any time the CBN may deem fit for the purpose of satisfying itself that the bank in question is in compliance with the provisions section 45 (1) of the CBN Act 2007. In case a bank fails to respond to these requests the CBN has the power to prohibit such a bank from giving out loans or from undertaking new investments until such a time the bank is able to comply and satisfy the CBN. The act, in addition to empowering the CBN to ensure banks comply with its provisions, also stipulates punishments for erring banks. For instance, any bank which supplies false information for any purpose under the section shall be guilty of an offence and liable upon conviction to a fine, not less than N10, 000,000 but not more than N20, 000,000.

3.6.5 Code of Good Corporate Governance for Insurance Industry [NAICOM 2009]

This code was created to introduce the quality and efficiency of insurance industries due to the need for countries to have an efficient insurance regulatory system to supervise the actives of the insurance industry. The code sets out the composition, duties, and responsibilities of the board as well as standards expected of the board members, designed to ensure efficiency and accountability by both board and management of insurance companies. It also sets out and recommends various structures and control systems, designed to provide efficiency and accountability by both the Board and Management of insurance companies, as well as measures that will eliminate fraudulent and self-serving practices among members of staff, the management and boards of insurance institutions, in line with modern trends.[405] The code provided that no insurance company shall have less than seven members and not more than 15 members of its board.[406]

3.6.6 Securities and Exchange Commission (SEC) Code 2011 and 2014

In 2008, the Security and Exchange Commission set up a national committee, headed by Mr. M.B Mahmoud to have a review of the SEC code of 2003. This committee was to address the weaknesses in current corporate practices concerning public companies; examine practices in other jurisdictions with a view to adopt international best practices; recommend ways of effecting greater compliance; identify and advise

[405] Code of Good Corporate Governance for the Insurance Industry in Nigeria [2009] https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/centre-for-corporate-governance/code-of-good-corporate-governance-for-the-insurance-industry-in-nigeria.pdf accessed 18/05/17

[406] Section 5.04 NAICOM CODE 2009

on other issues that are relevant to promoting good corporate governance practices by public companies.[407]This code was introduced with the aim of having a code to deal with corporate governance issues in all industries similar to what is applicable in developed nations like that of the UK rather than industry-specific codes. The SEC code of 2011 was also more informed by the need to address the weakness in the enforcement mechanism of the SEC code of 2003. The code is anchored on five main principles, which includes;

The 2011 SEC code is voluntary and where there is a conflict between it and the provisions of any other code in relation to a company covered by the two codes, the code that makes a stricter provision shall apply.[408] Even though this code applies only to public companies, the SEC has encouraged private companies to adopt its principles in the conduct of their affairs. However, despite the changes brought by the SEC code of 2011, there were mounting criticism against some of its provisions. Some of the criticism noted was that there is no clarity as to whether the code should be enforced as a rule-based or a principle-based code; the issue of multiple directorships as it was unclear whether an independent director in a company can act as an independent director in another company;[409] the resolution of conflicts was said to be weak and issue of conflict between SEC code and other corporate governance codes.[410]

[407] Aina, K., and Adejugbe, B., (2015) "A Review of Corporate Governance Codes and Best Practices in Nigeria" *Journal of Law, Policy and Globalization* Vol.38, 2015 https://www.iiste.org/Journals/index.php/JLPG/article/view/23517 accessed 12/02/17

[408] section 1 [1.3 g] SEC Code http://www.sec.gov.ng/files/CODE%20OF%20CORPORATE%20GOVERNANCE_web%20optimized.pdf accessed on 24/08/16

[409] Adegbite, E. (2012) "Corporate governance regulation in Nigeria" *Corporate Governance*, 12(2), 257-276.

[410] Ofo, N. (2011) "Code of Corporate Governance in Nigeria 2011: Its Fourteen Fortes and Faults" https://poseidon01.ssrn.com/delivery.php?ID=402119071098094011118114097004123117098000022

Due to the growing challenges faced in the corporate world and changes in the nature of the capital market, SEC made further amendments to the SEC Code of 2011 in order for the Code to reflect the International Best Practice. A new code came into force on May 12, 2014, as SEC Code of Corporate Governance for Public Companies. The major issue covered by the amendment was upgraded the status of the code from a moral-suasion based voluntary code to a mandatory code. The code, according to the amendment, will now be described as a framework that is expected to facilitate sound corporate governance practices and behaviour and it should be seen as a dynamic document defining minimum standards of corporate governance expected particularly of public companies with listed securities. The new code also made provisions for the application of sanctions and penalties which would scale up the code to the same level of statutory rules being made by SEC under the mandate of the Investment and Security Act.[411] The 2014 SEC Code made few amendments requiring Public companies to adopt and implement which includes; the separation between the office of the chief executive officer (CEO) and that of the chairman of the board of directors. The chairman's role is to provide leadership for the board, while the CEO is responsible for the day-to-day management of the company;[412] The board must comprise at least five directors, whose tenure is limited to three years, after which a director can be nominated for reappointment, in addition to this, the board must have at least one independent director who has no substantial shareholding (directly or indirectly) and has no professional, financial or personal ties

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029012082094008080086111080087002110101049058006100016121016066083113066114074083104032069065006077012074078085090108007081053072019114095114078100004116092127092070000080121022016023012115101020066071071&EXT=pdf accessed on 29/06/18

[411] Marshall, J.B., (2015) "Corporate Governance Practices: An Overview Of The Evolution Of Corporate Governance Codes In Nigeria" *International Journal of Business & Law Research* 3(3):49-65, July-Sept 2015

[412] Unlike previous code where the had the same person as chairman of the board and CEO, but this is no longer good practice

to the company or its executive directors this in addition to executive directors and non-executive directors. Non-executive directors are responsible for setting the remuneration of executive directors, details of which must be published in the company's annual report;[413] companies must rotate external audit firms, while the firms themselves must rotate audit partners assigned to carry out external audits of the company. Audit firms cannot act for more than 10 years on a continuous basis; Companies must establish a whistleblowing system known to all contractors, shareholders, employees, and the public to report unethical practices within the organisation anonymously.[414]

3.7 Presentation and Critical Analysis of the National Code of Corporate Governance 2016

Due to the failure of the previous codes in preventing corporate collapse and a need to correct the anomaly to correct the multiplicity of Codes [or sector-based approach to CG], there was an increase in clamour for a unified code of corporate governance for all corporations in Nigeria. This led to the birth of the National Code of Corporate Governance released by the FRC for public comments, which reveals the intention of the FRC to regulate corporate governance for private and public companies, not for profit organisations, and public interest entities in Nigeria.[415] The code is divided into three parts which are; Code of Corporate Governance for the Private Sector; The code of Corporate Governance for the Not-for-profit sector and the Code of Governance for the Public Sector. However, this thesis will focus more on the Code

[413] Only two family members may serve as directors of a public company at the same time

[414] http://www.internationallawoffice.com/Newsletters/Company-Commercial/Nigeria/SPA-Ajibade-Co/Complying-with-amended-corporate-governance-code accessed on 06/10/16

[415] Marshall, J.B., (2015) "Corporate Governance Practices: An Overview Of The Evolution Of Corporate Governance Codes In Nigeria" *International Journal of Business & Law Research* 3(3):49-65, July-Sept 2015

of Corporate Governance for the private sector, this will be applied to listed and non-listed companies; private companies that are holding companies or subsidiaries of public companies; and regulated private companies as defined in section 40.1.14[416] of this code.[417]

The code was active from the 17th of October 2016. The code was driven by the need to usher in a unified corporate governance code with governance standards that are more country-specific, contextual, and environmentally congruent, while at the same time conforming to international best practices".[418] The chairman of the committee stated that the code's focus was to harmonize and unify all the existing sectoral corporate governance codes in Nigeria.[419] Furthermore, the provisions of the code indicated that regulators are required to apply the code as their general guidelines for corporate governance notwithstanding that they are empowered to issue sector-specific regulation guidelines on issues relating to corporate governance, to such extent that such guidelines do not conflict with the provisions of the code. Where there is a conflict between the Code and other sector-specific guidelines, the provisions of the Code shall prevail.

The main aim of these regulations is to ensure transparency, accountability, and disclosure in the running of affairs of companies' which will, in turn, guarantee investors' confidence, protection of shareholders' investment, and flow of both local

[416] "private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission, except such companies with not more than eight (8)
employees)".
[417] The National Code of Corporate Governance 2016 Part B section 2. 2.1 [a-c]
[418] http://www.jacksonettiandedu.com/lawfirm/wp-content/uploads/2016/11/National-Corporate-Governance-Code-2016.pdf
[419] I.E the Code of Corporate Governance for Banks in Nigeria Post-Consolidation 2006, Code of Corporate Governance for Licensed Pensions Operators 2008, Code of Corporate Governance for Insurance Industry in Nigeria 2009, SEC Code of Corporate Governance in Nigeria 2011 and CBN Code of Corporate Governance for Banks and Discount Houses 2014.

and foreign capitals.[420] Compliance with the provision of the Code is mandatory. This thesis will, however, focus on the provisions of this Code in comparing its provisions with that of the UK, USA, and the OECD principles of corporate governance where necessary. And also as it applies to public companies in Nigeria, which are the subject of concern in this thesis. The 2016 code will be fully discussed in the next chapter of the thesis.

However, the Omnibus legislation, the Companies, and Allied Matters Act 1990 [CAMA] is still the basic law on corporate governance in Nigeria. This Act made provision for the formation of corporate entities to set time and structures for corporate governance. It provides that every corporate entity must have a Memorandum and Articles of Association[421] which is the Constitution of every company.[422] The Act made numerous provisions for corporate accounting and auditing practices, some of which included requirements for Auditing,[423] disclosures, and preparations and publications for financial statements of companies. The Registrar of Companies at the Corporate Affairs Commission (CAC) is to monitor compliance with these requirements and specifies obsolete penalties in cases of non-compliance.[424] It further made provisions for appointment, remuneration, rights functions, powers, removal of auditors, and the establishment of an audit committee.[425]

[420] www.oecd.org
[421] This is the document setting up the structures of governance of the entity. The document is also regarded as a contract between the members of the company (See section 41 of CAMA)
[422] Section 35 of CAMA 1990
[423] the CAMA provides for the liability of the auditor for negligence if, as a result of failing to discharge his fiduciary duty properly, the company suffers loss or damage (see section 67 CAMA 1990]
[424] Sections 137, 211 (3) & (5), 343, 345, 354 CAMA 1990
[425] sections 357, 358, 362,363 in part XI of CAMA 1990

3.8 Conclusion

After examining the evolution of corporate governance and the Codes developed for best practice of corporate governance in Nigeria, the codes revealed that the regulators in Nigeria are willing to update the provision of their respective codes to always be in reality with changing circumstances and in line with international best practice. Nigeria's corporate law appears to be comprehensive and detailed as it addresses functions like shareholder protection, management securities, and many others as discussed in other codes like those applicable in the USA and UK respectively. However, these changes have not been far-reaching enough; neither have they adequately resolved the challenges which corporate governance faces in Nigeria. These reviews are done mainly in line with CAMA provisions which are to protect the interest of shareholders and stakeholders through proper accountability, transparency, and timely disclosures by the board of directors. However, CAMA is long overdue for amendment for it to align with international best practice as it is the principal law regulating the activities of companies in Nigeria and provide adequate penalties. Suffice it to say, however, that CAMA is not the focus of this work and will thus not be emphasized.

This chapter also explains the challenges inhibiting corporate governance in Nigeria, clearly establishing the need for a radical reform of the system. This leads on to the next chapter where the newly introduced National Code of Corporate Governance, Nigeria's attempt at delivering the much-needed reform, will be discussed alongside with having a comparison of its provisions with what is applicable in the UK, USA and the OECD provisions of Corporate governance where necessary. This will form the basis for the recommendations which will come in the final chapter of the thesis.

CHAPTER FOUR

NATIONAL CODE OF CORPORATE GOVERNANCE AND GOVERNMENT FRAMEWORK IN THE UNITED KINGDOM, USA AND OECD PRINCIPLES OF CORPORATE GOVERNANCE

4.0 Introduction

Chapter 3 analysed the historical background of corporate governance in Nigeria and the evolution of corporate governance codes in Nigeria. In chapter 3 the various codes adopted by Nigeria in an attempt to keep up with international best practices were examined, starting from the Code of Best Practices on Corporate Governance in Nigeria 2003 through to the newly released National Code of Corporate Governance [NCCG 2016]. It examined the laws and the regulation governing companies in Nigeria as well as the regulatory bodies. The chapter went further to examine the financial scandals that have taken place in Nigeria, and it argued that gross violations of existing codes were rife just as inherent inconsistencies and inadequacy of the codes pose many challenges. Following on from the analysis of the Nigerian Code, chapter four aims to explore the evolution of the UK system to establish the fact that good corporate governance is a marathon, not a sprint. The chapter argues that the Nigerian experience of CG evolution is similar to that of the UK where several attempts have been made over many years through the introduction of new codes and improvements to existing ones in a quest to achieve a robust system of corporate governance.

The chapter further presents an analysis of the CG approach promoted by the OECD principles as well as the system of governance in the United States. The chapter contextualises the CG approach in need of a good CG practice within an organisation

and how having the same can help deal with problems and improve performance[426]. A correlation is known to exist between good corporate practice, firm performance, and investor confidence[427]. It is essential therefore that in seeking to establish an approach that establishes good corporate practice, Nigeria needs to emulate the best practices across the board. Hence the need to compare and contrast and come up with an approach that guarantees good corporate governance. However, it is important to devote a chapter to the comparator countries to allow an exhaustive analysis of relevant pieces of codes and constitutional provisions where applicable. By doing so, this chapter will help to identify critical areas of divergence among the comparator countries as well as relevant sections that may be adapted to the Nigerian situation with a view to delivering a more effective CG system. Also, the chapter helps identify key areas where change is needed in the Nigerian code.

4.1 National Code of Corporate Governance in Nigeria of 2016

4.1.1 Nature of the Issuing Body

The corporate scandals in the late 1990s and early 2000s, which led to the collapse of Enron Corporation, WorldCom, and several other national and international companies, did not only implicate the accounting profession but also de facto led to the failure of one of the five largest audit and accountancy partnerships in the world.[428] These global financial and accounting scandals led to the introduction in the

[426]Lipton, M. and Lorsch, J.W. (1992), 'A modest proposal for improved corporate governance', The business lawyer, Vol. 48, No. 1, pp. 59-77.

[427]Ahmad, N., Iqbal, N. and Tariq, M.S. (2014), 'Relation of corporate governance with financial performance', International Letters of Social and Humanistic Sciences, Vol. 29, No. 40, pp. 35-40

Babu, B.P. and P.Viswanatham (2013), 'Corporate governance practices and its impact on indian life insurance industry', International Journal of Innovative Research and Practices, Vol. 1, No. 8, pp. 44-54

[428] Herbert, W.E., Anyahara, I.O., Okoroafor, E.N., and Onyilo, F., (2016) "Financial Reporting Council of Nigeria and the Future of Accounting Profession in Nigeria" *International Journal of*

United States, of the Sarbanes-Oxley Act of 2002, which brought into effect the Public Company Accounting Oversight Board [PCAOB]. The Act was amended through Public Law 106 -112 and enacted on April 5, 2012. For the effectiveness of corporate governance in the country, the Act is currently being reviewed by the concerned stakeholders with the special reference to definitions of crucial sections of the Act and strengthening of some sections to enhance effective corporate governance practice further.[429] The passage of the Sarbanes-Oxley creates a global awareness of the importance of good corporate governance practice.

This regulation is what has been replicated in Nigeria through the promulgation of the Financial Reporting Council Act No.6 of 2011 to replace the defunct Nigerian Accounting Standards Board with the Financial Reporting Council of Nigeria. This replication became necessary because of the need for a more effective means of registering and coordinating the activities of auditors, both local and foreign. Consequently, the FRCN was established as a regulatory body charged with the responsibility of registering all external auditors for listed firms on the NSE (The Nigerian Stock Exchange). The institutionalisation of ethical standards in reporting of financial reporting statements and other related financial information by national and foreign auditors is the main benefit of following the United States of America's registration and coordination approach. The approach has equally helped Nigeria in gaining improved foreign investors' confidence in its firms, most importantly companies with international presence.

Finance and Accounting Volume 5, No 3 Pp5146-157Accessed on http://article.sapub.org/10.5923.j.ijfa.20160503.02.html 14/03/2018

[429]Securities Exchange Commission (2018) Smaller Reporting Company Definition Accessed on https://www.sec.gov/rules/final/2018/33-10513.pdf; Americans for Financial Reform (AFR) and the Consumer Federation of America (2018) Bills AFR and CFA Oppose https://consumerfed.org/wp-content/uploads/2018/07/afr-cfa-comments-hfsc-markup.pdf Accessed on 6/7/2019

More importantly, it is worth noting that the FRCN's scope of operation far extends beyond that of the PCAOB, as clearly enunciated under its establishing Act. Firstly, the FRC Act in Nigeria marked the end of Voluntary self-regulation of professional accountancy bodies and the beginning of formal, mandatory oversight. This is significant in the accounting practice in relation to corporate governance because it has removed illegal dealings and improved quality[430] on the part of accounting professionals in collusion with company executives while preparing and reporting financial information to the business owners and regulatory agencies. This is a positive and significant step towards the institutionalisation of processes for ethical and sustainable corporate governance practices. Also, the Council serves as a unifying independent regulatory body for Accounting, Actuarial, valuation, and corporate governance practices in public and private sectors of the Nigerian economy. This, as pointed out earlier, has eliminated self-regulation and has the potential to engender rivalry within accounting, actuarial, valuation professions, and corporate governance practices before the consideration of the United States of America's system. National risk management has been shaped towards making business environment safer.

Under the National Accounting Standards Board, this was elusive because of the absence of unifying independent regulatory agency. For instance, each of the profession has an agency regulating its affairs in terms of complying with provisions of the Act that established association or regulatory body for the profession and sanctioning erring professionals or firms.

[430]Jeffrey R. Cohen and W. Robert Knechel (2013) A Call for Academic Inquiry: Challenges and Opportunities from the PCAOB Synthesis Projects. AUDITING: A Journal of Practice & Theory: 2013, Vol. 32, No. Supplement 1, pp. 1-5.

The Act gives the FRC its powers, functions, and objects. The FRCN has, however, been given a much more significant role to play in the Act. Amongst the functions provided are; to develop and publish accounting and financial reporting standards to be observed in the preparation of financial statement of public interest entities;[431] monitor compliance with the reporting requirements specified in the adopted code of corporate governance; promote compliance with the adopted standards issued by the International Federation of Accountants and International Accounting Standards Board; monitor and promote education, research, and training in the fields of accounting, auditing, financial reporting, and corporate governance.[432] The most crucial power given under this Act are listed in section 7 [2][a] of the Act where it stated; Without prejudice to the generality of sub-section (1) of this section, but subject to the provisions of this Act, the Council shall have the power to enforce and approve enforcement of compliance with accounting, auditing, corporate governance and financial reporting standards in Nigeria, to enter into contracts that are necessary for discharging its functions.[433]

With these responsibilities, the FRCN has already been overburdened with many responsibilities covering the various aspects of accounting, auditing, reporting, and corporate governance. This has established that the performance of the agency in the area of effective monitoring of the extent to which professionals and businesses are

[431] Review, promote and enforce compliance with the accounting and financial reporting standards adopted by the Council; receive notices of non-compliance with approved standards from preparers, users, other third parties or auditors of financial statements; receive copies of annual reports and financial statements of public interest entities from preparers within 60 days of the approval of the Board; advise the Federal Government on matters relating to accounting and financial reporting standards; maintain a register of professional accountants and other professionals engaged in the financial reporting process;

[432] Section 8 [1] [a-i] Financial Reporting Council of Nigeria Act, 2011 Accessed on http://emekauzodinma.com/wp-content/uploads/2014/07/FINANCIAL-REPORTING-ACT.pdf 05/0617

[433] Section 7 [2] [a] Financial Reporting Council Of Nigeria Act, 2011 Accessed on http://emekauzodinma.com/wp-content/uploads/2014/07/FINANCIAL-REPORTING-ACT.pdf 05/0617

complying with the code of corporate governance would be restricted. By having many responsibilities for the agency within accounting, auditing and reporting have created doubt on Nigeria's readiness to have the best global corporate governance practices within the context of the United States of America's PCAOB. The body needed to have a limited and focused scope of responsibility in order to achieve its core aims and objectives, which is to ensure compliance of corporate governance code and promote appropriate corporate behaviour among managers and board of corporations in Nigeria. Restricting FRCN's activities or functions to the core aspects of corporate governance practices will also go in a long way of helping the agency meeting the public expectation regarding actual performance monitoring of businesses and managers.

Section 2[2 a-e][434] of the FRC Act[435] provides for the body that is to form the members of the council. These composition and job specification of most members of the council, particularly its key members, suggest it is an accounting-related organisation which is also charged with the responsibility of overseeing corporate governance practice in Nigeria. Whilst some of the most celebrated corporate governance failures have had roots in auditing and accounting,[436] the majority have

[434] The council shall form a Board which shall have an overall control of the council and which shall consist of; a Chairman two representatives from the Association of National Accountants of Nigeria, two representatives from the Institute of Chartered Accountants of Nigeria, one representative each from the following offices: the Office of the Accountant General of the Federation, Office of the Auditor General of the Federation, Central Bank of Nigeria, Chartered Institute of Stockbrokers, Chartered Institute of Taxation of Nigeria, the Corporate Affairs Commission, Federal Inland Revenue service, Federal Ministry of Commerce, Federal Ministry of Finance, Nigerian Accounting Association, Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture, Nigerian Deposit Insurance Corporation, Nigerian Institute of Estate Surveyors and Values, the Securities and Exchange Commission, National Insurance Commission, the Nigerian Stock Exchange and the National Pension Commission and Executive Secretary of the Council

[435] Section 2[2 A-E] Financial Reporting Council of Nigeria Act, 2011

[436]Ifeanyi.D.N., Olagunju, A., Adeyanju O. D. (2011) Corporate Governance and Bank Failure in Nigeria: Issues,
Challenges and Opportunities Research Journal of Finance and Accounting Vol 2, No 2, 2011

been much more extensive than just accounting issues[437]. For instance, in 2009 many banks closed down because of the failure to meet up with the new recapitalisation ratio due to various bad debts from customers, especially businessmen and women with the high political connections and societal status and operating obligations of the Central Bank of Nigeria and other regulatory bodies.

However, one of the central mandates given to the FRC is to promote international best practices on corporate governance in Nigeria, whereas it has been overwhelmed with accounting, auditing, and other related responsibilities than ensuring effective corporate governance despite the Act referring corporate governance 'the roles of persons entrusted with the supervision, control, and direction of an entity (Section 77 of the Act).'[438] Part VI of the Act provides for the creation of the Directorate of Corporate Governance.[439] Section 50 of the Act stated the objective of the Directorate to include; develop principles and practices of corporate governance; promote the highest standards of corporate governance; promote public awareness about corporate governance principles and practices; on behalf of the Council, act as the national coordinating body responsible for all matters pertaining to corporate governance.[440] Section 51 of the Act listed out the functions of the committee on corporate governance as, the most important of which is to issue the code of corporate governance and guidelines and develop a mechanism for periodic assessment of the

[437]Babalola Adeyemi (2011). Bank failure in Nigeria: a consequence of capital inadequacy, lack of transparency and non-performing loans?. Banks and Bank Systems, Vol 6(1)
[438] Section 77 Financial Reporting Council of Nigeria Act, 2011
[439] Section 49 Financial Reporting Council of Nigeria Act, 2011
[440] Promote sound financial reporting and accountability based on true and fair financial statements duly audited by competent independent Auditors; encourage sound systems of internal control to safeguard stakeholders' investment and assets of public interest entities ; and ensure that audit committees of public interest entities keep under review the scope of the audit and its cost effectiveness, the independence and objectivity of the auditors; Section 50 Financial Reporting Council of Nigeria Act, 2011

code and guidelines[441]. This does not only empower the FRC to issue a code of Corporate Governance guidelines through its Directorate of Corporate Governance. It also imbues the council with powers to amend provisions of the code from time to time as it deems fit. The need assessment is essential in Nigeria because the activities of corporations and managers remain unpredictable. The assessment role is critical in order to protect the shareholders and business communities. As a regulatory body, assessing the business environment frequently would help in devising an appropriate monitoring framework and reduce incessant corporate failures due to bad debts among other issues.

The combined reading of section 12 [5][442] and section 15[1] of FRCN Act 2011, allows for the Board of the FRCN to establish a committee as it deems necessary for its efficient and effective functioning, while section 51[c] of the Act empowers the Committee on corporate governance to issue the Code of Corporate Governance and guidelines, and develop a mechanism for periodic assessment of the code and guidance.

As laudable as these provisions are, the regulatory body lacks the power to enforce the provisions. The body has statutory duty to issue a code of corporate governance-related matters in the country, but it has been incapacitated with political interference and poor corporate culture among the executives, managers, and professionals in all the sectors of the economy.[443] The agency could not deal with businesses that have high political connections because of the influence on the enforcement of a robust regulatory framework as provided in the code. The agency struggles to deal with the

[441]Provide assistance and guidance in respect of the adoption or institution of the code in order to fulfil its objectives; and establish links with regional and international institutions engaged in promoting corporate governance; Section 51 Financial Reporting Council of Nigeria Act, 2011

[442] The Board shall set up such Committees for its efficient and effective functioning

[443] Osemeke, L. and Adegbite, E. (2016) Regulatory Multiplicity and Conflict: Towards a Combined Code on Corporate Governance in Nigeria; Journal of Business Ethics Vol 133, Issue 3, pp 431–451

politically exposed business owners and religious leaders who have registered their organisations as corporate establishments because of the support they get from their highly placed political friends. This has negatively impacted the implementation of critical aspects of the provisions and those of the Act establishing the agency impossible.[444]

In performing its statutory duties, the FRC developed a National Code of Corporate Governance which was to unify all existing codes of corporate governance in the financial services sector. This code came into force in October 2016. Before the introduction of the National Code of Corporate Governance in Nigeria, there was a multiplicity of codes of corporate governance with distinctive dissimilarities emanating from various regulatory sectors[445] many of which were discussed in Chapter 3 of this work. Although all these codes focused mainly on corporate governance, there are often disparities in the content of their provisions and their enforcement mechanism. Inconsistency permeates in most provisions which make translation of specific procedures or principles into a concrete framework for implementation impossible. As argued earlier, weak corporate governance culture remains the major problem of business growth and development in the country. Some of the reoccurring issues attributed to corporate failures include; insider dominated boards; non-independent or affiliated corporate boards; inadequate minority shareholder protection; comprisable external audit function; ineffective audit

[444]Rock City FM (2017) "Buhari Dissolves FRCN, Suspends Code of Corporate Governance" https://www.rockcityfmradio.com/adeboye-buhari-dissolves-frcn-suspends-code-corporate-governance/ Accessed on 6/7/2019

[445] which were listed and discussed in previous chapter identifiable at the commencement of the Steering Committee's work were the Code of Corporate Governance for Banks in Nigeria Post-Consolidation 2006, Code of Corporate Governance for Licensed Pensions Operators 2008, Code of Corporate Governance for Insurance Industry in Nigeria 2009, SEC Code of Corporate Governance in Nigeria 2011 and CBN Code of Corporate Governance for Banks and Discount Houses 2014.

committees; inadequate board monitoring and supervision of the executive; inadequate board monitoring and supervision of the executive; inadequate whistleblowing apparatus and others.[446] In Nigeria, it is often common to find in most corporate organisations that the basis of board composition is hinged on perceived preference for personal friendship, compatibility, and non-adversarial relationship, rather than the current global emphasis on independence, diversity, robust engagement, competence, experience, expertise, and integrity. In order to protect investors, the Act in section 11 empowers FRC to 'protect investors and other stakeholders' interests; give guidance on issues relating to financial reporting and corporate governance; ensure good corporate governance practices in the public and private sectors of the Nigerian economy.[447] And also to ensure accuracy and reliability of financial reports and corporate disclosures, pursuant to the various laws and regulations currently in existence and harmonise activities of relevant professional and regulatory bodies as relating to Corporate Governance and Financial Reporting.[448] These provisions have the tendency of ensuring a healthy business environment and mutual benefits for the stakeholders and shareholders. In spite of the likelihood of the provisions enhancing the business environment, the weak regulatory mechanism remains one of the obstacles. Businesses believe in window dressing their financial reports to make their companies look "healthy" and please shareholders, stakeholders, and investors. The regulatory body lacks an appropriate mechanism to discover the window dressed reports. When they are discovered, the body would

[446]Dugeri, M., (2015) "The Role of FRC in the Promotion of Corporate Governance in Nigeria" Accessed on https://mikedugeri.wordpress.com/2015/07/28/the-role-of-frc-in-the-promotion-of-corporate-governance-in-nigeria/ 28/09/2017

[447] Section 11 [a-c] FRC Act, 2011

[448] Section 11 [d-e] FRC Act, 2011

rather succumb to the political influence, or its personnel collects bribes from the defaulters.

However, after identifying the sections of the Act which empowers the FRC to develop the principles and practices of corporate governance in order to unify the Codes of Corporate Governance in Nigeria, the question that has been raised by some industry stakeholders and shareholders and organisations is whether the FRCN followed the provisions of the Act in line with establishing the Code. The Minister of Industry, Trade and Investment who supervises the ministry to the Financial Reporting Council, Mr. Okechuku Enelamah asked Mr. Jim Oabzee who oversees the Financial Reporting Council of Nigeria to provide the evidence of the adoption of the Code by the Board of the council and the minutes of the meeting at which the Board adopted the Code.[449]The FRC Secretary was also asked to explain to the Federal Government whether the committee on Corporate governance, acted in line with provisions of Section 51 of the Act, empowered to issue the Code of Corporate Governance, and whether they are in a position to act in the absence of the Board of the council in the light of provisions of Section 2[1]450 and 10[d]451 of the Act. The FRC failed to comply with the provisions when read together which suggests that the Board will be responsible for the overall control of the Council and the Directorates as the Board was yet to be constituted as at the release of the Code. This and many others which shall be discussed in the latter part of this chapter have, however, led to the suspension of the Code by the Federal Government for it to be reviewed.

[449] Nwachukwu, I., (2015) "FG suspends Obazee's Code of Corporate Governance" *Business Day* on 7 November 2016 Accessed on http://www.businessdayonline.com/exclusives/article/fg-suspends-obazees-code-of-corporate-governance/ 05/07/18.

[450] There is established for the Council, a Board (in this Act referred to as "the Board") which shall have overall control of the Council.

[451] The Board shall oversee the delivery by each directorate of their functions, through regular reports from the directorates' coordinating directors

4.1.2 National Code of Corporate Governance 2016

The National code of corporate governance is the first of its kind in Nigeria, which makes provisions for all entities in the country. The Unified National code is the outcome of the directive given to the Steering committee on corporate governance on the 17th of January 2013 by the honourable Minister of Trade and Investment. Mr. Victor Odiase chaired the Committee, and its focal remit was to harmonise and unify all the existing sectoral corporate governance codes in Nigeria.[452] The directive was aimed at the development of a National Code of Corporate Governance which would enable the FRC to promote the highest standards of corporate governance. This is imperative based on the fact that both the private and public sectors have over the years had different codes of practice. The FRC is also expected to act as the national coordinating body responsible for all matters pertaining to corporate governance in both the private and public sectors of the Nigerian economy.[453]As good as this function is, it made the body solely responsible for overseeing all professional bodies considering the fact that the bodies cannot do without finances.[454] This negates the role expected of a similar agency in the world. The Financial Reporting Council of Nigeria released the National Code of Corporate Governance 2016 on the 17th of October, 2016. The Code shows the intention of the FRC to regulate corporate governance for private and public companies, not for profit organisations, and public

[452] Financial Reporting Council of Nigeria (2016) "National Code of Corporate Governance 2016" Accessed on https://drive.google.com/file/d/0BxB1-bqcIt35aXVjMEY3c2NyYnc/view accessed on 25/12/2017

[453]Financial Reporting Council of Nigeria (2016) "National Code of Corporate Governance 2016" page 4 Part A: section 1.1 [a-f] Accessed on https://drive.google.com/file/d/0BxB1-bqcIt35aXVjMEY3c2NyYnc/view accessed on 30/04/2018

[454]PWC (2014) "The Impact of the Recent Judgement on the Powers of the Financial Reporting Council of Nigeria" Accessed on https://www.pwc.com/ng/en/assets/pdf/tax-bites-june-2014.pdf 9/6/2019

interest entities in Nigeria.[455] It is a consolidation and refinement of different sectoral codes on corporate governance and has been issued in three parts which are; Corporate Governance for the Private Sector, Code of Governance for Not-for-Profit entities, and the Code of Governance for the Public Sector. These three codes collectively form the National Code of Corporate Governance 2016. The main concentration of this thesis will be on the Code of Corporate Governance for the private sector.

The National Code of Corporate Governance for the private sector was driven by the need to usher in a unified corporate governance code with governance standards that are more country-specific, contextual, and environmentally congruent, while at the same time conforming to international best practices".[456] The chairman of the committee stated that the code's focus was to harmonise and unify all the existing sectoral corporate governance codes in Nigeria.[457] Furthermore, the provisions of the code indicated that regulators are required to apply the code as their general guidelines for corporate governance notwithstanding that they are empowered to issue sector-specific regulation guidelines on issues relating to corporate governance, to such extent that such guidelines do not conflict with the provisions of the code. Where there is a conflict between the Code and other sector-specific guidelines, the provisions of the Code shall prevail.

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[455] Marshall, J.B., (2015) "Corporate Governance Practices: An Overview of The Evolution of Corporate Governance Codes in Nigeria" *International Journal of Business & Law Research* Volume 3, No 3 Pp49-65, July-Sept 2015

[456] National Code of Corporate Governance (2016) Accessed on ttp://www.jacksonettiandedu.com/lawfirm/wp-content/uploads/2016/11/National-Corporate-Governance-Code-2016.pdf

[457] I.E the Code of Corporate Governance for Banks in Nigeria Post-Consolidation 2006, Code of Corporate Governance for Licensed Pensions Operators 2008, Code of Corporate Governance for Insurance Industry in Nigeria 2009, SEC Code of Corporate Governance in Nigeria 2011 and CBN Code of Corporate Governance for Banks and Discount Houses 2014.

4.1.3 Application of the Code

As argued earlier, the Nigerian government through the FRCN unified disaggregated existing codes into the new one that is legally binding on all companies, whether listed and unlisted companies; private companies that are holding companies or subsidiaries of public companies; and regulated private companies[458] which are defined as private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission, except such companies with not more than eight (8) employees)".[459] It should be noted that based on this provision, the code does not apply to all private companies unless private companies that are holding companies or subsidiaries of public companies. This provision, however, contradicts that of section 24 of CAMA which classified that 'Any company other than a private company shall be a public company and its memorandum shall state that it is a public company.' A company is either a public or private and the fact of being a holding company or being a subsidiary of a public company or being regulated does not make such private companies assume a different status under CAMA.[460] The Code requires mandatory compliance from the companies which render operational returns.

The NCCG will be analysed in more significant details alongside codes from reference jurisdictions in the next chapter. The analyses will be presented in a comparative form to help understand how the Nigerian code of corporate governance compared to those from the jurisdictions discussed below, namely The UK, The US, and some features of the OECD principles of corporate governance.

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[458] The National Code of Corporate Governance 2016 Part B section 2. 2.1 [a-c]
[459] The National Code of Corporate Governance 2016 Part B section 40.1.14
[460]Esan, F., (2016) "The Un-Enforceability of the Nigerian FRC's Code of Corporate Governance" Accessed on http://investadvocate.com.ng/2016/11/08/un-enforceability-nigerian-frcs-code-corporate-governance/ 17/07/17

4.2 The United Kingdom Corporate Governance

4.2.1 Corporate Governance Framework

As argued earlier, corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies while the shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business, and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations, and the shareholders in general meeting.[461]

The United Kingdom is generally acknowledged as the world leader in corporate governance reforms[462]. The various scandals that characterised its system due to the ineffective control of corporate management which necessitated the need to review its code continually. This review was not a predetermined strategy, but it came about as a result of a growing interest in corporate governance issues with the boardroom, institutional investment community, and the government.[463] This was in part a reaction to a series of sensational business scandal in the late 1980s and early 1990s in the UK that is the pension funds fraud by Robert Maxwell, failure of auditors to expose the impending bankruptcy of the Bank of Credit and Commerce International,

[461] The Cadbury Report Para 2.5 Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf accessed 23/12/2016

[462]Lawrence, Mathew (2017) Corporate Governance Reforms: Turning Business towards Long-Term Success *Discussion Paper*https://www.ippr.org/files/2017-07/cej-cgr-dp-17-07-14.pdf Accessed 3/8/2019

[463] Solomon, J., (2010) *Corporate Governance and Accountability* (2nd edition)
245 Financial Reporting Council (2016) *The United Kingdom Corporate Governance Code* London: The Financial Reporting Council Limited

and at the undeserved high pay rises received by senior business executives and the introspection by boards and shareholders following economic decline were the circumstances which drew criticism to the lack of controls on business conduct in the United Kingdom. These and many more scandals created incentives for corporate reform in the UK. The United Kingdom's regulation of corporate governance consists of several laws, codes of practices, and market guidance. The mandatory rules and legal standards are the ones gotten from common law, the statute [i.e. The Companies Act 2006], company's constitutional documents [and article of association] regulations are mostly gotten from the Listing Rules and the Disclosure and Transparency Rules published by the Financial Conduct Authority [FCA]. Some of the laws and regulations governing the corporate governance standards in the UK are derived from European Law, while some are specific to the UK.

Nigeria like many other former British colonies follows the same common law [judicial precedent] approach like that of the United Kingdom, unlike what is in practice in France and German which follows the civil law [Act of Parliament] approach. This is the reason why the research is looking at the UK corporate governance Codes in specific terms in addition to the previous usage of the UK codes within the Nigerian Codes' appraisal done earlier.

4.2.2 Evolution of Policy Recommendations

In the latter half of the 1980s and early 1990s, a series of high-profile corporate failures involving the apparent misuse of executive power by domineering CEOs such as Robert Maxwell and Asil Nadir pointed to the absence of adequate checks and

balances. This drew criticism of the apparent lack of controls on business conduct in the United Kingdom.

The Pension Fund Scandal [Maxwell Pension Fraud] has been said to be the most dramatic of all cases of abuse of power and the greatest fraud of the 1990s. Maxwell built his business empire over time by accruing a lot of debts and fraudulent activities in order for his businesses to survive. His business empire was founded on two companies which were publicly quoted: Maxwell Communication Corporation and Mirror Group Newspapers alongside other private companies. After his death, it emerged that Maxwell has taken money out of the pension funds of his public companies to finance and support his ailing business empire. The money taken from the pension fund of his two public companies was estimated to be £727 million as well as companies' assets and £1 billion lost from shareholder value after the public companies crashed.

In the case, there were a number of corporate failures relating to the affair company which gave room for Maxwell to abuse his position this includes; lack of separation of power[Maxwell was both the chairman and the CEO of Maxwell Communication corporation from 1981 to 1991, and he was also the CEO and chairman of Macmillan Publishers from 1988 to 1991]; he also appointed the non-executive directors to the board which included some prominent former politicians, conferred respectability on the Maxwell business empire but seemingly did nothing to deter the wrongdoing. They failed to perform the useful and independent function of alerting the shareholders to the lack of transparency in Maxwell's financial activities. They only gave the company a respectable picture to the public due to the high-ranking positions they hold; the Companies auditors who were in a position to have noticed movements of funds from the pension fund to the company did not seem to have noticed such

activities. This case also proves that no amount of checks, balances, codes of practice, or regulation can change the character of an individual who is personally corrupt which points to a central issue of how ethics in the boardroom can be monitored. Maxwell's case is not entirely different from Abdulrasheed Maina, Head of Pension Reforms Task in Nigeria, who was charged alongside the former Head of Civil Service, Steve Oransoye for conspiracy in embezzling over N2 billion.[464] The incident further justifies how weak the regulatory system and level of corruption in the country. The accused along with others spent the money on the purchase of personal materials such as houses in choice countries and locations in Nigeria despite the fact that the Task Committee was inaugurated with the aim of correcting illegal activities of businesses regarding pension funds.

4.2.2.1 The Cadbury Report of 1992

Prior to the setting up of the Cadbury Committee, company shareholders are usually in the position to elect the board of directors and chairperson who manages the board's affairs. The board are positioned to appoint a chief executive officer who is responsible for the day-to-day management of the firm's business activities. The directors provide an annual report to the shareholders on the firm's financial performance. The directors' report is validated by external auditors, appointed by the shareholders on the recommendation of the board. There is a formal annual meeting of shareholders during which financial results are presented, directors are elected, and

[464] The Punch (2019) "N2.1 billion Pension Fraud: Security agencies remove Maina from watch list" accessed on https://punchng.com/n2-1bn-pension-fraud-security-agencies-remove-maina-from-watch-list/ accessed on 24/6/2019

auditors are appointed[465]. With structures like this in place; a number of fiduciary responsibilities placed by law; legal requirements for an annual independent external audit of company's' account; overseeing by the Financial Service Authorities [FSA] and many others, there were several cases of corporate abuse of powers and corporate collapse in the late 1980s and early 1990s. These led to a public outcry for the review of corporate governance in the UK and necessitated the provision of several corporate governance policy documents and codes of best practice for UK companies and investors. When the Cadbury's 2006 auditing case happened in Nigeria, it equally received similar public outcry. Till today, the scandal remains Nigeria's equivalent of Enron.

The Cadbury Committee was set up in May 1991 by the Financial Reporting Council, the London Stock Exchange, and the accountancy profession and the Financial Reporting Council, an independent regulator backed by accountancy organizations and the UK government to address the financial aspects of corporate governance following various financial scandals, collapses and general lack of confidence in the financial reporting of many UK companies[466]. Sir Adrian Cadbury chaired the committee. However, the Cadbury report has been recognised as the first of numerous policy documents, principles, guidelines, and codes of practice in the UK. The report has helped influence the development of many corporate governances in many countries across the world where some of the recommendations were wholly or partly implemented.

[465]Boyd, C., (1996) "Ethics and Corporate Governance: The Issue Raised by The Cadbury Report in The United Kingdom" *Journal of Business Ethics* Volume 15 Pp167-182, 1996.

[466] But after the committee was set up, the scandal at Bank of Credit and commerce international [BCCI] and Maxwell occurred, as a result of these cases the committee widened their inquiry to look beyond financial aspects to corporate governance as a whole.

Since the setting up of the Committee and the publication of the Cadbury report, corporate governance structure and practices within the UK have undergone significant changes in response to the recommendations of the various committees and reports.[467] This could not be said about Nigeria because, after the scandal, many other corporate failures were also recorded. These failures include those in the banking sector in 2009, especially Intercontinental, Oceanic, and Afri banks. Meanwhile, the focus of the UK was to 'to review those aspects of corporate governance specifically related to financial reporting and accountability'.[468] Because of this, the committee recommendations were mainly directed towards issues of control and accountability. The Report relied primarily on improved information to shareholders, continued self-regulation, more independent directors, and strengthening of auditor independence to improve accountability.[469] The objective of the committee to enhance openness, integrity, and accountability in the British corporate governance system is based upon two main ideas; [i] that self-regulation is better than statutory enforcement for improving the way companies are run; [ii] the financial markets are a more efficient system of providing external controls over those companies that fail to adopt satisfactory standards of corporate governance[470] In Nigeria, the objective of the committee for the review of the Cadbury's case was to unravel financial mismanagement to the tune of N13 billion and find out how the

[467]Keasey, K., Thompson, S., and Wright, M., (2005) *Corporate Governance: Accountability, Enterprise and International Comparisons* John Wiley & Sons, Ltd

[468] The Cadbury Report Para 1.2 Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf 23/12/2016

[469]Keasey, K., Thompson, S., and Wright, M., (2005) Corporate Governance: Accountability, Enterprise and International Comparisons John Wiley & Sons, Ltd

[470] Finch, V., (1992) "Board Performance and Cadbury on Corporate Governance" *Journal of Business Law* Pp581-595

appropriate sanctions would be imposed on the violators, especially the Managing Director.[471]

The UK's corporate governance code is a principle-based type, unlike the USA where it is a legal-based rule. At the time the Cadbury committee were working on the inquiry, there were expectations that its findings would be incorporated into company law. Such expectation was also exhibited in Nigeria, but not factored by the Securities and Exchange Commission when its report was eventually made public. The Commission only sanctioned the violators, while affected shareholders received little attention from the commission. However, Sir Adrian Cadbury felt that informality would be more potent than rules, where it is tempting for those affected to obey the 'letter of the law' and ignore the deeper purpose behind it[472]. For this reason, the Cadbury code is not legally binding on Companys' boards of directors.

Nevertheless, one of the rules of the Stock Exchange Yellow Book at the time of Cadbury's publication was a statement of 'Compliance'.[473] The Yellow Book requires that all public companies quoted on the stock exchange had an obligation to state in their annual reports whether or not they had implemented the codes in all aspects. In situations where the board had refused to comply with the provision of the code, they were compelled to make a definite statement of reasons why they failed to comply. This mechanism gives investors detailed information about situations of non-compliance and enables them to decide whether it is justified or not.[474] This rule introduced was what became known as the 'Comply or Explain' obligation. Many

[471] Securities and Exchange Commission (2008) Final Decision on Cadbury http://www.proshareng.com/admin/upload/reports/SECdecisiononCadbury.pdf accessed on 24/6/2019

[472] Davis, A., (2006) *Best Practice in Corporate Governance: Building Reputation and Sustainable Success* Gower Publishing Limited

[473]Solomon, J., (2010) *Corporate Governance and Accountability* (2nd edition).

[474] Boards are not expected to comment separately on each item of the Code with which they are complying, but areas of non-compliance will have to be dealt with individually. The Cadbury Report Para 3.7 Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf 09/01/2017

critics of the Cadbury Report argued that the report was too vague and insufficiently ambitious and that improvement would be incremental as adherence to the guidelines was not required by law.[475]

The Cadbury report's main recommendations were to develop a code of best practice which all listed companies in the UK would be able to use as a guiding principle. This is not considered in Nigeria. Before the setting up of the Cadbury Committee, there was a concentration of power at the head level where an individual is appointed to act as both chairperson and CEO. The report recommended that the separation of responsibilities at the head where the roles of the CEO should be separated from that of the Chairperson. However, in situations where one individual holds both positions, the 'board members should look to a strong non-executive director, who might be the deputy chairman, to the person to whom they should address any concerns about the combining office of chairman/chief executive officer and its consequence for the effectiveness of the board'[476]. The separation of the roles of CEO and chairman is very significant in the history of UK corporate governance reform. Since the recommendation, there has been a decline in chairmen serving at the same time as the CEO of a corporation. The act is seen as a controversial arrangement for large UK public companies an example was that of Sir Stuart Rose's move to combine the roles at Marks & Spencer, (though this act was meant to be on a temporary basis) was outrightly rejected and provoked the Company's significant shareholders to draft a protest resolution at the Company's 2008 Annual General Meeting [AGM]. Weir and Laing in their survey on UK companies between 1992 and 1995 concluded that

[475]Cheffins, B.R., (2013) "The Rise of Corporate Governance in the UK: When and Why 'The History of Corporate Governance' in Mike Wright and others (eds), *The Oxford Handbook of Corporate Governance* (OUP 2013) 46, 46;

[476] The Cadbury Report Para 4.5 Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf 09/01/2017

companies who adopted the Cadbury report had 8a higher returns and have established a compensation committee[477]. Another researcher also showed that since the Cadbury report, UK companies have increased non-executive director representation, reduced CEO duality, and increased the presence of board committees[478]

The report also increased the importance and number of NEDs by recommending the Independence of non-executive directors where it stated that NEDs should bring independent judgment to be bear on issues of strategy, performance, resources, key appointments, and of standards of conduct. It went further to recommend that there should be a minimum of three NEDs, one of whom may be the chairman of the company provided that he is not also the CEO or head of the company[479]. The report recommended that these NEDs should be independent of the company. 'This means that apart from their directors' fees and shareholdings, they should be independent of management and free from any business or other relationship which could materially interfere with the exercise of their independent judgement'.[480] One of the main criticisms of this recommendation is the fact that it demands radical changes in the role of the non-executive director, changes which have a number of implications as the code recommends a minimum of three non-executives for each of the boards of the 6000 firms listed on the London Stock Exchange, suggesting a minimum of 18000 outside director positions. There were questions as to the stock of available

[477] Gamble, A., and Kelly, G., (2001) "Shareholder Value and the Stakeholder Debate in the UK" *Corporate Governance: An International Review* Volume 9 No 2 Pp110-117.
[478] Weir, C., Laing, D., and McKnight, P.J., (2002) "Internal and External Governance Mechanisms: Their Impact on the Performance of Large UK Public Companies" *Journal of Business Finance and Accounting* Volume 29 No 5-6 Pp579-611
[479] The Cadbury Report Para 4.11 Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf 09/01/2017
[480] The Cadbury Report Para 4.12 Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf 09/01/2017

candidates in the UK, especially given the criterion of independence[481]. It required that directors' service contracts should not exceed three years without shareholders' approval and that the Companies Act should be amended in line with this recommendation[482].

Alongside these recommendations, the report turned to executive compensations where it recommended that a full and clear annual disclosure of directors' pay which includes their pension contributions, stock option separate figures should be given for their salary and performance-related elements and that the criteria on which performance is measured should be explained[483]; executive directors' pay was to be determined by a remuneration committee of the board of directors, itself wholly or mainly comprised of non-executive directors and chaired by a non-executive, and those members should draw upon outside advice as necessary; membership of the remuneration committee should be published in the annual report. However, it should be noted that the Cadbury report did not mention or advocate for the need for changes in the level of executive pay, it stated that this should be determined in accordance with the firm's market needs. What the report seeks to implement was a pay-setting procedure that would more closely align executive and shareholder interests by significantly raising the indirect and direct role of shareholder's voice[484].

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[481] Boyd, C., (1996) "Ethics and Corporate Governance: The Issue Raised by The Cadbury Report in The United Kingdom" *Journal of Business Ethics* Volume 15 Pp167-182, 1996.

[482] The Cadbury Report Para 4.12 Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf 09/01/2017

[483] We recommend that in disclosing directors' total emoluments and those of the chairman and highest-paid UK director, separate figures should be given for their salary and performance-related elements and that the criteria on which performance is measured should be explained. Relevant information about stock options, stock appreciation rights, and pension contributions should also be given. Para 4.40 Cadbury Report

[484]Girma, S., Thompson, S., and Wright, P.W., (n.d) "Corporate Governance Reforms and Executive Compensation Determination: Evidence from the UK" Accessed on https://pdfs.semanticscholar.org/4787/735735a0c40146f605c71457e49130811fc5.pdf 10/01/17

However, the report encouraged institutional investors to take a more active role in monitoring the companies, most notably with the way their votes have been applied at the annual general meeting. The Cadbury report made several emphases on the roles of NEDs and institutional shareholders. The constant emphasis reflects that corporate governance in the UK at the firm level acts through the boards of directors and the annual general meetings meaning the board of directors is required to produce at the annual general meeting externally audited accounts to enable shareholders to assess the adequacy of the directors' stewardship[485]. It also encouraged the accounting profession to seek options in which the statutory audit might become more effective and objective.[486] The objective of the committee's recommendations was to design a code of best practice to achieve high standards of corporate governance behaviour in the UK. However, upon the presentation of the report, the London International Stock Exchange [LISE] accepted the Cadbury report recommendations as to the best practice.

The Cadbury Code set out several changes that were intended to subject corporate executives to greater and more effective monitoring by the representatives of the shareholders, especially the non-executive directors[487]. A survey carried out after the report suggests that the report was widely and quickly accepted and implemented by UK's listed companies.[488] The Cadbury report recommends that the board of directors is comprised of at least three Non-executive Directors in which two out of them

[485]Keasey, K., Thompson, S., and Wright, M., (2005) *Corporate Governance: Accountability, Enterprise and International Comparisons* John Wiley & Sons, Ltd

[486]Gregory, A. and Collier, P. (1996) "Audit Fees and Auditor Change; An Investigation of the Persistence of Fee Reduction by Type of Change" *Journal of Business Finance & Accounting* Volume 23 Pp13–28

[487]Girma, S., Thompson, S., and Wright, P.W., (n.d) "Corporate Governance Reforms and Executive Compensation Determination: Evidence from the UK" Accessed on https://pdfs.semanticscholar.org/4787/735735a0c40146f605c71457e49130811fc5.pdf 10/01/17

[488]Conyon, M.J., and Mallin, C., (1997) "Women in the Boardroom: Evidence from Large UK Companies" Volume 5, Issue 3 Pp 112–117

should be independent. Some expert in the industry has widely criticised this recommendation.

Despite the criticism, the UK Cadbury report is effective in the institutionalisation of sustainable corporate governance than in Nigeria. As stated earlier, the massive fraudulent accounting and mismanagement in companies continue after Nigeria's Cadbury report. Insider illegal dealings, compromised boards, and numerous powerless shareholders' groups' audit committees continue unabated in all sectors of the economy.[489] The rubber stamp Annual General Meetings in most companies after the Cadbury case equally suggests the end of best corporate governance practice in Nigeria.[490]

Although the CEO and the directors of the company who were found guilty by the Stock Exchange Commission were accordingly sanctioned,[491] it did not prevent the resultant crises that rocked the stock exchange as Cadbury was one of the biggest companies listed on the stock exchange; this meant that the ripple effect was felt in the wider economy. The sanction model employed by the regulatory agency was ineffective in addressing illegal corporate governance practice. The earlier monitoring of corporate activities by the Nigerian regulatory body remains the best approach to address the future occurrence of the kind of activities exhibited by the management of Cadbury. This should be done in line with the UK's comply or explain the approach to compliance.

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[489] Analysis follows later in the chapter

[490]Oyebode, A., (2009): "The Imperative of Corporate Governance in Nigeria" Accessed on http://www.nigeriavillagesquare.com/articles/the-imperative-of-corporate-governance-in-nigeria.html 22/08/16

[491]Onwuamaeze, D., (2008) "Cadbury fraudulent directors punished" *Newswatch Magazine* (Nigeria) Pp58-59; Akanbi, P.A., (2012) "An examination of the link between Corporate Governance and Organizational Performance in the Nigerian Banking Sector" *Elixir Mgmt. Arts* Volume 43 Pp6564-6573 Accessed on http://www.elixirpublishers.com/articles/1350290079_43%20(2012)%206564-6573.pdf accessed on 22/08/2016

4.2.2.2 The Greenbury Report 1995

The Greenbury committee was set up in response to the public outcry of the 'fat cats' as regards the size of the director's remuneration packages, their inconsistency, and incomplete disclosure in companies' annual reports. The 'fat cat' report as the code is often referred to was prompted by British Gas shareholder revolt over the pay of their managing Director Cedric Brown in 1994. Such a revolution cannot happen in Nigeria because employees do not have absolute rights to check the excesses of their managers, especially those at the corporate level. Besides, it is even difficult for employees to know the actual salary of their executives. However, employees who are knowledgeable enough to understand that such information could be discovered in the annual reports would not hesitate to read the reports.

The focus of the Greenbury committee and its recommendations were on disclosure of directors' remuneration and how much disclosure should be made. This report was mainly directed to the directors of public limited companies, and it hoped that both smaller listed companies and unlisted companies would find the recommendations useful. Following the Cadbury report's path, the Greenbury committee draws from the recommendations of the report (Cadbury) that focus on establishing the remuneration committee. However, the report consists entirely from non-executive directors, rather than the maximum of three non-executive directors as recommended by Cadbury report. The central aim of the Greenbury report was to strengthening accountability and enhance directors' performance and these were aimed to be achieved by; the setting up of remuneration committees which comprises of independent non-executive directors who would report fully to the shareholders each year about the company's remuneration policy, including full disclosure of the elements in the remuneration of individual directors. When it becomes impossible for

companies to set up remuneration committees the report wants the companies to explain and justify the traps and state how the strategies or techniques adopted towards setting up the committees could not lead to desired results; the adoption of performance measures lining rewards to the performance of both the company and individual directors, so that the interests of directors and shareholders were more closely aligned.[492]The setting up of remuneration committee as one of the solutions to the non-disclosure of the executive pay aligns with the provision of the NCCG 2016 which states that "the remuneration of the MD/CEO shall be determined by the remuneration committee and may include a component that is long-term performance-related, stock options and bonuses, the details of which must be disclosed in the company's annual reports."[493] Using key performance indicators as one of the tools of measuring directors' performance is expected to enhance the connection of directors' roles in the attainment of companies' desired revenue and profits. The main expectation is that the individual directors should earn based on their contributions to the multiplication of shareholders' funds. This position is also applicable to the Nigerian context as various codes have specified the essence of using the approach to make governance transparent and avert a situation where executive earn bogus salary without commensurate efforts Specifically, directors' corporate activities should be the basis of setting remuneration. Setting up of pay structure to align with the interest between shareholders and directors; Reporting all the details of components of directors' remunerations that is salaries, pensions, bonuses among others; Shareholders' consent to be sought for long term incentives;

[492]Mallin, C.A., (2013) *Corporate Governance* 4th Edition, Oxford University Press
[493]Section 6.3.8 Nigeria Corporate Governance Code 2016

There should be a link between the performance of the directors and the remuneration packages. This has been noted earlier.

In November 1995, both the Cadbury Committee and the Greenbury Committee requested that a committee be formed to review the implementation of their recommendations. This request led to the establishment of the Hampel Committee [also known as Combined Code]. Apart from providing for a structure through which executive pay is to be determined, it also provided that such payments must be performance-related not only to align the interest of directors and shareholders but also to ensure that shareholders are protected from a system which allows directors to arbitrarily set pay without considering the company's status or the interest of shareholders. These innovative provisions, no doubt, are signals to probity and responsibility in the manner in which executive pay should be determined. However, the provisions could not be said to be effective fully because executive pay rose after the code emerging and still increasing across the sectors. Similar situation occurred in Nigeria after the Cadbury scandal in 2006. Transparency and disclosure of remuneration of executives continue to be at a low ebb among quoted companies on the Nigerian Stock Exchange.[494] While Nigeria continues to experience many failures due to bogus salary decided by the executives themselves without recourse to the corporate rules and stipulated provisions in the existing codes, the Cadbury committees ensure that shareholders play a role in determining long term incentives. This allows shareholders to critically scrutinise the award of bonuses and other

[494]Odewale, Robert and Karmadin, Hasnah (2015) "Directors' Remuneration Disclosure Transparency in Nigeria and Influence of Block Share Ownership" International Journal of Business and Social Research Volume 5, Issue 8 pp65-78

incentives as a safeguard against unnecessary and undeserved benefits for executives even to the detriment of the company.

4.2.2.3 The Hampel Report and Combined Code of 1998

In response to many requests on the need to have a set of principles and code which embraced Cadbury, Greenbury, and the committee's work, the Combined Code of 1998 emerged. [495]This effort was not embraced in Nigeria despite having various committees investigating different corporate failures. Stakeholders failed to harmonised recommendations of the committees towards formulation of new codes that would prevent future occurrence. The country only harmonised different codes to form a unified one. It has been generally said that the work carried out by the Cadbury, Greenbury, and Hampel committee have had an effect on the corporate governance debate in other European countries alongside the UK law. It has been argued that the corporate governance framework in the UK is more stringent and highly developed than those in other European markets.[496]

As a successor committee to the Cadbury and Greenbury Committees, the Hampel Committee was formed in November 1995 under the chairmanship of Sir Ronald Hampel. The Financial Reporting Council initiated the setup of this committee.[497] The focus of the committee was to review the application of the two previous recommendations. It also focused on the financial aspect of corporate governance and directors' remuneration, threading Greenbury's paths taking another approach. The

[495] The Combined Code Principles of Good Governance and Code of Best Practice 1998 Accessed on http://www.ecgi.org/codes/documents/combined_code.pdf 10/01/17

[496]Mantysaari, P., (2005) *Comparative Corporate Governance: Shareholders as A Rule-Maker* Springer

[497] The London Stock Exchange, the Confederation of British Industry, The Institute of Directors, the Consultative Committee of Accountancy Bodies, the National Association of Pension Funds and the Association of British Insurers were the ones who sponsored the report.

Hampel committee was specifically established to review the extent to which the Cadbury and Greenbury report had been implemented and whether the objectives had been met. In reviewing the previous codes, few specific recommendations were made for the modification of the Greenbury recommendations. They were to promote high standards of corporate governance in the interests of investors' protection to preserve and enhance the standing of companies listed on the Stock Exchange.[498] The Hampel report of 1998 consisted of 17 principles of corporate governance which were structures into four categories: directors, directors' remuneration, shareholders, and accountability and audit. One of the main requirements was its requirement for sound internal control, including financial, operational, compliance, and risk management. This enhances investors and shareholders' confidence in corporate organisations. After the Hampel report, the committee issued a further document which consolidated and amended the recommendations of Cadbury (1992), Greenbury (1995), and the Hampel Proposals (1998) and the result was a single combined code containing a set of principles and provisions published in 1998, based on good corporate governance practices and principles in the UK (Combined Code, 1998).

Despite the shortcomings of the Hampel report, many saw this report in some way as being more realistic than those of its predecessors. It triggered the combined code, which is the amalgamation of the Cadbury and Greenbury recommendations. This led to the publication of the Combined Code of 1998. The Code is named Combine code because it combined all issues covered in the Cadbury and Greenbury Report. The Hampel Report refined recommendations raised in the Cadbury Report and Greenbury Report. The code has two sections which are aimed at; the companies and

[498] Bloomfield, S., (2013) *Theory and Practice of Corporate Governance: An Integrated Approach* (1st edition) Cambridge University Press

institutional investors which operate on a 'comply or explain' basis.[499] Alongside, it covers areas relating to structure and operation of the boards, director's remuneration, accountability and audit, relations with institutional shareholders, and the responsibilities of institutional shareholders.

In relation to internal control of companies, the combined code states that the 'the board should maintain a sound system of internal control to safeguarded shareholders' investment and the company's assets' and that directors should at least annually, conduct a review of the effectiveness of the group's system of internal control and should report to shareholders that they have done so. The review should cover all controls, including financial, operational, and compliance controls and risk management'.[500]

Accordingly, the Hampel report recommended that superior governance be built on values rather than prescription and it could be achieved by permitting the companies to offer information in a different style and avoid a "box-ticking" exercise as recommended by the Greenbury report. The report highlighted the importance of maintaining a principle-based, voluntary approach to corporate governance rather than a more regulated one.[501] This approach has been widely described as an

[499] In the first part of the statement, the company will be required to report on how it applies the principles in the Combined Code. We make clear in our report that we do not prescribe the form or content of this part of the statement, the intention being that companies should have a free hand to explain their governance policies in the light of the principles, including any special circumstances applying to them which have led to a particular approach. It must be for shareholders and others to evaluate this part of the company's statement. Para. 4. In the second part of the statement the company will be required either to confirm that it complies with the Code provisions or - where it does not - provide an explanation. Again, it must be for shareholders and others to evaluate such explanations para 5. The Combined Code Principles of Good Governance and Code of Best Practice 1998 Accessed on http://www.ecgi.org/codes/documents/combined_code.pdf 10/01/17

[500] The Combined Code Principles of Good Governance and Code of Best Practice 1998 Part D.2.1 http://www.ecgi.org/codes/documents/combined_code.pdf accessed on 10/01/17

[501] Good corporate governance is not just a matter of prescribing particular corporate structures and complying with a number of hard and fast rules. There is a need for broad principles. Al1 concerned should then apply these flexibly and with common sense to the varying circumstances of individual

international benchmark for good corporate governance due to the flexibility it offers to companies through the option of complying with its principle or explaining why they do not, and this stands in contrast to the mandatory system in place in other countries[502] , i.e. Sarbanes-Oxley Act in the USA

4.2.2.4 The Turnbull Committee Report [1999, revised 2005]

This committee was set within a year of the Hampel report. This committee was chaired by Nigel Turnbull and supported by the FRC and the Institute of Chartered Accountants. The report initiated to make recommendations as a result of the failure surrounding the detail of the Baring Bank and the shortcomings of the company's internal control; it also looked at the responsibility of the company's auditors as shareholder's adviser, for probity and account's integrity.

In its recommendations, the Turnbull report adopted the recommendations made by the Hampel report on Internal control of companies it did not impose new ones. However, the Hampel report requires directors to regularly check the quality of internal control and consider means of measuring risks facing the company. The report introduced risk management as part of effective internal control.

It also asserts that directors should review the current procedures to evaluate their adequacy and relevance for the new risks confronting the corporation. It provides

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companies. This is how the Cadbury and Greenbury committees intended their recommendations to be implemented. It implies on the one hand that companies should be prepared to review and explain their governance policies, including any special circumstances which in their view justify departure from generally accepted best practice, and on the other hand that shareholders and others should show flexibility in the interpretation of the code and should listen to directors' explanations and judge them on their merits. Hampel Committee, Final Report (January 1998)http://www.ecgi.org/codes/documents/hampel_index.htm accessed on the 21/01/17

[502]Arcot, S., Bruno, V., and Grimaud, A.F., (2005) "Corporate Governance in the UK: is the Comply-or-Explain Approach Working?" *Corporate Governance at LSE Discussion Paper Series* No 001

guidelines for the directors in order to report on the effectiveness of the internal control in the companies for the shareholders. In addition, Turnbull (1999), consistent with other views, moves away from a prescriptive advice approach; it allows companies which do not have an internal audit function from time to time to review and choose to establish specific internal audit function.

This report was revised in 2005 by the Turnbull committee formed by the FRC to look further into the guidance and disclosure requirements. In the revised report, some suggestions were raised as to the steps to be taken or considered by the board to successfully implement the internal control system in the operations of the business and to form a part of the business environment and culture such as; ensure effective communication between managing directors and all other managers and employees; provide appropriate training across the company on internal control and risk management; set up communication channels that allow people to report any problems.

4.2.2.5 The Higgs Report 2003

This report came into being after the collapse of large corporations [i.e. Enron and WorldCom] in the USA. This collapse revealed some difficulties in the corporate governance system in the US, which led to concern about the system of corporate governance in the UK and Europe.[503] This also proves that non-executive directors were not effective in performing their governance role in monitoring and management behaviour[504]. These events hook the confidence of shareholders in the practices of corporate governance, which made them pressured for a more effective

[503] Financial Reporting Council 2006, The UK approach to corporate governance, London.
[504] Solomon, J., (2010) *Corporate Governance and Accountability*, (3th edition), Wiley, Hoboken, NJ

corporate governance mechanism. Despite the adoption of the Combined Code, corporate failures continued in the UK. In response to the pressure from shareholders, the UK government set up a committee which was chaired by Derek Higgs to review the Combined Code and the corporate governance practices at the time and provide recommendations alongside the scandals to prevent its reoccurrence.

The Higgs committee came up with their report after reviewing the role, and effectiveness of non-executive directors in the UK listed companies, including their remunerations; independence; and their relationship with shareholders in performing their duties in the governance of a company. The Report constituted a ringing endorsement of the approach of the Cadbury Committee and contained recommendations for the strengthening of the Combined Code but along the lines of rules already established by the committee which included the requirement that; annual reports should consist of the number of meetings of the board, record of attendance per director, and a clear explanation about how the board functions and operates; non-executive directors should meet in a group without the presence of executive directors at least once a year; board to explain to the shareholders why they believe that an individual should be appointed as non-executive director; performance of board should be assessed once every year and others.

However, the Higgs report was criticised by many leading companies when it was published, which contributed to an intense debate between the management of companies and institutional shareholders. The report was however criticised for being too prescriptive, divisive about the relationship between the executive and non-

executive directors and may threaten board unity and undermine the role of the chairman.[505]

4.2.2.6 Smith Report 2003

The Smith Committee was formed by the Financial Reporting Council as a response to one of the significant contributors to the Enron failure, which was blame on the financial reporting standard and the role of company auditors, most notably the external auditors and their relationship with the board of directors. Sir Robert Smith chaired this committee. The focus of the committee was to look at the framework of the audit committee and the relationship between external auditors and the board of directors.

According to the report, the primary responsibility of the audit committee is to monitor the integrity of the financial statements of the company, which ensures the application of appropriate principles of financial reporting, and fair information about the company financial position, to monitor and review the effectiveness of the company's internal audit function[506]. It went further to state that the audit committee is responsible for reviewing the company's internal financial control system as well as the risk control systems to prevent fraud and ensure that directors are managing the company's assets in the best interest of the shareholders.

One of the main recommendations of the smith committees was that there should be at least three independent non-executive directors involved in the audit committee

[505]Keasey, K., Short, H. and Wright, M. (2005a), "The Development of Corporate Governance Codes in The UK", in Keasey, K., Thompson, S. and Wright, M. (eds.) *Corporate Governance: Accountability, Enterprise and International Comparisons*, Chichester: John Wiley & Sons Ltd., 21-44.

[506] The Smith Report of 2003 Accessed on http://www.riskavert.com/wp-content/uploads/2011/10/Smith-Report.pdf 12/02/17

and that one of the three members should have experience related to finance. Having finance experience or knowledge is aimed at enhancing the NEDs' understanding of companies' financial processes and information that would help in making informed decisions towards mutual benefits. Moreover, the audit committee is to meet at least three times a year and ensure the independence of the external auditors through effective monitoring. The recommendation on the Audit committee both in the US and UK did not give a clear definition of Independence. For example, in the US provisions of the Sarbanes-Oxley Act 2002, it provided that the Audit Committees should be wholly independent, while both the Smith and Higgs reports stressed the importance of the independence of non-executive directors.

However, the Smith and Higgs report was criticised by many British institutions; chairmen, and institution of directors most especially on the report's conclusion of the separation between the role of the chairman and the CEO. This was highly criticised by those who held at the time dual positions as chairman and CEO in their companies.

4.2.2.7 Combined Code of 2003, 2006

Smith and the Higgs report noted that the development of the corporate governance system in the country is good but suggested reviewing the Combined code of 1999 to have the best practice in the UK. This, however, led to the FRC forming a committee, which included the Smith and Higgs, to review the combined code[507]. The revised code of 2003 retained many of the recommendations in Higgs' committee's recommendations in the original report. However, the language used was altered but

[507] Jones, I and Pollitt, M. G., (2001) "Who influences debates in business ethics? An Investigation into the Development of Corporate Governance in the UK Since 1990" *ESRC Centre for Business Research*, University of Cambridge, Working paper No. 221.

with the same message to absorb business opposing and critics. The 2003 committee, clarified the roles of chairman and senior independent directors, emphasising the chairman's roles in providing leadership to the non-executive directors and in communicating shareholder's view to the board; it provides for formal and rigorous annual evaluations of the board's, the committees', and the individual directors' performance[508]; individual investors should avoid box-ticking when assessing investee companies' corporate governance; non-executive directors should only be reappointed after six years' service, following a rigorous review. It also recommended that at least half of the board in large listed companies are to be independent non-executive directors. The code emphasised shareholder activism as a means of furthering corporate accountability and transparency. [509]

It should also be noted that the revised Combined code of 2003 was widely welcomed by both the corporate and institutional investment communities, despite their initial reactions to the Higgs report. The revised Code of 2003 was, however, updated in 2006 to evaluate the progress in implementing the code. Following the valuation, the FRC approves the few changes made to the Revised code of 2003 by issuing the Combined Code of 2006. This code made three main changes to the recommendation in the combined code of 2003 which includes; to allow the company chairman to serve on [but not to chair] the remuneration committee where he is considered independent on appointment as chairman; to provide a 'vote withheld' option on proxy appointment forms to enable a shareholder to indicate that they wish to withhold their vote; recommend that companies publish on their website the details of

[508]Mallin, C.A., (2013) *Corporate Governance* (4th Edition) Oxford University Press
[509] Solomon, J., (2010) *Corporate governance and accountability* (3th Edition) Wiley, Hoboken, NJ

proxies lodged at general meetings where votes were taken on a show of hands[510]. Combined Code of 2006 also requires listed companies to follow the rule of 'Comply or explain' approach. The Combined Code of 2008 was issued because of the global financial crisis in 2008 along with the collapse of big corporations like Northern Rock, Lehman Brothers in the UK, and the USA. This Code was issued by the FRC to promote confidence, incorporate recording and governance. The 2008 code introduced two main changes to the Combined code of 2006 which are; to remove the restriction on an individual chairing more than one FTSE 100 company; and for listed companies outside the FTSE 350, to allow the company chairman to sit on the audit committee where he or she was considered independent on appointment.[511]

4.2.2.8 The Companies Act 2006

The UK government in 2006 updated the provision of the Companies Act of 1985. The Enactment has been a significant development in Britain's company law history. Not only was it the most significant single piece of legislation and has 1,300 provisions and multiple schedules.[512] The significant changes made to the provision of the Act were relations to directors, auditors, company secretaries, and shareholders. This Act contains various provisions to help shareholders engage in productive dialogue with company directors and hence overcome the agency problem of not willing to disclose essential information to the principal and preventing agents from disclosing protected information to a third party that is not supposed to be aware of the information; however, the financial crisis of 2008 came about because these

[510]Mallin, C.A., (2013) Corporate Governance (4th Edition) Oxford University Press
[511] Ibid.
[512]Tomasic, R., (2011) "Company Law Modernisation and Corporate Governance in The UK— Some Recent Issues and Debates" *Victoria Law School Journal* Volume 1 http://search.ror.unisa.edu.au/media/researcharchive/open/9915909372601831/53108422750001831

provisions were not used frequently enough.[513] The Act also adopted some important new principles seeking to simplify company law and to reduce the burden of regulation, especially on smaller companies, which will continue to echo within UK company law as well as in the Commonwealth jurisdictions which tend to look to the UK for reform ideas.[514] In an apparent bid to strengthening corporate financial reporting and disclosures and ensure transparency, the Act stressed the production of high-quality business reviews and disclosures to enable shareholders to gain more information about the business. This provision aligns with the UK Code, which also expects businesses to give an accurate account of their dealings at the end of each year in an annual report. One of the main benefits of this approach to the shareholders, most importantly, the minority ones is that having access to a business report before the annual report will help in detecting signs capable of showing the financial strength of the company. Such signs could be reported to the regulatory body, which will also assist in ensuring effective and sustainable corporate governance practice.[515]

The provisions of the Act give the shareholders the following rights which include; the right to vote,[516] this right is to ensure the protection from the weaknesses in directors' fulfilment of their duties and responsibilities; rights to requisition a meeting,[517] thereby enabling hard questions to be asked of the board; the right to right to election[518] and removal[519] of individual members of the board can be carried out

[513]O'Dwyer, A., (n.d) "Corporate Governance after the Financial Crisis: The Role of Shareholders in Monitoring the Activities of the Board" Accessed on https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf 21/01/17

[514]Tomasic, R., (2011) "Company Law Modernisation and Corporate Governance in The UK— Some Recent Issues and Debates" *Victoria Law School Journal* Volume 1

[515]Mallin, C.A., (2013) *Corporate Governance* (4th Edition) Oxford University Press

[516] Companies Act 2006 s284 contains the general rules on voting

[517] ss303-306 Companies Act 2006

[518] Section 160 Companies Act 2006

during this meeting when required. Company shareholders also have the rights to have a statement of a proposed resolution distributed to them, this encourages companies to produce a high-quality business review to enable shareholders to gain information [this includes a business reviewing which the board details the principles risks and uncertainties facing the company and a report on executive and director remuneration] about the business,[520] which reduces informational costs. Additionally, any long-term service contract must be approved by the members,[521] which improves transparency and accountability, and there is, of course, the ultimate power to remove a director.[522] Many of these rights have existed before the introduction of the 2006 Act, but they were not utilised, by either ordinary or institutional shareholders, to any significant degree. A consequence of this lack of scrutiny has been the ability of company boards to behave recklessly.[523] The Act additionally allows for civil proceedings to be brought if regulations are ignored,[524] which adds some teeth to this provision. The International Corporate Governance Network supplemented these provisions with a statement of principles for institutional investors, advising that '[a]s a matter of best practice… [asset managers] should disclose an annual summary of their voting records together with their full voting records in important cases.'[525] This advice could be strengthened by requiring that voting records be disclosed in all cases, as opposed to just essential cases.

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[519] Section 168 Companies Act 2006
[520] ss314-317 Companies Act 2006
[521] s188 Companies Act 2006
[522] Companies Act 2006 s168
[523]O'Dwyer, A., (n.d) "Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board" Accessed on https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf 21/01/17
[524] s1277(4) Companies Act 2006
[525] International Corporate Governance Network (2007) "Statement of Principles on Institutional Shareholder Responsibilities" para 4.4.iii https://www.icgn.org/images/ICGN/files/icgn_main/Publications/best_practice/inst_share_responsibilities/2007_principles_on_institutional_shareholder_responsibilities.pdf

The 2006 Act did not make mention of Executive or independent directors, or the chairman of the board. It requires that the chairman of the board be chosen by directors unlike the Codes of Corporate governance which requires that the chairman of the board is to be chosen by shareholders. For a very long time in the UK, directors' duties were provided by common law rules and equitable principles. The UK in 2006 decided to follow suit of its other common law jurisdiction by codifying the duties of directors which was embedded in the Companies Act of 2006. These duties became operational in 2008, now serve as guides for many of the management activities of directors, and will determine whether directors have acted appropriately. Sections 170 to 177 list out the duties of directors. This has helped in enshrining the notion of corporate social responsibility within the director's statutory duty to promote the success of the company and implementing the European Union's Takeover and Transparency Obligations Directives.[526]

However, the director's duty of section 172[527] has been the most controversial and challenging duty introduced by the Act, and different scholars and lawyers have argued it. The section remains section that concerns most companies and their directors. For the directors to fulfil these duties in the section, they are required to act in the best interest of the company. However, this has not yielded the desired results because efforts made through various committees to minimise agency problem in the UK remain. Different committees formed in different years were tasked with addressing different mechanisms which allowed them to focus on specific areas of concern such as Cadbury Report [1992] recommended three minimum numbers of non-executive directors on the Board; the Higgs committee which was set up after the

[526] Dempsey, A.L., (2013) *Evolutions in Corporate Governance: Towards An Ethical Framework For Business Conduct* Greenleaf Publishing Ltd

[527] Section 172 of Companies Act, 2006 http://www.legislation.gov.uk/ukpga/2006/46/section/170

Enron scandal in its report [2003] recommended that at least half of the board should comprise non-executive directors.

4.2.2.9 Turner Review

The Committee headed by Lord Turner in October 2008 to review the causes of the financial crisis. Critics have argued that the principal challenge facing UK policymakers is the need to re-conceptualise the more shareholder-centric UK corporation in the financial setting as a means of curbing risk-taking in banks.[528] Bruner went further to suggest that policymakers in the UK and US seem to advocate the need to empower the very stakeholder group whose incentives are most skewed toward the kind of excessive risk-taking that led to the financial crisis in the first place[529]

4.2.2.10 The Walker Review of 2009

The recent financial crisis prompted fresh scrutiny of the adequacy of existing corporate governance measures and companies' compliance with both the spirit and the letter of the regime. The wake of the financial scandals led to a series of reviews which led to substantial adjustment to the codes and associated guidance. The scandals led to an independent review of the governance of banks and other financial institutions which was carried out by Sir David Walker. The financial crisis of 2007

[528] Bruner, C. M. (2011) "Corporate governance reform in a time of crisis" *The Journal of Corporate Law*, Volume 36 No 2 Pp309-341 Accessed on http://lesliecaton.com/wordpress/wp-content/uploads/2012/01/A2-Bruner-FINAL.pdf
[529] Ibid.

reminded the society that there is a tangible link between business activities in the financial services sector and the real economy of the country.

The Treasury Committee set in 2009 to investigate the financial crisis concluded that the bonus-driven remuneration structures encouraged reckless and excessive risk-taking and the design of bonus schemes was not aligned with the interest of shareholders and long-term sustainability of the banks. This review code was concerned with corporate governance failures within banks during the financial scandals, but it has also influenced development more broadly. An example of this was the 'shareholder spring' during 2012, which saw several CEOs stand down, which focused attention on the 'pay without performance' problem. Sir Walker highlights the importance of investor activism, nothing that if this has been exercised to a greater degree in the UK banking sector, director behaviour would have been more efficiently dealt with. The report comprises thirty-eight recommendations which includes; five sections relating to the size, composition, and qualification of boards; eight sections relating to the functioning of board and evaluation of performance; nine sections relating to the role of institutional shareholders' communication and engagement.

4.3 The United Kingdom Corporate Governance Code

The code was published and updated periodically by the Financial Reporting Council considering the significant decline in economic condition. The latest edition of the code was in 2016 when few amendments were introduced. The code touches fundamental governance issues such as fairness; accountability; transparency; board

attributes; the responsibility for stakeholders' interest; and complying with the law.[530] The UK corporate governance code requires all listed companies to follow the Comply or Explain rule. It states that an explanation for non-compliance should set out the background, provide a clear rationale that is specific to the company, indicate whether the deviation from the code's provisions is limited in time, and state what alternative measures the company is taking to deliver on the principles set out in the code and to mitigate any additional risk.[531] All companies with listing in the UK are more required under the Stock Exchange Listing Rules to report on how they have applied the Combined Code in their annual report and accounts and confirm that they have complied with the Code's

Suffice to note that in the UK as well as the USA and the commonwealth countries, a one-tier board structure is a system in place where the managing and superior function is both carried out by a single board. However, the Companies Act of 2006 did not require the directors of a company to act as a board and did not make mention of the division of functions between the board, and its committees about the role of the chair of the board. Evidence of survey carried out shows that the practice of delegating [from the board] day to day management and significant operational questions to a 'management board' is on the increase in the UK, however, this has been said not to infringe the provision of the statue, and, provided the articles permit such further delegation by the board and provided the board monitors effectively the

[530] Coombes, P. and Wong, S. C.Y., (2004) "Why codes of governance work" *The McKinsey Quarterly*, (2).

[531]Calkoen, W.J., (2004) "The Corporate Governance Review" (4th Edition) *Law Business Review*Pg 378 Accessed on https://www.slaughterandmay.com/media/2082941/the-corporate-governance-review-united-kingdom-chapter.pdf 13/03/17

functioning of the management board, it involves no breach by the directors of their duties or risk of disqualification on grounds of unfitness.[532]

4. 3.1 Application of the Code

4.3.1.1 Leadership

The Code provides that every company should be headed by an effective board which is collectively responsible for the long-term success of the company.[533] It recommends that at least half of the board excluding chairman is required to comprise individuals determined by the board to be independent. This requirement has seen different changes to it over time. The Cadbury report stipulated in its provision requires at least three non-executive directors, while the Hampel [1998] argues that non-executive directors should be a third of the board for there to be an effective board contribution. The Higgs Report of 2003 recommends half of the board, except the chairman, should be an independent non-executive director.

It went further to state that there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business as no one individual should have unfettered powers of decision.[534] This provision emphasised on the separation of powers and duties of the chairman and chief executive officers to be established and should not be exercised by one person. The separation of the chairman and CEO is one of the critical checks and balances in the UK and in situations where this role is

[532] Davies, P.L., and Worthington, S., (2016) *Gower Principles of Order Company Law'* Sweet and Maxwell (10TH Edition)

[533] Para A.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

[534] Para A.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf accessed on 12/03/17

combined, it must be publicly justified in accordance with the comply or explain principle, and the company should expect close questioning from individual investors.

The code states that the chairman should be responsible for the leadership of the board and ensuring its effectiveness; promote a culture of openness and debate for facilitating the effective contribution of non-executive directors; and ensuring constructive relations between the executive and non-executive directors.[535] In agreement with the principle of integrity as provided by provision of the Cadbury report [1992], the chairman should on appointment meet the independence criteria set out in B.1.1 of the Code. The role of the chairman has become a crucial role as the code puts the responsibility on, he or she the leader of the board and ensuring the board's effectiveness in all aspects of its position. The FRC's Guidance on Board Effectiveness[536] emphasises the role of the chairman in creating the right conditions for the effectiveness of the board and individual director[537]. All company directors must act in what they consider to be in the best interest of the company, consistent with their statutory duties as listed in sections 170 to 177 of Companies Act 2006.

4.3.1.2 Effectiveness

The code provides that the Board and its committees should have the appropriate balance of skills' experience, independence, and knowledge of the Company to

[535] Para A.3 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf accessed on 12/03/17

[536] FINANCIAL REPORTING COUNCIL MARCH 2011 GUIDANCE ON BOARD EFFECTIVEN 2011 Para 1.6 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Guidance-on-Board-Effectiveness.pdf 14/03/17

[537] The chairman should demonstrate the highest standards of integrity and probity, and set clear expectations concerning the company's culture, values and behaviours, and the style and tone of board discussions; The chairman, with the help of the executive directors and the company secretary, sets the agenda for the board's deliberations

enable them to discharge their respective duties and responsibilities effectively. Its supporting principle stipulates that the board should be of sufficient size that will fit the business needs; it should include an appropriate combination of executive and non-executive directors such that no individual or small group of individuals can dominate the board's decision making.[538]

The Code provides that there should be formal, rigours, and transparent procedure for the appointment of new directors to the board. The search for board candidates should be conducted, an appointment made, on merit against objective criteria and with due regard for the benefits of diversity on the board, including gender.[539] It stipulates that the board and its committees should have a balance of executives and non-executive directors with appropriate diversity and independence of the firm to enable them to discharge their roles effectively.[540]

There should be a nomination committee which should lead the process for board appointments and make recommendations to the board. Most members of the nomination committee should be independent non-executive directors.[541] Non-executive directors should be appointed for specified terms subject to re-election and statutory provisions relating to the removal of a director. Terms beyond six years for a non-executive director should be subjected to rigorous review and should consider the need for progressive refreshing of the board.[542] The Code also provides that the board should satisfy itself that plans are in place for an orderly succession for

[538] Para B.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[539] Para B.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[540] Para B.1 The UK Corporate Governance Code 2010 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[541] Para B.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[542] Para B.2. 3 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

appointments to the board and senior management, to maintain an appropriate balance of skills and experience within the company and on the board, and to ensure progressive refreshing of the board.[543] All directors of FTSE 350 companies should be subjected to annual election by shareholders. All other directors should be subjected to election by shareholders at the first annual general meeting after their appointment, and re-election after that at intervals of no more than three years.

4.3.1.3 Accountability and Audit

The Code provides that the board should present a fair, balanced, and understandable assessment of the company's position and prospects.[544] They should explain in the annual report their responsibility for preparing the annual report and accounts, and state that they consider the annual report and accounts, taken is fair, balanced, and understandable and provides the information necessary for shareholders to assess the company's position and performance, business model and strategy.[545] The Directors of the company are required to confirm in the annual report that they have carried out a robust assessment of the principal risks facing the company, including those that would threaten its business model, future performance, solvency, or liquidity. The directors[546] should describe those risks and explain how they are being managed or

[543] Para B.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[544] Para C.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[545]Para B.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[546]They are also required to state in annual and half yearly financial statement whether they consider it appropriate to adopt the going concern basis of accounting in preparing them, and identify any material uncertainties to the company's ability to continue to do so over a period of at least twelve months from the date of approval of the financial statements.

mitigated.[547] They are to monitor the company's risk management and internal control systems and, at least annually, carry out a review of their effectiveness, and report on that review in the annual report. The monitoring and review should cover all material controls, including financial, operational, and compliance controls.[548]

The combined code of 2003 provides that the Board should provide for a true and fair assessment of the company's finance and to always safeguard shareholder's fund by maintaining a sound internal control system. Alongside this, the board should enhance the financial reporting process and audit quality for forming an audit committee. The Walker Review [2009] also recommended a risk committee that is separate from the audit committee and responsible for overseeing risk exposure and future risk strategy for boards of FTSE100 banks and other financial institution is to be formed. The Code provides that the board should establish an audit committee of at least three independent directors, one of whom should have recent and relevant financial experience. The code went ahead to list the roles of an audit committee some of which are; to monitor the integrity of the financial statements of the company and any formal announcements relating to the company's financial performance, reviewing significant financial reporting judgments contained in them; to monitor and review the effectiveness of the company's internal audit function; to make recommendations to the board, for it to put to the shareholders for their approval in general meeting, in relation to the appointment, re-appointment, and removal of the external auditor and to approve the remuneration and terms of engagement of the

[547] Para C.2.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

[548] Para C.2.3 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17 ; https://www.shieldtherapeutics.com/wp-content/uploads/2018/09/Corporate-Governance-Code-2016.pdf accessed on 12/03/2017

external auditor and others.[549] The audit committee should have primary responsibility for making a recommendation on the appointment, reappointment, and removal of the external auditors. FTSE 350 companies should put the external audit contract out to tender at least every ten years. If the board does not accept the audit committee's recommendation, it should include in the annual report, and any papers recommending appointment or re-appointment, a statement from the audit committee explaining the recommendation and should set out reasons why the board has taken a different position.[550]

4.3.1.4 Remuneration

Directors' remuneration has always been in question for years, and it has been identified as one of the areas of failure in corporate governance. For this reason, different codes have considered reforming and proposed recommendations on how to control directors' remuneration. As pointed out earlier, the Greenbury report [1995] and the Cadbury report of 1992 made recommendations on openness. The UK Code of corporate governance provides that the level of pay to the directors should be sufficient to attract, retain, and motivate directors of the quality required to run the company. It should be designed to promote the long-term success of the company. The board of a company should establish a remuneration committee of at least three, or in the case of smaller companies two, independent non-executive directors. In addition, the company chairman may also be a member of, but not chair, the

[549] Para C.3.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17; THE INTERNAL AUDIT FUNCTION 2004 https://www.icaew.com/-/media/corporate/files/technical/audit-and-assurance/audit/guidance-for-audit-committees/the-internal-audit-function.ashx accessed on 15/04/2019

[550] Para C. 3.7 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

committee if he or she was considered independent on appointment as chairman. The remuneration committee should make available its terms of reference, explaining its role and the authority delegated to it by the board. Where remuneration consultants are appointed, they should be identified in the annual report and a statement made as to whether they have any other connection with the company.[551]

The remuneration committee should reflect the time commitment and responsibilities of non-executive directors in the level of its remuneration. The remuneration committee should carefully consider what compensation commitments (including pension contributions and all other elements) their directors' terms of appointment would entail in the event of early termination. The aim should be to avoid rewarding poor performance. They should take a robust line on reducing compensation to reflect departing directors' obligations to mitigate loss.[552]

However, the level of executive pay has been highly criticised by the public in the context of the recent financial crisis and in ensuring economic austerity. To control the level of remuneration of directors, the Enterprise and Regulatory Reform Act 2013, gives the members/shareholders of quoted companies the power to give a vote in the approval of directors' remuneration.[553] The code also provides that shareholders be invited to approve all new long-term incentive schemes and significant changes to existing schemes, save in the circumstances permitted by the listing rules. Companies are obliged to publish a report on the directors' remuneration in their annual report, including the remuneration policy in the years it is being put forward for approval.

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[551] Para D.2.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

[552] Para D.1.4 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

[553] Section 79 of Enterprise and Regulatory Reform Act 2013 Accessed on http://www.legislation.gov.uk/ukpga/2013/24/section/79/enacted 13/03/17

4.3.1.5 Relationship with shareholders

The UK code specifically addressed the issue of the board's relationship with shareholders by prescribing regular dialogue with shareholders based on the mutual understanding of objectives. The chairman should ensure that the views of shareholders are communicated to the board.[554] The board should state in the annual report the steps they have taken to ensure that members of the board, and the non-executive directors, develop an understanding of the views of major shareholders about the company.[555]The Code provides that the board should be in touch with shareholder opinion in whatever ways that are practical and efficient and they should at general meeting propose a separate resolution on substantial separate issues relating to the report and accounts and encourage shareholder's participation. Section 63 (4) of CAMA is contrary to this provision. It states that Directors should not be bound to carry out the wishes of shareholders so long as they consider such requests not to be in the interest of the company. This provision gives directors the opportunity of dominating and exploiting shareholders. The provision failed to recognise opinions that are practical and efficient as the UK code does. Instead, it emphasises directors' discretion in whether opinions from the shareholders should be accepted or not.

[554] Para E.1.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[555] Para E.1.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

4.3.2 Compliance with the Corporate Governance Codes in the UK (Comply or Explain Rule)

Since the publication of the Cadbury Report (1992), when CG reform started in the UK, the voluntary approach of "comply or explain" has been adopted as the preferred approach of regulation in the UK.[556] The Comply-or-explain rule which was issued by the Yellow book rule of the Stock Exchange has been said to form the basis of most of the UK's soft laws, aiming to solve the agency problem by creating dialogue between investors and directors. The reason for this approach is the understanding that there is no single structure of CG that can fit all companies. Instead, every company may select the appropriate CG mechanisms that fit with its conditions. Therefore, to allow more flexibility, compliance with the code is not compulsory; however, disclosure related to compliance is.[557] It has been identified that for companies to be capable of complying with rules regardless of their size and circumstance, a minimum acceptable standard of compliance is usually set with the rules listed in the codes. This is to establish a benchmark of appropriate behaviour; it does not encourage companies to do more than the minimum as it understands that not all companies will achieve the rules set out immediately and that for some companies it may be more appropriate to take a different approach to protect the long-term interest of their owners.[558] The Flexibility is also thought to lie in its ability to encourage companies to adopt the spirit of the code, rather than the letter, whereas a more statutory regime like what is in practice in the US would lead to a 'box-ticking' approach that would fail to allow for sound deviations from the rule and would not

[556] Solomon, J., (2010) *Corporate governance and accountability* (3th Edition), Wiley, Hoboken, NJ
[557] MacNeil, I., and Li, X. (2006). "Comply or Explain": Market Discipline and Noncompliance with the Combined Code. *Corporate Governance: An International Review* Volume 14 No 5 Pp486–496
[558]Hodge, C., (2012) "The Development of the UK Corporate Governance Regime" in Cronin, P., Murphy, F., and Slaughter and May (eds.) *Corporate Governance for Main Market and AIM Companies* Accessed onhttp://www.londonstockexchange.com/companies-and-advisors/aim/publications/documents/corpgov.pdf 05/03/17

foster investors' trust.[559] This model of compliance would lead to better governance, and its underlying premises had been adopted by several other countries like Austria and Germany.

However, this procedure has its disadvantages attached to it, meaning it risks the directors or managers of companies failing to live up to expectations of the investors.[560] Unlike the laws, regulations, and each company's constitution, the code is issued with an acknowledgement of flexibility; this is in recognition of the principle that no single governance regime would be appropriate in its entirety, for all companies[561]. This approach, however, relies on shareholder's engagement to challenge non-compliance with this system where necessary. This approach has yet been identified to deliver greater transparency and confidence in a company than formal regulations which are purely a matter of compliance.[562] The Cadbury report emphasised the importance of adopting an approach that encouraged compliance with a voluntary code of practice, as it will more likely develop a good corporate governance culture with UK companies as it would encourage them to comply in spirit rather than in letter[563]. This approach has not been widely adopted in other jurisdictions, and many other countries chose to adopt a more legal and statutory approach to the corporate governance framework an example is that of the USA

[559] Faure-Grimaud, A., Arcot, S., and Bruno, V., (2005) "Corporate Governance in the UK: is the Comply-or-Explain Approach Working?" Corporate Governance at LSE Discussion Paper Series No 001N Accessed on https://eprints.lse.ac.uk/24673/1/dp581_Corporate_Governance_at_LSE_001.pdf 15/02/17

[560]O'Dwyer, A., (n.d) "Corporate Governance after the financial Crisis: The Role of Shareholders in Monitoring the activities of the Board" Accessed on https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf 21/01/17

[561] Ryde, A., and Cox, M, (2014) "United Kingdom's Corporate Governance Review" in Calkoen, W.J.L., (ed.) *The Corporate Governance Review* Pp376-388 Accessed on https://www.slaughterandmay.com/media/2082941/the-corporate-governance-review-united-kingdom-chapter.pdf

[562]Mallin, C.A., (2013) *Corporate Governance* (4th Edition) Oxford University Press

[563] Cadbury Code (1992) The Report of the Committee on the Financial Aspects of Corporate Governance: The Code of Best Practice Great Britain: Burgess Science Press Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf

where a more regulated rule-based approach is in practice. Therefore, having a rule-based approach does not necessarily mean it will cure the challenges faced by corporate governance in Nigeria or the non-compliance of corporate operators in Nigeria.

In the annual survey carried out by UK FRC in 2013 to check for compliance of this approach, it found that under 60per cent of all FTSE350 companies [the 350 largest UK-Listed Companies] reported full compliance with the code and that with respect to all 53 provisions of the Code, there was a compliance rate of 85 per cent.[564] The report found that the greater strength of the code was that the principles were expressed in general, rather than in specific form which allows for some latitude in their implementation. The survey also found that many cases of non-compliance were due to circumstance rather than a deliberate choice.[565] Therefore the survey proves that companies widely adopt the provision of the code despite the comply or explain approach. However, the recent annual survey carried out by Grant Thornton in 2016, shows much improvement with Compliance as it found compliance to remain high with 90 per cent of FTSSE 350 companies reporting that they were either complying with all or all but one or two, of its 54 provisions.[566]

It should be noted that the softness of the Codes with it is comply or explain approach does not mean that it can be disregarded as the compulsory disclosure regime. It only indicates that corporate governance principles could be presented in the form of codes or soft laws to serve as mere guidelines for corporate conduct. In situations where a

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[564] https://www.slaughterandmay.com/media/2082941/the-corporate-governance-review-united-kingdom-chapter.pdf

[565]https://www.slaughterandmay.com/media/2082941/the-corporate-governance-review-united-kingdom-chapter.pdf

[566]"Developments in Corporate Governance and Stewardship 2016" https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewa-(2).pdf 07/03/17

company did not comply with the provisions of the code, they must explain, the explanation should set out the background, provide a clear rationale for the action being taken, and describe any mitigation activities. Moreover, where the deviation from a provision is intended to be limited in time, the explanation should indicate when the company expects to meet the provision.[567] However, Companies that did not comply with provisions of the Code often do a poor job in explaining why they have not complied with it, and in situations where an explanation is provided, most of the time it fails to identify specific circumstances that could justify such a deviation from the rule.[568] This approach is a market-based approach which aims to solve agency problem, where a company does not abide by the principles, its share price will likely drop due to potential shareholders choosing not to invest.[569] This, therefore, allows a market sanction as opposed to a legal sanction and supports the soft law approach. Another way in which the disadvantage of the Comply or Explain rule can be eradicated is through the establishment of a monitoring body to assess company disclosures. These bodies are available in other EU member states except for the UK. In the EU states, the regulating bodies possess discretionary powers to issue penalties for uninformative statements.[570] With this, companies will retain the choice of whether or not to abide by the Code provisions but would have to provide a

[567] Ibid 559

[568] Faure-Grimaud, A., Arcot, S., and Bruno, V., (2005) "Corporate Governance in the UK: is the Comply-or-Explain Approach Working?" Corporate Governance at LSE Discussion Paper Series No 001N Accessed on https://eprints.lse.ac.uk/24673/1/dp581_Corporate_Governance_at_LSE_001.pdf 15/02/17

[569]Keay, A., (2012) "Comply or Explain: In Need of Greater Regulatory Oversight?" *Working Paper*, Pp4-5; O'Dwyer, A., (2014) "Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board" Accessed on 21/01/17 https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf

[570]Keay, A., (2012) "Comply or Explain: In Need of Greater Regulatory Oversight?" *Working Paper*, Pp4-5; O'Dwyer, A., (2014) "Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board" Accessed on 21/07/17 https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf

statement of sufficient quality to give investors enough information to enable them to engage in dialogue with the board, or punitive risk measures.[571]

Despite the fact that many companies have adopted the comply or explain the approach to the enforcement of the corporate governance codes in the UK, its level of enforcement by the Financial Conduct Authority has been said to below as there is no obligation to abide by it provided non-compliance is fully and adequately explained.[572] In situations where the Board of a company fails to comply with the corporate governance code, the regulators are quick to take legal action against companies or the officers of the company who are seen to have breached any of its regulations[573]. Regardless of these findings, surveys show that more companies chose to comply; and indeed, the move has often been from inadequate explanation of non-compliance to full compliance rather than to explain.[574] With some companies who choose to explain reasons for non-compliance, some of the explanations have historically been brief and uninformative, making it difficult for the shareholders to question their non-compliance as they have little information about it.

However, despite the increased level of compliance over time, there is a significant occurrence of non-compliance. Instead of investors examining the insufficient information and sometimes non-existent explanations, some investors use financial performance of the company to decide whether non-compliance has been

[571]Ibid.

[572] Moore, M.T., (2009) "Whispering sweet nothings": the limitations of informal conformance in UK corporate governance" *Journal of Corporate Law Studies* Volume 9 No 1 Pp95-103

[573] Davies, P.L., and Worthington, S., (2016) *Gower Principles of Order Company Law* Sweet and Maxwell (10th Edition)

[574] Financial Reporting Council (2015) "Developments in corporate governance and stewardship" Accessed on [https://www.frc.org.uk/Our-Work/Codes-Standardards/Corproate-governance/UK-Corporate -Governance-Code.aspx]; ARCOT, S., and Bruno, V In Letter But Not in Spirit: An Analysis of Corporate Governance in The UK.

warranted.[575] Therefore, these investors will not engage in monitoring as long as the company is doing well financially. When performance is lacking, however, they may be more inclined to begin monitoring the board[576]. With this kind of attitude in place, even when useful explanations are being presented, they are not always assessed. The institutional investors often employ a box-ticking approach instead of comply or explain toward engagement, where investors may say they are monitoring, but in practice, no real effort is being made to engage and assess company disclosures.[577]

Another disadvantage of the Comply or Explain approach is the lack of accompanying enforcement; there are no penalties for those who do not abide by it. The European Commission highlighted this disadvantage stating that voluntary law systems are often unsuccessful as a result of being no penalties as a way of enforcement.[578] Although, there is supposed to be a market sanction attached to this approach, there is no such thing when the mechanism fails due to uninformative company disclosures and investors' apathy.[579] Nevertheless, the UK Listing Authority listing rules, provide that companies who failed to comply with the provisions of the Code must explain the reason why they have not done so.[580] Failure to comply with this rule could lead to sanctions involving public censure or a fine. However, none of these sanctions has ever been applied; it only appears to exist as a scare tactic to

[575] MacNeil, I., and Li, X., (2006) "Comply or explain": market discipline and non-compliance with the Combined Code" Corporate Governance: An International Review Volume 14, No 5 Pp486, 486

[576]O'Dwyer, A., (2014) "Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board" Accessed on 21/07/17 https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf

[577]Ibid.

[578] European Commission (2010) "Green Paper: Corporate Governance in Financial Institutions and Remuneration Policies" *COM* Volume 285 No. 6; O'Dwyer, A., (n.d) "Corporate Governance after the Financial Crisis: The Role of Shareholders in Monitoring the activities of the Board" Accessed on 14/01/17
https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf

[579]Ibid.

[580] United Kingdom Listing Authority, 'Listing Rules' 9.8.6 R (6) https://www.handbook.fca.org.uk/handbook/LR/9/8.html 14/01/17

encourage companies to either comply with Code provisions or provide informative explanation for not complying.

Having said that, Nigeria will benefit immensely from combining both approaches, that is allowing self-regulation where appropriate while also applying full sanctions for non-compliance in some crucial regions, mainly where there is an established case of infractions or failure to convincingly explain why provisions of the code have not been implemented. Indeed, self-regulation is most effective where there exists a solid legal foundation. It is thus argued that effective enforcement and efficient self-regulation are both directly dependent on the legal nature of corporate governance codes.[581] In adopting an approach which seeks to achieve a synergy between the two approaches, Nigeria would have succeeded in implementing a governance regime which not only considers her corporate ownership structure, cultural norms, and values but one which also takes cognisance of her social-political and economic climate as well as the ethical environment of business conduct. This will not only allow corporations to take ownership of the code and its provisions to play a critical role in its implementation. It also allows the country some measure of flexibility in tackling areas of particular challenge such as disclosure and transparency, accountability and treatment of shareholders.

[581]Wymeersch, E, (2005) 'Enforcement of corporate governance codes' Law Working Paper N° 46/2005 University of Ghent

4.4 United States of America Code of Corporate Governance

4.4.1 United States of America Corporate Governance System

United States of America's corporate governance system is premised on stringent rules occasioned by the several corporate failures experienced before 2002 in most sectors. The failures led to public call for radical changes towards shareholders' funds' protection and improve foreign direct investment and capital importation into the country. The country's Code is driven by the Sarbanes-Oxley Act, which was drafted by two legislatures without public surveys and consultation with the business community. This qualifies it as a rigorous rule-based approach to corporate governance practice in the world, particularly in the North American region. With the Act, there is a separation between ownership and control in American companies due to a single-tier board approach being used. Stock possession is not the exclusive right of the view. It is being held widely, indicating the absence of majority shareholders. Specifically, the US's system protects minority shareholders' rights while exercising strict control of the directors and other internal stakeholders.[582]

4.4.2 Application of the Code

In this section, I will examine specific sections of the Act that led to the United States of America Code of Corporate Governance. Components of the Act that align with the thesis' focus were explicitly analysed. The expectation is that the analysis will enhance readers' understanding of the United States' Code beyond the placement of the specific rules of the code within the context of discerning the Nigerian Code of Corporate Governance with a view of revealing its (NCCG) weaknesses and proffer solutions in line with the strengths identified in United States' Code.

[582]Krackhardt, O., (2005) "New Rules for Corporate Governance in the United States and Germany –A model for New Zealand?" A paper submitted as parts of the LLM Programme at Victoria University of Wellington.

4.4.2.1 Public Company Accounting Oversight Board

This component is designed with the sole aim of strengthening financial activities of businesses after the financial crisis that generates critical questions about auditing practices. The claim was that the external audit improves the credibility of financial statements.[583] Section 103 states that with auditing, quality control, and independence standards and rules as the heading states that "The Board shall, by rule, establish, including, to the extent it determines appropriate, through adoption of standards proposed by 1 or more professional groups of accountants designated pursuant to paragraph [3][A] or advisory groups convened pursuant to paragraph [4], and amend or otherwise modify or alter, such auditing and related attestation standards, such quality control standards, such ethics standards, and such independence standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.[584] Evidently, it appears that this section addresses the identified financial issues. For instance, in a study comparing 31 US commercial bank registrants with audit committees and 31 non-US commercial bank registrants without audit committees, it was discovered that the demand for oversight protection increases in non-US commercial banks as the total market capitalisation (size) increases.[585]

[583] Sikka, P., (2009) "Financial Crisis and the Silence of the Auditors" Essex Business School University of Essex Working Paper No. WP 09/04 Accessed on http://repository.essex.ac.uk/8090/1/WP_09-04.pdf 2/8/2019

[584]Section 103 Para 3[A] and 4 Sarnebes-Oxley Act 2002. https://pcaobus.org/About/History/Documents/PDFs/Sarbanes_Oxley_Act_of_2002.pdf 2ns of February 2019.

[585]Braiotta, L., (2003) "An exploratory study of adopting requirements for audit committees for non-US commercial bank registrants: an empirical analysis of foreign equity investment" Managerial

The low interest in the oversight function by the US commercial bank registrants is an indication that section 104 of the component has presumed such action. The section expects the Board to conduct a continuing programme of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.[586] Sections 105 and 107 provide further actions on the containment of non-compliance activities by corporations. By section 105, investigations and disciplinary proceedings need to be taken through the Board by rules subject to the requirements of the section. According to section 107, "The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 17[a][1] of the Securities Exchange Act of 1934 (15 U.S.C. 78q[a][1], and of section 17[b][1] of the Securities Exchange Act of 1934 (15 U.S.C. 78q[b][1] shall apply to the Board as fully as if the Board were a ''registered securities association'' for purposes of those sections 17[a][1] and 17[b][1]."[587] This section calls for external interference when it has become practically impossible for the internal and external (auditing firms) stakeholders to provide good financial statements to the capital suppliers and other stakeholders of companies. Such interference would come from the regulatory agency or commission (in this case, the Financial Reporting Council).

Auditing Journal Volume 18 Number 6 Pp456-464 Accessed on https://www.researchgate.net/profile/Philomena_Leung/publication/242348727_The_Mad_Hatter's_Corporate_Tea_Party/links/00463520c8727cca5b000000.pdf#page=91 8th of February 2019.

[586] http://www.sox-online.com/the-sarbanes-oxley-act-full-text/ accessed on 25/05/2019

[587] Sections 105 to 107 Sarnebes-Oxley Act 2002. https://pcaobus.org/About/History/Documents/PDFs/Sarbanes_Oxley_Act_of_2002.pdf 2/2/2019.

4.4.2.2 Enhanced Financial Disclosures

Having good financial practices in terms of financial statement preparation and sound auditing procedures are not enough in ensuring good corporate practices in the US. Through the Act guiding the practices, financial dealings need to be communicated to the stakeholders and shareholders, not considering their status (minority or majority shareholders). Section 404, subsection 1 and 2 provide a mechanism for internal assessment and controls of financial activities towards appropriate and acceptable financial reporting. Section 407 stresses that "The Commission shall issue rules, as necessary or appropriate in the public interest and consistent with the protection of investors, to require each issuer, together with periodic reports required pursuant to sections 13[a] and 15[d] of the Securities Exchange Act of 1934, to disclose whether or not, and if not, the reasons, therefore, the audit committee of that issuer is comprised of at least 1 member who is a financial expert, as the Commission defines such term."[588]

By virtue of section 408 of the Act, the regulatory commission is expected to further enhance the interest of stakeholders and shareholders through periodic review of financial activities disclosed by businesses. The section stipulates that "The Commission shall review disclosures made by issuers reporting under section 13[a] of the Securities Exchange Act of 1934 (including reports filed on Form 10–K), and which have a class of securities listed on a national securities exchange or traded on an automated quotation facility of a national securities association, on a regular and systematic basis for the protection of investors."[589]

[588] Section 407 of Sarnebes-Oxley Act 2002. https://pcaobus.org/About/History/Documents/PDFs/Sarbanes_Oxley_Act_of_2002.pdf 2/2/2019.
[589] Ibid

4.4.2.3 Corporate Fraud and Accountability

Section 1104 instils fear in the minds of managers and directors, to eliminate corporate fraud and enhance accountability. The section aims at amending the Federal Sentencing Guidelines periodically relevant to securities and accounting fraud and related offences in the corporate establishments, according to sub-section [1] of the section. Sub-section [2] expects the Commission to "expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offences, while subsection [3] submit to Congress an explanation of actions taken by the Sentencing Commission pursuant to paragraph [2] and any additional policy recommendations the Sentencing Commission may have for combating offences described in paragraph [1]."[590] From the public accounting oversight board to the elimination of corporate fraud and institutionalisation of accountability, US Corporate Code has the tendency of ensuring good corporate practices.

[590] Section 1104 of Sarnebes-Oxley Act 2002. https://pcaobus.org/About/History/Documents/PDFs/Sarbanes_Oxley_Act_of_2002.pdf 2nd of February 2019.

4.5 Organisation for Economic Cooperation and Development Code of Corporate Governance

4.5.1 OECD Corporate Governance System

The position of the Organisation for Economic Cooperation and Development is that a single model does not exist for the corporate governance practice. What countries have been doing is the identification of common elements that could be harnessed to underlie good corporate governance practice. The consideration of legal, regulatory framework and political landscape of the 34-member states makes OECD corporate governance system robust and inclusive in terms of adequate financial and managerial elements for good corporate governance practices. Since its emergence in 1999, it has been an international benchmark for concerned stakeholders in the corporate world because of its practical guidance provisions and suggestions for the stock exchange, investors, and businesses around the globe.[591]

The OECD released its first principles with the approval and endorsement of the World Bank; OECD's Business and Industry Advisory committee; Trade Union Advisory Committee and International Monetary Fund [IMF] (who participated as observers, regional roundtables and consulted for non-member countries) and ministers of the OECD member countries in 1999, then later updated in 2004. In other words, the OECD approach to corporate governance preaches inclusivity and enjoys broad acceptance right from inception, and this remains the case even today. Several bodies have widely praised this inclusion as an example of a process that sets

[591] Abu-Tapanjeh, A.M., (2009) Corporate governance from the Islamic perspective: A comparative analysis with OECD Principles Critical Perspectives on Accounting Volume 20 Pp 556–567 Accessed on https://kantakji.com/media/9428/file731.pdf

out to promote and protects a broader common interest[592]. It has helped in overriding people's opinion of the organisation as a rich man's club due to its restricted membership.

A similar progress was recorded recently in 2015 revision where the review benefited from OECD committee and all member countries, experts from key international institutions, world bank group, the FSB,[593] Basel Committee, the consultation with stakeholders, such as business sector, investors, professional groups at national and international levels, trade unions and others.[594] with all the G20 countries invited to participate in the review on an equal footing with the aim of building strong economies within its member states and to help non-OECD member states government in their efforts to create legal and regulatory frameworks for corporate governance in their countries. Despite this inclusion, some have suggested that the principles set out were based on the lobbying of some international institutional investors through the International Corporate Governance Network [ICGN] while others argued that the principles were one-sided promotion of the Anglo-Saxon model of corporate governance with shareholder primacy been highly emphasised.[595] The OECD does not agree with these arguments as it was stated in its preamble that 'there is no single model of good corporate governance. However, some common elements underlie good corporate governance which the principles build in those common

[592]A Baker 'The "Public Interest" Agency of International Organizations? The Case of the OECD Principles of Corporate Governance' (2012) 19 Review of International Political Economy 389; Mathias M Siems and Oscar Alvarez-Macotela The G20/OECD Principles of Corporate Governance 2015: A Critical Assessment of their Operation and Impact Journal of Business Law 2017, 310-328.

[593]https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf accessed on 03/01/19

[594]http://www.oecd.org/corporate/2014-review-oecd-corporate-governance-principles.htm accessed on 06/01/19.

[595] S Soederberg, 'The Promotion of 'Anglo-American' Corporate Governance in the South: Who Benefits
from the New International Standard?' (2003) 24 Third World Quarterly 7; Mathias M Siems and Oscar Alvarez-Macotela The G20/OECD Principles of Corporate Governance 2015: A Critical Assessment of their Operation and Impact Journal of Business Law 2017, 310-328

elements and are formulated to embrace the different models that exist'.[596] An example given to back this common element is that the Principle does not advocate any particular board structure and the term 'board' as used in the principles is meant to embrace the different national models of board structures.[597]The organisation understands that one size does not fit for all meaning that there is no single model of corporate governance that applies to all countries.[598]Which is in support of Chowdary's argument which states that the principle is designed to be adapted to different financial, cultural, circumstances, and traditional beliefs of different countries in the world.[599]

4.5.2 Application of the Code

4.5.2.1 The Basis for an Effective Corporate Governance Framework

If there is a need to have a corporate governance framework, OECD wants it to be formulated considering the short, medium and long terms overall impact on economic performance, market integrity, and the kinds of incentives it would create for concerned stakeholders. For instance, how a company or corporation will combine her material and human resources in an ethical manner to generate and capture values for the benefits of shareholders and stakeholders should be the priority of the managers and groups of people or regulatory organisations saddled with the oversight functions. In order to have the desired results as exemplified, the legal and regulatory needs must be consistent with the rule of law, transparent, and enforceable in all ramifications. The enforceability is hinged on the fact that agents (managers,

[596]G20/OECD Principles of Corporate Governance 2015, p 10. https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf accessed 02/01/19
[597]G20/OECD Principles of Corporate Governance 2015, p 10.https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf accessed 02/01/19
[598]ChritstineMallin, Corporate governance' 3rdedition Oxford University Press. Page 37.
[599] Chowdary, NV 2002, Corporate governance: principles and paradigms, Institute of Chartered Financial Analysts of India, Hyderabad, India.

directors, and members of the board) should always adhere to specific rules spell out for the protection of capital suppliers and public's interest. When it is evident that the agents have violated the rules, OECD Code expects "Supervisory regulatory and enforcement authorities should have the authority, integrity, and resources to fulfil their duties professionally and objectively. Moreover, their rulings should be timely, transparent, and fully explained."[600] This component of the principle spells out effective and efficient implementation and enforcement mechanisms towards the protection of parties' rights.

4.5.2.2 The Rights of Shareholders and Key Ownership Functions

OECD Code of Corporate Governance, like the US' Code, prioritises the rights of shareholders with the specific functions expected from them towards sustainable management of their capital. They are to secure methods of ownership registration, convey or transfer shares, obtain relevant and material information on the corporation on a timely and regular basis, share in the profits of the corporation, and participate and vote in general shareholder meetings. During the meetings, they have the right of electing and removing members of the board. In order for shareholders to make an informed decision during the voting exercise, management is expected to furnish the shareholders' necessary rules, procedures, that govern general shareholder meetings. Beyond the meeting engagement, "shareholders should have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as 1) amendments to the statutes, or articles of incorporation or similar governing documents of the company; 2) the authorisation of additional shares; and

[600] G20/OECD Principles of Corporate Governance 2015. https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf accessed 02/01/19

3) extraordinary transactions, including the transfer of all or substantially all assets, that in effect result in the sale of the company."

Enabling environment that would enhance exercising of ownership rights by all shareholders should be facilitated by the corporation, while capital structures and arrangements that will allow individual shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed. When the rights are not clear to the shareholders, the Code wants the company to give room for consultation. Shareholders should be allowed to seek clarification among themselves. As argued earlier, the sound system of the OECD Code of Corporate Governance protects both majority and minority capital suppliers. It considers the shareholders as the 'primary owners' of business based on its entangle and disentangle approaches to the principles specification.

4.5.2.3 Equitable Treatment of Shareholders

The central focus of this chapter is to ensure equal treatment of shareholders. There should be no discrimination based on the percentage of shares owned by any shareholder. The chapter also protects shareholders' capital utilisation for illegal trading (not disclosed or known by the shareholders), while abusive self-dealing is to be eliminated. The chapter wants investors' confidence in the management of capital provided to be ensured by the board, corporate managers, and other stakeholders saddled with the responsibility of managing both material and human resources. Specifically, members of the board and key executives should inform shareholders of

their interest in any transaction or matter directly, indirectly, or on behalf of third parties affecting the corporation.[601]

4.5.2.4 The Role of Stakeholders

This component advocates that the rights of investors, employees, creditors, and suppliers established by law or through mutual agreements should be protected. When the rights are protected, these stakeholders should have the opportunity to obtain effective redress for violation of their rights. The chapter also expects the stakeholders to partake in the corporate governance process towards collective value creation. To function effectively in the process, they must be provided with relevant, sufficient, and reliable information timely and regularly. When they feel threatened with the process, they should not be denied the opportunity to communicate their concerns about factors responsible for the uncertainties to the board, and their rights should not be compromised for taking the approach. To avoid distorted corporate governance usually erupted due to poorly defined and ineffectively enforced creditor rights, component wants a corporate governance framework that complements an effective and efficient insolvency framework.[602]

4.5.2.5 Disclosure and Transparency

This chapter prioritises information disclosure and transparency from the agents and principals of the corporation to the shareholders. From the financial information to non-financial information, stakeholders and shareholders should not be placed in

[601] G20/OECD Principles of Corporate Governance 2015, p 37. https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf accessed 02/01/19

[602]Bouchez, L., (2007) "Principles of Corporate Governance: the OECD Perspective" European Company Law Volume 4, Issue 3 Pp109-115 Accessed on https://kvdl.com/uploads/documents/Louis-Bouchez-Principles-of-corporate-governance.pdf 2/8/2019

darkness by concealing relevant information towards informed decision making. Such information must be prepared and disclosed with the quality and acceptable standards of accounting, financial and non-financial disclosure. Channels for disseminating information should provide for equal, timely, and cost-efficient access to relevant information by users. The market must know the extent to which the corporation is being run in line with the interests of all stakeholders and shareholders. The transparency aspect of the component is hinged on the creation of processes that ensure good account auditing practices by the internal and external auditors. An annual audit should be conducted by an independent, competent, and qualified auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the company in all material respects.[603]

4.5.2.6 The Responsibilities of the Board

The purpose and responsibilities of the board are captured in this chapter. At all times, the board is expected to fulfil specific functions using its independence without comprising the rights of other parties. While carrying out the functions, high ethical standards must be followed, considering the interests of stakeholders. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly. To enable members of the board act diligently and in the best interests of all parties, they must be equipped with sufficient information regularly.

[603] Principle V G20/OECD Principles of Corporate Governance 2015, p 41. https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf accessed 02/01/19

4.6 Conclusion

This chapter has established the existing code of corporate governance in Nigeria. The chapter does not only examine the code of corporate governance within the Nigerian context. It equally revealed current codes in the United Kingdom, the United States of America, and the Organisation for Economic Cooperation and Development. From the presentation and examination, it is evident that Nigeria could learn a lot from the countries reviewed. While the chapter prepares the foundation for the in-depth comparative analysis of the codes presented in chapter 5, the focus has, correctly, been on the presentation of the specific provisions and sections of the codes.

The Nigerian Code of Corporate Governance (NCCG) while drawing heavily from the UKCG has also drawn some features from the United States approach to Corporate Governance. In Nigeria, Financial Reporting Council of Nigerian (FRCN) was established to function similarly to the Public Company Accounting Oversight Board in the US in terms of extending accounting oversights and monitoring beyond accountants to cover non-accountants and organisation. In addition, the NCCG as released by the FRCN adopts a compulsory compliance approach like in the US marking a substantial departure from the UK approach of comply or explain. It also differs significantly in many areas to the US approach, having incorporated many other features from the United Kingdom Code of Corporate Governance. Features such as those relating to the relationship between management and shareholders, shareholders' rights protection, board size, and composition as well as executive pay and compensation, all essential features of corporate governance.

Considering the foregoing, Chapter five will present a comparative analysis of the critical features discernible from these three jurisdictions and identifying the best approach for Nigeria to take in reforming her approach to corporate governance.

CHAPTER FIVE

COMPARATIVE ANALYSIS OF THE CODES

5.1 Introduction

Chapter 4 laid the foundation for what shall be discussed in this chapter by examining the previous codes which had been in place in the country before the introduction of the recently released National Code of Corporate Governance. The previous chapter also explored the UK Code of Corporate Governance, which is based on a 'Comply or Explain' which means companies can choose to either comply with the UKCG principles or explain any reason they may have for non-compliance.[604] This unique approach means some regard the UKCG Code as the benchmark for CG practice.[605] Therefore, this chapter will be a comparative analysis of the UK Code with certain crucial elements of the Nigerian code with a view to strengthening the newly released code by the Nigerian authorities. This extensive analysis of key sections of the code will not be limited to comparisons to the UK Code but will also be broadened out relevant sections of the American system of CG as well as OECD principles. The key areas in which the Code impacted on include, the structure, composition, and functions of the board or equivalent body; risk management and audit; minority shareholder protection; relationship with stakeholders, as well as business conduct and ethics.

[604] FRC 2016

[605] Arcot, S., Bruno, V. and Faure-Grimaud, A. (2009), 'Corporate governance in the UK: Is the comply or explain approach working?', International Review of Law and Economics, Forthcoming.

5.2 Analysis of the Codes

Nigeria, United Kingdom and the Organisation for Economic Cooperation and Development (OECD) countries are jurisdictions where corporate governance is being practised within the principle-based system. On the other hand, the United States practices a rule-based system which espouses in adherence to CG provisions. However, the thesis argues that Nigeria is most likely to have a robust system if she practices the rule-based system alongside the principle-based system[606] so that higher level of compliance can be achieved in areas such as accounting and disclosure, which have been identified in the course of this research work as some of the main failure areas for CG in Nigeria. The principle-based approach[607] of Nigeria's National Code of Corporate Governance 2016 is premised on the fact that the country has lineage with the United Kingdom. The United Kingdom colonised it, and since it became independent in 1960, it has become practically impossible to separate its legal processes and implementation (in some situations) from the United Kingdom. The principle-based approach adopted by the OECD could also be linked to the consensus among the member states about the need for the participant to take ownership of the process. Out of the three reference jurisdictions being examined in this chapter, the United States of America is the only country having its code of corporate governance driven by legally binding rules. The United States approach to corporate governance is formulated based on constitutional provisions that establish the need to protect the

[606] The success of the rule-based system relies heavily on a strong judiciary. For Nigeria to achieve desired result with the approach, steps must be taken to reform and strengthen the country.

[607] A principles-based approach to CG involves a set of principles rather than rules, for instance The UKCG, which requires key players (mostly directors) to give a personal description of the way they have applied the general principles of corporate governance. This contrasts the rule based approach which is rather statutory in approach like the US Sarbanes-Oxley Act which mandates all listed in the US to include in their annual report a certificate vouching for the accuracy of the financial statements.

rights of every citizen at business and societal levels[608]. The uniqueness of the US code is also based on the fact that the USA is the only country that has a corporate governance approach driven by an Act of parliament.[609] The Analysis of the codes of the countries mentioned above indicates that Nigeria has 267 main principles, followed by the United Kingdom with 57 principles. OECD trails the two countries with 28 principles. For instance, these jurisdictions usually state what should be done and not by the managers and owners using "shall" and "should". These words are less rigid towards ensuring compliance with the codes than the United States' Code, which emphasises "request to" and "must". Based on its rule-based approach to corporate governance, 64 sections were found in the United States of America's Act that specify specific rules and provisions for corporate governance in the country.

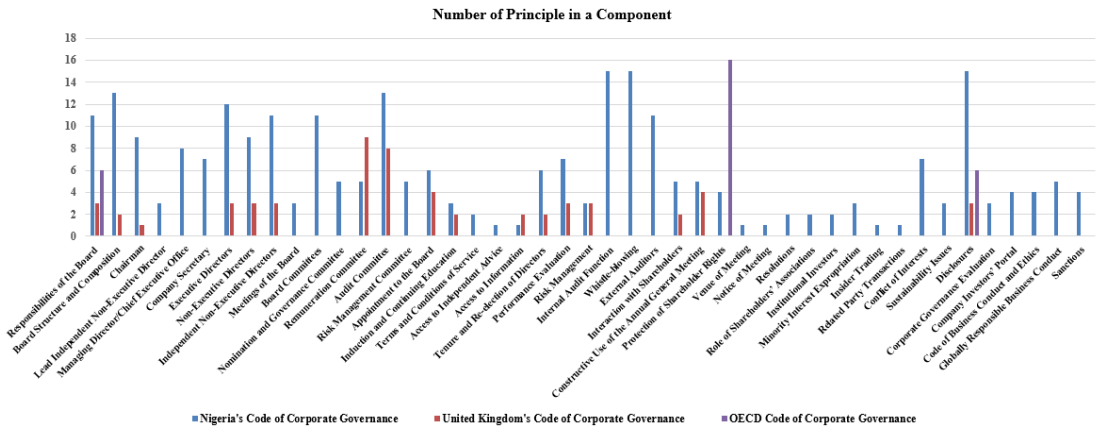

Fig 5.1

Source: Author's Compilation, 2019

[608] Jackson, Gregory (2010) "Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment" Arbeitspapier 223 Accessed on https://www.boeckler.de/pdf/p_arbp_223.pdf 13/6/2019

[609] Sarbanes-Oxley Act 2002 as Amended Through P.L.112-106, Enacted April 05, 2012.

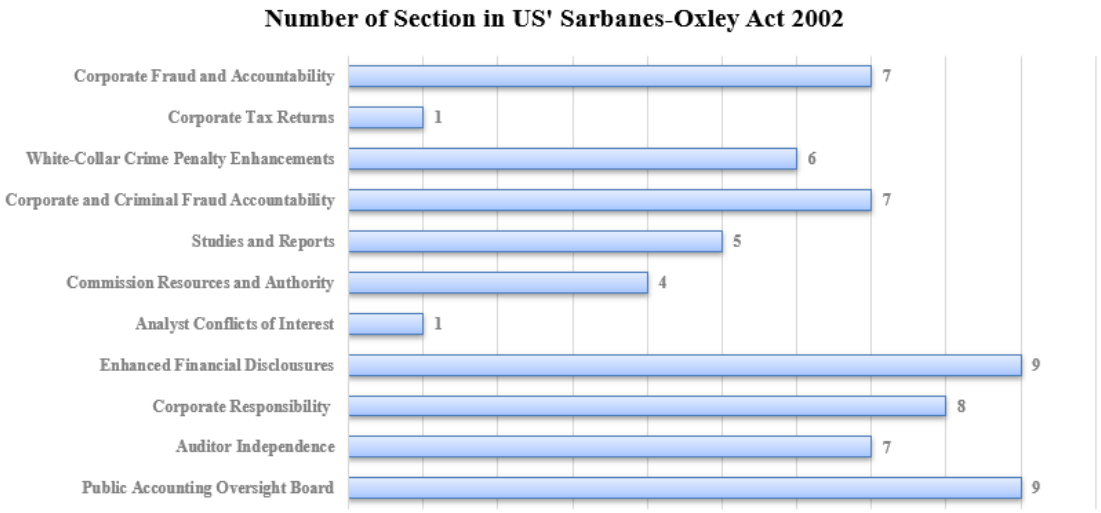

Fig 5.2

Source: Author's Compilation, 2019

5.2.1 Board Structure and Composition

As a legal entity which can sue and be sued, corporate establishments are expected to constitute a board and saddle with the specific responsibilities towards effective operations that ensure the protection of every shareholder. The two economies (and the OECD) under review make specific provisions for the structure and composition of the board formation with a slight difference. Nigeria wants businesses to have boards that have both executive and non-executive directors as members. This is similar to what is in the United Kingdom. In addition to providing for executive and non-executive directors as members, the NCCG provides for the inclusion of independent non-executive directors. OECD principles does not specify the number of members which the USAs' Act stresses. It makes a case for a sufficient number of non-executive directors with a personal bias for individuals capable of making decisions that would address possible conflict of interest. From the variation, it is clear that both the USA and OECD prioritise transparency and integrity at the board

level. This is good considering that the decisions that make or mar businesses are made at the top level of management. It is interesting to note that while the USA and the OECD stress transparency and integrity at the board composition level; Nigeria and UK direct their resources towards separating the Chief Executive Officer position from that of the Managing Director. While there is no absolute further justification for the provision in the Nigeria Code, in the UK Code it is enshrined that when a combination of the two positions becomes necessary as proposed by the board, consultation must be held with stakeholders. This further strengthens the possible effectiveness of the provision than what is obtainable in the Nigeria Code. Suffice to note Nigeria. The jurisdiction only wants CEO/MD to be responsible for the institutionalisation of an appropriate ethical framework which must be followed by all personnel irrespective of level, for instance in the area of reporting where a director has the responsibility of ensuring fair, accurate, and unbiased reports[610]. In addition to ethical conducts, Nigeria Code aligns with the UK Code, which expects organisations to ensure adequate compliance with the corporate rules and performance evaluation[611]. However, the USA and the OECD expects companies to have compliance and performance monitoring mechanisms in place, s something that is not emphasised or provided for in Nigeria and the United Kingdom CG codes. This further places the USA and OECD jurisdictions ahead in terms of the code likely to ensure effective corporate governance practice by ensuring directors have a more profound sense of responsibility for the implementation of code provisions.

[610] Section C.1.1 of the UK code
[611] Section 33.1 of the FRCN code

The Nigerian Code[612] makes provisions for rules and principles on matters such as knowledge provision in the form of entrepreneurial insights, strategic and ethical directions to the company. This is an indication that Nigeria does not only want to provide principles that guide corporate governance practice towards best global practices but is equally ready to assist businesses with appropriate knowledge and skills through seminars, workshops, and other learning and sharing platforms. On the ethical directions, the NCCG stated that the primary purpose of the board is to ensure that management is acting in the best interest of owners and other stakeholders through the board's advisory and monitoring roles, and in the process, enhance and sustain the prosperity of the company over time.[613] The Board is answerable to the shareholders and shall exercise the vital role of identifying other stakeholders relevant to the business of the company and incorporate their expectations in its decisions. It gives the responsibility for the appointment and removal of the head of internal audit to the board on the recommendations of the statutory or Board Audit Committee.[614]

Table 5.1: Comparison of Select Provisions on Board Structure and Composition

Nigeria	**United Kingdom**	**United States of America**	**OECD Countries**
The board shall include an	The board should include an	The Board shall have five	Boards should consider assigning

[612] The NCCG 2016
[613] The National Code of Corporate Governance 2016 Part C section 3
[614] The National Code of Corporate Governance 2016 Part C section 4. 4.7

appropriate combination of executive and non-executive directors.[615]	appropriate combination of executive and non-executive directors (and, in particular, independent non-executive directors)	members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public.[616]	a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest.[617]
The positions of the Chairman of the board and the Managing Director/Chief Executive Officer (MD/CEO) of the company shall be	The roles of chair and chief executive should not be exercised by the same individual.[619] A chief executive should not become chair of the same		

[615] The National Code of Corporate Governance 2016 Part C section 5. 5.2 file:///C:/Users/Bliss/Downloads/PRIVATE%20SECTOR%20CODE%20-2016[1]%20(3).pdf

[616] Section 101 E(1) of PCAOB 2002 https://pcaobus.org/About/History/Documents/PDFs/Sarbanes_Oxley_Act_of_2002.pdf

[617] Part VI.E.1 G20/OECD Principle of Corporate Governance 2015.

[619] UK Code of Corporate Governance 2016 Section A.2.1 https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf

separate such that one person shall not combine the two positions in any company.[618]	company. If exceptionally, this is proposed by the board, major shareholders should be consulted ahead of an appointment.[620]		
The MD/CEO and the senior management shall establish a culture of integrity, compliance, conformance, and performance which shall be imbibed by personnel at all levels of the company.[621]	The non-executive directors, led by the senior independent director, should be responsible for performance evaluation of the chairman, taking into account the views of executive directors.[622]	The Board shall conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act.[623]	Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets, and business plans; setting performance objectives; monitoring implementation and corporate

[618] The National Code of Corporate Governance 2016 Part C section 5. 5.9
[620] The UK Code of Corporate Governance 2016 Section A.3.1
[621] The National Code of Corporate Governance 2016 Part C section 6.3(6.3.4)
[622] The UK Code of Corporate Governance 2016 Section B.6.3
[623] Section 104a of PCAOB 2002

			performance; and overseeing major capital expenditures, acquisitions and divestitures.[624]

Source: Author's Compilation, 2019

Meanwhile, prior to the introduction of NCCG 2016, there existed divergent provisions on the number and composition of company boards due mainly to the multiplicity of codes. Different codes are applied in different sectors of the economy. For instance, whilst the CBN Code does not place a minimum but has a maximum number of 20 members on the board of banks, the SEC (Securities and Exchange Commission) Code o provides for a minimum of 5 and a maximum of 15 with a mix of both executive and non-executive directors.[625] Various other codes in Nigeria have different provisions and requirements considering the composition of the company board. Disparities such as these in the provisions of the codes are part of the reasons that led to the call for a harmonised code whose provision will be applicable across the board. The SEC code was however inadequate in its provisions for the composition of the board considering the factors that led to some corporate governance scandals in Nigeria during its time.

[624] Part VI.D.1 G20/OECD Principle of Corporate Governance 2015
[625] section 4.2 of the 2003 Securities and Exchange Commission (SEC) code amended 2009 and, section 5.3.5 of the 2006 Central Bank of Nigeria (CBN) Code

An example of this is the banking scandal of 2009, this scandal involved top bank executives indicating the inadequacy of the code of corporate governance in ensuring the board of directors' independence. After the scandal, the former Governor of the Central Bank of Nigeria [CBN] Sanusi Lamido Sanusi argues that corporate governance practice is ineffective in the banking sector because of misinformation, members of the management, especially board members, participation in securing loans at the expense of depositors and not having the required qualification to enforce good governance on bank management.[626] Bank chairpersons/CEOs often had an overbearing influence on the board, and some board lacked independence; directors often failed to make contributions to safeguard the development of banks and had weak ethical standards, the board committees were often inefficient or dormant.[627] This shows the lack of board ethics arising from the lack of board of directors' independence in Nigerian listed companies. With the emergence of the new code [NCCG] and the provision that the CEO/MD should institutionalise ethical framework without explicit reference to the role board should play in the conceptualisation of the framework, one can argue that the issue noted by the former governor will remain in Nigeria's corporate governance system. It is imperative to further dissect the composition of the board along with the previous codes in Nigeria. The NCCG Code provides that the minimum number of directors on a board shall be

[626] Sanusi, L. S. (2011) Banks in Nigeria and National Economic Development: A Critical Review http://library.cbn.gov.ng:8092/jspui/handle/123456789/18 [Accessed 28/07/2019]

[627] Sanusi, S.L., (2010) *The Nigerian Banking Industry: what went wrong and the way forward* Central Bank Nigeria Accessed on http://www.cenbank.org/out/speeches/2010/the%20nigerian%20banking%20industry%20what%20went%20wrong%20and%20the%20way%20forward_final_260210.pdf

eight [8],[628] with the number of non-executive directors on the board not be less than two-thirds of the total members of the board; and number of independent non-executive directors not less than half of the number of non-executive directors of the board.[629] It went further to state that, without prejudice to the minimum number of directors and the ratios of non-executive directors to independent non-executive directors on the Board, the board of regulated companies that are not holding companies or subsidiaries of public companies shall have a board membership of not less than five [5] out of which three [3] shall be non-executive directors (of which a majority shall be independent non-executive directors).[630] This provision has seen different changes to it over time. The SEC code provides that there should be on board at least one independent director while the CBN code provides for a minimum of 2 independent directors. The NAICOM is silent as to the number of independent directors to be present on company's board while PENCOM code provides that the number of non-executive members [excluding the chairman] of the board shall be equal to the number of the executive directors.[631] This provision is similar to that of the UK code of corporate governance, which recommends that at least half of the board excluding the chairman, is required to comprise individuals determined by the board to be independent.

As promising as this new development may appear, the provision clearly runs contrary to the provision of Companies and Allied Matters Act [CAMA] under

[628] The National Code of Corporate Governance 2016 Part C section 5.4
[629] The National Code of Corporate Governance 2016 Part C section5.6
[630] George Etomi 'Nigeria: The Financial Reporting Council Of Nigeria - National Code Of Corporate Governance' http://www.mondaq.com/Nigeria/x/589962/Corporate+Governance/The+Financial+Reporting+Council+Of+Nigeria+National+Code+Of+Corporate+Governance accessed on 04/06/2019
[631] Atekebo, T., Okolo, O., and Longe, O., (2014) "Corporate Governance Board structures and directors' duties in 33 jurisdictions worldwide" Accessed on http://sskohn.com/wp-content/uploads/2015/09/CG2014-Nigeria.pdf

section 246 [1] which provides that; 'every company registered on or after the commencement of this Act shall have *at least two directors* and every company registered before that date shall before the expiration of six months from the commencement of this Act have at least two directors'.[632] Therefore, there is a need for the contradiction between the Act and the Code to be clarified and for the two to find common ground reached to ensure that it does not confuse the average shareholders and more importantly, to ensure that the code conforms with the provisions of the supervening laws and regulations of the country. The failure to remove the contradicting provisions or harmonise the similar ones would continue to be of help to businesses and managers in abandoning the best corporate governance principles being provided through the new code. Already, Nigeria is battling with the weak regulatory system and endemic corruption. By not removing the contradicting provisions in the Act and the Code, a broad avenue would be created for more scandals to surface across the country's industries, which would be severe on the economy and create bad international image.

Aside from its conflict with the provision of CAMA, as stated above, there is a question about the applicability of this provision in Nigeria. The code did not provide an explicit provision as to the size of the board in order to prevent an oversize or undersized board. This will have severe implications for the mandatory compliance and effective corporate governance practices because the lacuna allows for different interpretations based on the whims of whoever is interpreting. Also, the code did not put into consideration smaller companies who have a minimum of 8 directors on

[632] Section 246 [1] the Companies and Allied Matters Act ("CAMA") (Cap. C20, Laws of the Federation of Nigeria 2004 http://www.placng.org/new/laws/C20.pdf accessed on 12/05/17

board might be too expensive for as many of the companies in Nigeria fall under the small company criteria and to promote corporate governance amongst all corporate bodies in Nigeria, having a requirement of a minimum of 8 directors with non-executive and independent non-executive will be too expensive and not practical for them. Therefore, there is a need for the code to be more elaborate and more transparent on the type of companies to whom the provision of the minimum of 8 directors applies while making exceptions for smaller companies just like what is in practice in the UK where smaller companies are required to have at least two independent non-executive directors.[633]

Also, in Nigeria, just as in many emerging markets, business ownership tends to be family operated with a single majority owner and composition of the management team with a bias to the inclusion of family members. Therefore, under such ownership pattern, it is impractical to have provisions that prevent family members from serving on the same board or specifying a minimum board size of as much as eight (8) as many companies currently operating in Nigeria will then have to embark on complex restructuring to be in compliance with the provisions of the code. To be effective, these provisions should only apply to public or listed companies that are of certain size, not all companies operating in the country regardless of their size. The code should go clearer on stating which type of company this provision applies to, making exceptions for smaller companies just like it is the case with the UK code.

[633] Part B.1.2. "UK Code of Corporate Governance 2016" Accessed https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf 04/09/17

The UK made provision that smaller companies should have at least two independent non-executive directors.[634]

Section 5.8 of the Code provides for the appointment of a lead independent director who is expected to serve as an intermediary for the other directors when necessary. The lead independent non-executive director shall be available to shareholders if they have concerns with contact through the usual channels of chairman, chief executive, or other executive directors has failed to resolve or for which such contact is inappropriate.[635] This provision is the first of its kind in the history of corporate governance codes in Nigeria and can be said to be a welcome idea as this similar to the appointment of Senior Independent Director [SID] provided for under the UK Code of corporate governance. The UK code provides for a SID to be appointed to provide a similar requirement stated above with the FRC's Guidance on Board Effectiveness [2011] further emphasising the critical role of the SID to help resolve significant issues when the board is under periods of stress.[636]

I. Size

The code went further making it mandatory for companies to have a board of a sufficient size which is relative to the scale and complexity of the company's operations, and which must be composed in such a way as to ensure diversity of

[634]B.1.2. "UK Code of Corporate Governance 2016" Accessed https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf 04/09/17

[635] The National Code of Corporate Governance 2016 Part C section5.8

[636] Calkoen, W.J.L., (2014) "The Corporate Governance Review" 4th Edition *Law Business Review* Pp 378 Accessed on https://www.slaughterandmay.com/media/2082941/the-corporate-governance-review-united-kingdom-chapter.pdf 13/07/18

experience and gender without compromising competence, independence, integrity, and availability of members to attend meetings.[637] This board shall include an appropriate combination of executive[638] and non-executive directors (and independent non-executive directors) such that no individual or group of individuals can dominate the board's decision-making.[639] With these provisions, it is clear that the new code aims at balancing board size with a view of ensuring balanced decisions on various corporate issues which have been hitherto being the exclusive right of the business owners. The combination of executive and non-executive directors indicates the country's willingness to help businesses in the areas of having purposeful entrepreneurial insights and guidance from the internal and external resources. However, as highlighted earlier, having an open-ended provision on an issue such as board size does not enhance the effectiveness of a corporate governance code. It creates loopholes that could be exploited, most especially to the detriment of shareholders and indeed the overall interest of the company. Recommending appropriate sizing of boards is good, but more important is ensuring this does not create gaps that end up defeating the purpose of the provision. This thesis thus argues for more clarity and more specificity for recommendations/provisions around board sizes.

In terms of structure and balance, both the NCCG 2016 and the UK Code 2016 have similar provision about having a balance between executive and non-executive directors in the board, and a larger board size means that there can be more non-

[637] The National Code of Corporate Governance 2016 Part C section5.1
[638] The National Code of Corporate Governance 2016 Part C section5.3 'No person, having retired from the board or executive management of a company, shall continue to exercise any surreptitious influence or dominance over any of these two governance structures. Such continued dominance or influence may vitiate the validity of the disengagement cool-off period as provided for by this Code'
[639] The National Code of Corporate Governance 2016 Part C section5.2

executive directors with corporate and financial expertise. Therefore, a large board can play a decisive role in evaluating management's plan and prevent behaviours such as executive compensation abuses. Larger boards can spread the power within the board reducing the potential influence of dominant members who might divert the decisions of the board to their own interest[640] and may improve the efficiency of the decision-making process due to the sharing of information. Functional relationship between non-executive and executive directors can facilitate greater communication in the boardroom which will positively affect the decision-making process by increasing advisory interactions.[641]

However, having the right size of the board can be described as another significant feature of the board which has been linked by several academics to corporate performance.[642] The board size influences the quality of the board when it comes to supervising and monitoring the management of the company which are the two leading roles of the board; thus affecting the quality of internal control of a company.[643] However, there have been several arguments over the years as to the advantages and disadvantages of having large board sizes as to small board sizes; some argue that smaller boards are more effective as it allows for better

[640]Lehn, K., Patro, S., and Zhao, M. (2003) "Determinants of the Size and Structure of Corporate Boards: 1935–2000" *Working paper*, November, 2003 University of Pittsburgh

[641] Westphal, J. D. (1999) "Collaboration in the Boardroom: Behavioural and Performance Consequences of CEO-based Social Ties" *Academy of Management Journal*, Volume 42, No 1, Pp7-24

[642] Naveen, C.J. D., and Boards, N., (2008) "Does one Size Fit all?" *Journal of Financial Economics* Volume 87 No 2, Pp329-356

[643] Jensen, M. (1993) "The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems"
The Journal of Finance, Volume 48, No 3 Pp831-880.

communication and interaction among directors,[644] while others argue that larger boards are supposed to provide their firms with better monitoring as they generally have more time and experience than smaller boards.[645] The latter argument was supported by Klein who stated that the quality of work of a larger board would be better as it is carried out by a high number of directors.[646] In theory, a large board of directors brings advantages to the company because it can provide more expertise and information, and it can also lead to better corporate performance.[647] While those who argue against large board states that the problems of coordination and communication increases, thus decreasing the ability of board members to monitor management behaviour and thereby increasing the agency problem and resulting in lower firm performance, in companies with a large board, there will be difficulty in arranging and coordinating meetings, which will have a negative impact on the efficiency of the board process and its effectiveness in deciding on investment opportunities that might occur.[648] Small board size will make directors know each other, in other to deliberate on issues more effectively with directors making contributions and reaching a valid agreement from the deliberation.[649]

The thesis will, however, argue in support of Jensen's argument which stressed that keeping board small can help improve their performance when the board gets beyond seven or eight people, they are less likely to function effectively and are easier for the

[644] Ozkan, N. (2007a) "Do Corporate Governance Mechanisms Influence CEO Compensation? An Empirical Investigation of UK Companies" *Journal of Multinational Financial Management* Volume 17, No 5, Pp349- 364.
[645] Monks, A. and Minow, N. (2004) *Corporate Governance*. 3rd Edition. Blackwell Publishing
[646] Klein, A. (2002a) "Economic Determinants of Audit Committee Independence" *Accounting Review* Volume 77 No 2, Pp435-453.
[647] Dalton, C., and Dalton, D. (2005) "Boards of Directors: Utilizing Empirical Evidence in Developing Practical Prescriptions" *British Journal of Management* Volume 16, No 1 Pp91-97
[648] John, K., and Senbet L.W. (1998) "Corporate Governance and Board Effectiveness" *Journal of Banking and Finance*, Volume 22, Pp371–403
[649] Martin, L., and Lorsch J.W., (1992) "A Modest Proposal for Improved Corporate Governance" *Business Law* Volume 48 Pg59-77

CEO to control.[650] He went further to state that firms with large board size code of remuneration, sitting allowance, and other expenses are higher than firms with fewer board sizes. A company should have a board size that can meet the requirement of the business and be composed in a way as to ensure diversity of experience without compromising independence, compatibility, integrity, and availability of members to attend the meeting.[651] The positive influence of the NCCG 2016 is the introduction of appointment of executive and non-executive directors with NEDs as majority of the board and appoint a lead independent non-executive director mandatory for all companies. This provision is alien to the Nigerian corporate governance as CAMA which is the primary company law of the country is silent about this position with no provision for their appointment. The right mix of the executive and Non-executive is very important to the effectiveness of the board of a company as the executive directors are in a better position to ascertain the core professional issue and decisions to be taken[652] while a proper and proportionate balance of the executive and NEDs will bring a proper and genuine growth and quality decision backed by experience.[653]

II. Board Independence

In Nigerian companies, independence of board can be said to be only in theory and not reflected in practice because of the kind of interferences and issues stated by the former governor of the Central Bank, Lamido Sanusi Lamido discussed earlier remain

[650] Jensen, M.C., (1993) "The Modern Industrial Revolution, Exist, and the Failure of Internal Control Systems" *The Journal of Finance* Volume 48, No 3, Pp831-880.
[651] Aina, K., (2013) "Board of directors and corporate governance in Nigeria" *IJBFMR* Volume 1, Pp21-34 Accessed on http://www.bluepenjournals.org/ijbfmr/pdf/2013/October/Aina.pdf
[652] Weldo C.H., (1985) *Board of Directors; Their Changing Roles, Structure and Information Needs* Westport CT; Aina, K., (2013) "Board of Directors and Corporate Governance in Nigeria" *IJBFMR* Volume 1, Pp21-34 Accessed on http://www.bluepenjournals.org/ijbfmr/pdf/2013/October/Aina.pdf
[653] Vance S.C., (1964) *Boards of Directors Structure and Performance*, Eugene, University of Oregon Press; Aina, K., (2013) "Board of Directors and Corporate Governance in Nigeria" *IJBFMR* Volume 1, Pp21-34 Accessed on http://www.bluepenjournals.org/ijbfmr/pdf/2013/October/Aina.pdf

in most organisations.[654] In order to change this practice, the code made certain restrictions on the board by providing that there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. It states that the position of the chairman of the board and the Managing Director/Chief Executive Officer [MD/CEO] of the company shall be separate such that one person shall not combine the two positions in any company;[655] that the MD/CEO shall not go on to be the chairman of the same company. This has been earlier noted under the comparison of the provisions within the board structure and composition in which Nigeria's provision resonates with the UK, but different from the position of the United States of America. However, having such a provision in Nigeria is to prevent executive abuses that characterised previous practice and enhance stakeholders and investors' confidence.

Suffice to note that separation of power is also not a new provision in the history of corporate governance code in Nigeria, The SEC code of 2003 was the first regulatory code to provide that the positions of the chairman and the CEO should be separated and held by different persons. However, the NCCG has been very elaborate on this provision by listing out the functions of the chairman in Part 6.1.6 and that of CEO in Part 6.3.5 of the Code. This in a way is believed to help improve the knowledge of the chairman of the corporation of its responsibilities and duties to the company and also prevent a repetition of Cadbury's situation when the chairman of Cadbury Nigeria was believed to have lacked information concerning the financial reporting of

[654] Sanusi, L. S. (2011) Banks in Nigeria and National Economic Development: A Critical Review http://library.cbn.gov.ng:8092/jspui/handle/123456789/18 [Accessed 28/07/2019]

[655] The National Code of Corporate Governance 2016 Part C section5.9

the organisation he headed.[656] Codifying the duties and responsibilities of the chairman in a company ensures that the directors receive accurate, timely, and precise information[657]. These responsibilities are spelt out in the code in order to prevent the chairmen of a corporation from being figureheads but knowledgeable individuals to prevent the previous practice in Nigeria where we had retired military men or civil servants with no knowledge of the business appointed to head organisations.[658] This thesis is, however in support of the new section included in the Code as this will help in improving the corporate governance practice in Nigeria. This new provision is a welcome change in the Nigeria Corporate world. At least, the section will force business owners to appoint individuals with the required knowledge of corporate governance as chairmen to redress the imbalances associated with the functionality of the corporations over the years.

This provision of the code is similar to what was provided for under the Code of corporate governance in the UK.[659] It emphasised the separation of powers and responsibilities of the chairman and chief executive officers be established and should not be exercised by one person.[660] The main reason for this introduction was to prevent the individual from acting based on the selfish interest of the Chairman/CEO, rather than the interest of the corporation and decrease the efficiency of the board.

[656] Adegbite, E. (2012), "Corporate governance regulation in Nigeria", Corporate Governance, Vol. 12 No. 2, pp. 257-276. https://doi.org/10.1108/14720701211214124 accessed on 24/05/2019

[657] Part c section 6.1.7 National Code of Corporate governance 2016.

[658] Adewale, A., (2013) "Corporate Governance: A Comparative Study of the Corporate Governance Codes of a Developing Economy with Developed Economies" *Research Journal of Finance and Accounting* Volume 4, No.1,

[659] Para A.2 The UK Corporate Governance Code 2014 https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf accessed on 12/03/17

[660] This separation is one of the key checks and balances in the UK and in situations where this role are combined, it must be publicly justified in accordance with the comply or explain principle, and the company in should expect close questioning from individual investors. The UK Code of Corporate governance states that there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business as no one individual should have unfettered powers of decision

Combining the two roles may allow self-serving managers to take advantage of weak monitoring by expropriating the firm's resources, such as paying themselves huge bonuses regardless of their performance.[661] If power is concentrated in the hands of one person, they may disregard the interests of shareholders, thus weakening their protection against mismanagement. As a result, there is a growing belief that the chairman should be independent and separate from the CEO.[662] An important advantage of the separation between the chairman and the CEO position is that it engenders better oversight and management as it allows the independent Chairman better ensure the board is fully engaged in strategy formulation and how well such strategies are being implemented, which helps to increase the company's efficiency and protects the rights of shareholders. This aligns with the assumptions of the agency theory, which suggest that to prevent the conflict of interest between agents and principals, management control over the board can be minimised through the presence of independent directors, which in turn reduce the agency problem.[663]

However, there is split among several scholars as to the separation of the role of chairman and the CEO. Several researchers argue that CEO-chairman duality is detrimental to companies as the same person will be marking his examination papers. Separation of duties will lead to avoidance of CEO entrenchment; increase of board monitoring effectiveness; availability of board chairman to advise the CEO, and establishment of independence between the board of directors and corporate

[661] Berle, A., and Means, G., (1932) *The Modern Corporation and Private Property* Macmillan: New York, US,

[662] Blackburn, V., (1994) "The effectiveness of corporate control in the U.S" *Corporate Governance: An International Review* Volume 2, No 4, Pp 196- 202

[663] Bebchuk, L., and Weisbach, M., (2010) "The State of Corporate Governance Research" *The Review of Financial Studies* Volume 23, No 3 Pp 939-961

management.[664] Bagley and Koppes[665] argue in support of having the role of both Chairman and CEO managed by a single individual by suggesting that it is often seen as a vote of trust by the board and a reward for an excellent service. Other studies have come up with controversial reports such as that of Boyd who stated in his findings that CEO-chair is likely to have a greater knowledge of the firm, its environment, and industry and enjoyed better performance[666]; Yang and Zhao[667] also argues that CEO duality will affect firm performance.

On the other hand, other researchers believe that since the CEO and chairman is the same person, the company will: achieve a robust and unambiguous leadership; achieve internal efficiencies through unity of command; eliminate the potential for conflict between CEO and board chair, and avoid confusion of having two public spokespersons addressing firm stakeholders.[668] Whether the combination of CEO-Chair position yields positive results, the argument in this thesis is that it is more appropriate and better than the two positions are not together in Nigeria because doing so will continue to facilitate poor corporate governance practice. For instance, it would be practically impossible to check excesses of the CEO when it becomes essential for the chairman to evoke existing corporate rules and some sections of the new code that confer such responsibility on him or her.

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[664]Fama, E., and Jensen, M., (1983) "Separation of Ownership and Control" *Journal of Law and Economics*, Volume 26, Pp301–325; Uadiale, O.M., (2010) "The Impact of Board Structure on Corporate Financial Performance in Nigeria" *International Journal of Business and Management* Volume 5, No. 10

[665] Bayley, C. E. and Koppes, R. H. (1997) Leader of the Pack: A Proposal for Disclosure of Board Leadership Structure, San Diego Law Review, 13: 149-191; Gregory F. Maassen and Frans A. J. van den Bosch 'On the Supposed Independence of Two-tier Boards: formal structure and reality in the Netherlands' Volume 7 Number 1 January 1999.

[666] Boyd, B. K. (1995) "CEO Duality and Firm Performance: A Contingency Model" *Strategic Management Journal* Volume 16, No 4, Pp301-312

[667] Yang, T. and Zhao, S., (2014) "CEO Duality and Firm Performance: Evidence from an Exogenous Shock to the Competitive Environment" *Journal of Banking and Finance* Volume 49, Pp534- 552

[668] Donaldson, L., and Davis, J., (1991) "Agency Theory or Stewardship Theory: CEO Governance and Shareholder Returns" *Australian Journal of Management*, Volume 16, No 1, Pp49-64; Uadiale, O.M., (2010) "The Impact of Board Structure on Corporate Financial Performance in Nigeria" *International Journal of Business and Management* Volume 5, No. 10.

The NCCG went further to state that if in very exceptional circumstances the board decides that a former MD/CEO shall become chairman, the cool off period shall be 7 years, and the board shall consult both majority and minority shareholders in advance and inform the regulator of the appointment setting out its reasons for such appointment. This shall also be stated in the next annual report.[669] Alongside this, the code went further to provide that not more than two members of the same or extended family shall sit on the board of the same company at the same time.[670] These requirements allow for companies to measure a prospective directors' level of commitment to the board as well as determine the existence of conflict [if any] and forestall abuse of power by the directors.[671] However, this provision might be impracticable in many Nigerian companies where the companies are primarily family-owned, and prevention of family members from serving on the same board is impracticable, specifications of minimum board sizes and appointment of senior independent directors should not be prioritised.[672]

Companies board of directors are required to meet at least once every quarter for them to effectively perform its oversight function and to monitor management's performance;[673] they are required to attend at least two-thirds of all board meetings.[674] This requirement to attend two-thirds of meetings does not align with CAMA, which provides that directors may meet together for the despatch of business, adjourn, and

[669] The National Code of Corporate Governance 2016 Part C section6.1.4
[670] The National Code of Corporate Governance 2016 Part C section5.12
[671] Templars Law (2016) "Client Alert on National Code of Corporate Governance" Accessed on http://www.templars-law.com/wp-content/uploads/2016/10/Templars-Client-Alert-on-National-Code-of-Corporate-Governance-2016.pdf 05/06/17
[672] http://www.pwc.com/ng/en/assets/pdf/exposure-draft-unifiedcode-corporategovernance.pdf
[673] The National Code of Corporate Governance 2016 Part C section7.1
[674] Every director shall be required to attend at least two-thirds of all board meetings. Such attendance record shall be among the criteria for the re-nomination of a director by the board except where there are cogent reasons which the board must notify the shareholders of at the annual general meeting. The National Code of Corporate Governance 2016 Part C section7.2

otherwise regulate their meetings as they think fit.[675] This provision, however, is a repetition of an aspect of previous codes like that of PENCOM, CBN, and SEC[676] codes which recommends that board meetings be held at least quarterly in each financial year. The Code went further to provide that where a majority of independent non-executive directors dissent on an issue decided by the board, such decision can only be valid where at least 75% of the full board [without reference to quorum] vote in favour of such decision.[677] This provision of the code does not align with that of CAMA where it provides that a majority of votes shall decide any question arising at any meeting, and in case of any equality of votes, the chairman shall have a second or casting a vote, and each director shall be entitled to one vote.[678] The Code, however, appears to give independent Non-executive directors overriding powers in respect of board decisions.[679] Having this provision in the new code will help Nigeria in strengthening transparency and integrity of corporations.

III. Board Committees

The Code provides that the appointment of directors shall be a matter for the board as a whole and there shall be a formal selection process which will reinforce the independence of non-executive directors and make it evident that they have been appointed on merit and not through any form of patronage.[680] The nomination committee is to recommend names of prospective candidates for consideration for the

[675] Section 263 [1] CAMA 2004.
[676] PENCOM: The Pension Commission
CBN: Central Bank of Nigeria
SEC: Securities and Exchange Commission
[677] The National Code of Corporate Governance 2016 Part C section7.3
[678] Section 263 [2][9] of CAMA 2004 Accessed on http://www.placng.org/new/laws/C20.pdf
[679] Senbore, O., and Lawanson, F., (2016) "A critical analysis of the National Code of Corporate Governance for the Private Sector in Nigeria Accessed on http://www.aluko-oyebode.com/files/A%20Critical%20Analysis%20of%20the%20National%20Code%20of%20Corporate%20Governance%20for%20the%20Private%20Sect.pdf accessed on 23/02/17
[680] The National Code of Corporate Governance 2016 Part C section9.3

directorship position[681] , and this committee shall be composed of at least three members, all of whom shall be non-executive directors with a majority of independent non-executive directors.[682] The UK Code has a similar provision stated under Para B.2 UK code[683] where it said that there should be a nomination committee which should lead the process for board appointments and make recommendations to the board. Most members of the nomination committee should be independent non-executive directors.[684] Non-executive directors should be appointed for specified terms subject to re-election and statutory provisions relating to the removal of a director. Any term beyond six years for a non-executive director should be subject to particularly rigorous review and should consider the need for progressive refreshing of the board.[685] The Code also provides that the board should satisfy itself that plans are in place for an orderly succession for appointments to the board and senior management, to maintain an appropriate balance of skills and experience within the company and on the board, and to ensure progressive refreshing of the board.[686]The similarity is laudable and shown that Nigeria takes a cue from the functional aspects of the United Kingdom's system and its code of corporate governance to better its practice.

[681] The National Code of Corporate Governance 2016 Part C section9.4
[682] The National Code of Corporate Governance 2016 Part C section8.12.1
[683] The Code provides that there should be a formal, rigours and transparent procedure for the appointment of new directors to the board. The search for board candidates should be conducted, an appointment made, on merit against objective criteria and wit due regard for the benefits of diversity on the board, including gender Para B.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[684] Para B.2 The UK Corporate Governance Code 2014 https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf accessed on 12/03/17
[685] Para B.2. 3 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17
[686] Para B.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

However, it must be noted that the provision of NCCG is contrary to the provision of CAMA under section 248 CAMA which provides that members at the annual general meeting shall have the power to re-elect or reject directors and appoint new ones.[687] While in the case of a casual vacancy, section 248 of CAMA allows for the board of directors to give the power to appoint new directors to fill any casual vacancy arising out of death, resignation, retirement, or removal, and such appointments are subject to approval by the general meeting at the next annual general meeting.[688] CAMA provisions is similar to what is applicable in the UK where section 160 of Companies Act 2006 states that all directors of FTSE 350 companies should be subjected to election by shareholders at the first annual general meeting.[689] The only difference that can be identified in the provision of CAMA and the UK Companies Act having a similar requirement for the appointment of the director is that the enforcement of the UK Code is voluntary based on the Comply or Explain system. However, in the Nigerian situation, the compliance of the NCCG has been stated to be mandatory, which will make compliance with the provision of that Code difficult for companies as CAMA takes priority. Thus, the effectiveness of corporate governance will remain elusive as long as Nigeria maintains its mandatory compliance instead of allowing corporations to explain the core reasons for not adhering to the provisions in the code.

[687] SECTION 248 [1]2] OF CAMA (1) The members at the annual general meeting shall have power to re-elect or reject directors and appoint new ones. (2) In the event of all the directors and shareholders dying, any of the personal representatives shall be able to apply to the court for an order to convene a meeting of all the personal representatives of the shareholders entitled to attend and vote at a general meeting to appoint new directors to manage the company, and if they fail to convene a meeting, the creditors, if any, shall be able to do so. Accessed on http://www.placng.org/new/laws/C20.pdf 10/07/17

[688] Section 249 [1][2] of CAMA. (1) The board of directors shall have power to appoint new directors to fill any casual vacancy arising out of death, resignation, retirement or removal. (2) Where a casual vacancy is filled by the directors, the person may be approved by the general meeting at the next annual general meeting, and if not so approved, he shall forthwith cease to be a director.

[689] At a general meeting of a public company a motion for the appointment of two or more persons as directors of the company by a single resolution must not be made unless a resolution that it should be so made has first been agreed to by the meeting without any vote being given against it.

Additionally, the Code provides that the board is required to establish a nomination and governance committee, remuneration committee, audit committee, and risk management committee in which no director shall serve on more than two of the nomination and governance, remuneration and audit committee.[690] The board of regulated private companies may merge any of the committees mentioned taking into consideration the size, needs, and other requirements of the company, subject to adequate board oversight and regulatory concurrence.[691] The code precludes members of executive management to avoid conflict of interest of a relevant regulatory institution who leaves the services of such institution from being appointed as director or top management staff of a company that has been directly supervised or regulated by the said institution until after three years of disengaging from that institution. This is imperative because of the need to prevent such staff from giving insights into the regulatory mechanism of the institution to the company.

The code makes it mandatory for public companies to have a Board Audit Committee in addition to Statutory Audit Committee [prescribed by section 359[3] and [6] CAMA 2004],[692] with all members who shall have financial literacy and shall be able to read and interpret financial statement; at least one member shall be an expert and have current knowledge in accounting and financial management.[693] The consequence of not having the Committee would be an institutionalisation of the process that allows the managers to collude with internal and external auditors to undermine the acceptable auditing process or approach that protects shareholders and stakeholders' interest. The law requires every company in Nigeria to prepare financial statements and have it audited at least once a year. It requires that all private companies read out

[690] The National Code of Corporate Governance 2016 Part C section 8.4
[691] The National Code of Corporate Governance 2016 Part C section 8.5
[692] The National Code of Corporate Governance 2016 Part C section 8.14.2
[693] The National Code of Corporate Governance 2016 Part C section 8.14.3

the account and other reports to all shareholders in an annual general meeting. Despite this provision, the researcher's observation shows that many companies prefer sending out annual reports and other financial statements to shareholders using electronic message channels such as email, especially those who decided not to attend the annual general meeting. The Board audit committee shall be composed of at least three (3) members of non-executive directors, with majority of them being independent non-executive directors.[694] The code went further to provide that the chairman of the Board Audit Committee must be an independent non-executive director, while in case of the statutory audit committee, the chairman shall be either independent non-executive directors or an independent shareholder.[695] The Committee is to meet at least once every quarter.[696] Having an active audit committee in a company strengthen the position of the internal audit function by providing an independent and supportive environment and review the effectiveness of the internal audit function.[697] Subsequently, both Statutory Audit Committee and Board Audit Committee have similar functions and are empowered to make recommendations to the board; either independently or jointly, where they co-exist, on the appointment and re-appointment and removal of external auditors; on the removal of the head of the internal audit where they co-exist, these overlapping dual powers may cause operational conflict between both committees, which ultimately will not be in the best

[694] The National Code of Corporate Governance 2016 Part C section 8.14.4

[695] The National Code of Corporate Governance 2016 Part C section 8.14.5
[696] The National Code of Corporate Governance 2016 Part C section 8.14.6
[697] Karagiorgos, T., Drogalas, G., Gotzamanis, E., and Tampakoudis, L., (2010) "Internal Auditing as An Effective Tool For Corporate Governance" *Journal of Business Management* Volume 2, No 1

interest of the company.[698] In the USA, the PCAOB created under the SOX is the agency which performs these functions for public companies.

5.2.2 Risk Management and Audit Table

Table 5.2: Comparison of Select Provisions on Risk Management and Audit

Nigeria	United Kingdom	United States of America	OECD Countries
All companies shall have an effective risk-based internal audit function.[699]	The board should establish an audit committee of at least three, or in the case of smaller companies two, independent non-executive directors.[700]	There is established the Public Company Accounting Oversight Board, to oversee the audit of companies that are subject to the securities laws, and related matters, in order	An annual audit should be conducted by an independent, competent and qualified, auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the

[698] Duru, S., and Bashir, T., (n.d) "Unifying Nigeria's Sectoral Corporate Governance Regimes through a National Code of Corporate Governance for the Private Sector" Accessed on http://www.banwo-ighodalo.com/assets/grey-matter/0db6c12dffe498c79b6d3420b033a619.pdf
[699] The National Code of Corporate Governance 2016 Part D section 17.1
[700] Part 4 Section 24 UK Code of Corporate Governance 2018 https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf 28/07/2019

		to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports.[701]	financial position and performance of the company in all material respects.[702]
Sufficient reasons must be disclosed in the company's annual report with an explanation as to how assurance of effective internal processes and systems such as risk management,	Explain the reasons for not complying with the entire code.	The Board shall conduct a continuing programme of inspections to assess the degree of compliance of each registered public accounting firm and associated persons	Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate

[701] Section 101(a) SarbanesOxley Act of 2002 https://pcaobus.org/About/History/Documents/PDFs/Sarbanes_Oxley_Act_of_2002.pdf accessed on 28/02/2019

[702] Part V [A.9[c]] OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1561717283&id=id&accname=guest&checksum=DA40A8EA83861FC108316CCF429F44A5

internal control and the like will be obtained.[703]		of that firm with this Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.	systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.

Source: Author's Compilation, 2019

From the select provisions presented in Table 5.2, the Sarbanes-Oxley Act [SOX] appears to have a strict rules for financial accountability through proper auditing of corporations' accounts. Different from other jurisdictions being examined in the thesis with the provision that board should ensure appointment of independent auditor, the Sarbanes-Oxley Act emphasises the primary roles of the Public Company

[703] The National Code of Corporate Governance 2016 Part D section 17.1

Accounting Oversight Board to oversee the audit of companies in line with the extant securities laws and other related matters. This is appropriate in strengthening the internal audit system towards the preparation of accurate and acceptable audit reports than the Nigerian system which wants businesses to give adequate reasons for not ensuring effective internal processes and systems towards risks such as financial and auditing mitigation in the annual report. Rather than asking corporations to give reasons in the annual reports, the UK Code expects businesses to explain reasons for not complying with the whole code. In addition to the oversight function of PCAOB, SOX provides that the board should equally supervise internal auditing and compliance processes. Both the SOX and UK Codes are more effective in this regard, considering the fact that companies must have stated the reasons before the annual report preparation and submission. By explaining the issues preventing them from proper disclosures to the appropriate body earlier would go in a long way of detecting possible issues likely to impact effective corporate governance practice in the two markets.

Beyond these provisions, Nigeria Code also expects companies to have a practical risk-based internal audit function with their purpose, authority, and responsibility of the internal auditing activity clearly and formally defined in an internal audit charter approved by the board which shall be consistent with the definition of internal auditing by the institute of internal auditors.[704] Though similar to PCAOB's function, the provision does not represent the fact that the Nigerian system needs more than internal supervision of the risk and auditing mitigation mechanisms.

Furthermore, the Internal Audit Unit [IAU] is expected to be headed by a professional with relevant qualification and registered with the regulator. The Unit shall be

[704] The National Code of Corporate Governance 2016 Part D section 17.2

adequately resourced and have an appropriate budget to enable it effectively discharge its responsibilities.[705] The head of the internal audit function shall be a member of senior management and can only be removed by the Board on the recommendation of the Statutory Audit Committee (and Board Audit Committee where applicable).[706] A public interest Entity shall not outsource its internal audit functions.[707] From the foregoing, it is clear the board is not compelled to set up a risk-based internal audit, this in addition to merely requiring assurance of an effective internal process for risk appraisal and management, the code leaves a gap that could be exploited by unscrupulous managers. The Head of Internal Audit Unit shall report directly to both the Board Audit Committee and the Statutory Audit Committee (where both co-exist) while having a line of communication with the MD/CEO.[708] The Head of Internal Audit Unit shall have unrestricted access to the chairmen of both the Board Audit Committee and the Statutory Audit Committee (where both co-exist), and the Chairman of the Board.[709] Amongst other roles, the IAU shall report at least once every quarter, at audit committee meetings, on the adequacy and effectiveness of management, governance, risk and control environment, deficiencies observed and management mitigation plans.[710] This requirement would enable companies to identify any governance deficiencies and any potential risk factors before an external audit and establish a mechanism to mitigate these factors.[711] As good as these provisions, the enforceability is likely not to be realised based on the possibility of the heads of the Audit Unit of colluding with the managers on

[705] The National Code of Corporate Governance 2016 Part D section 17.3
[706] The National Code of Corporate Governance 2016 Part D section 17.4
[707] The National Code of Corporate Governance 2016 Part D section 17.15
[708] The National Code of Corporate Governance 2016 Part D section 17.4
[709] The National Code of Corporate Governance 2016 Part D section 17.4
[710] The National Code of Corporate Governance 2016 Part D section 17.5
[711] http://www.templars-law.com/wp-content/uploads/2016/10/Templars-Client-Alert-on-National-Code-of-Corporate-Governance-2016.pdf

perfecting illegal financial deals before external auditors perform their responsibility of vetting financial statements. However, the expectation is that auditing professional body's rules and regulations should help in curbing the excesses of the internal auditors who became heads of IAU. In addition to this, the additional provision that companies can use their discretion to outsource internal audit functions to external auditors could provide some level of sanity into the auditing system.[712] The new code mandates that listed and significant public interest entities to engage Joint External Auditors for their statutory audit,[713] where the first or existing statutory auditor is an international firm, the second auditor who must be appointed by show of hands [in an annual General Meeting] rather than by-poll, shall be national firm.[714] However, this requirement may lead to increased costs of procuring audit services for the relevant companies without the guaranteed outcome of improved quality.[715] The mandatory requirement for the voting to be by show of hand rather than by-poll for the purpose of appointing a National Firm as an auditor highlights the right given to the chairman of the Board and others authorised by the act 'at any general meeting, a resolution put to the vote shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands)'.[716] While section 225 of CAMA

[712] The National Code of Corporate Governance 2016 Part D section 19.4
[713] The National Code of Corporate Governance 2016 Part D section 19.2.1
[714] The National Code of Corporate Governance 2016 Part D section 19.2.2
[715] Duru, S., and Bashir, T., (n.d) "Unifying Nigeria's Sectoral Corporate Governance Regimes through a National Code of Corporate Governance for the Private Sector" Accessed on http://www.banwo-ighodalo.com/assets/grey-matter/0db6c12dffe498c79b6d3420b033a619.pdf
[716] Section 224 of CAMA 2004 1) At any general meeting, a resolution put to the vote shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by- (a) the chairman, where he is a shareholder or a proxy; (b) at least three members present in person or by proxy; (c) any member or members present in person or by proxy and representing not less than one tenth of the total voting rights of all the members having the right to vote at the meeting; or (d) any member or members holding shares in the company conferring a right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one tenth of the total sum paid up on all the shares conferring that right. (2) Unless a poll is so demanded, a declaration by the chairman that a resolution has on a show of hands been carried or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book containing the

makes void, any provision of the company's article is that excludes the right to demand a pool at general meeting on any question other than the election of the chairman of the meeting or the adjournment of the meeting. The only exception to this provision was stated in section 225 [3] which states that 'notwithstanding section 224 of this Act and subsections (1) and (2) of this section, there shall be no right to demand a poll on the election of members of the audit committee under section 359 of this Act'.[717] However, the provisions of the code attempts to eliminate the right to demand a poll, by restricting the voting concerning a resolution for the appointment of subsequent auditors [other than the first auditor], to a show of hands.[718]

Additionally, the code went further to state that where the regulator is satisfied that an external auditor of a company has abused his office or acted fraudulently or colluded in any fraud in the company, it may by regulatory order direct the company to approach its members to consider and resolve whether on the basis of any facts revealed. The company in general meeting shall change its auditors. The decision on this matter at the general meeting shall be by show of hands only. The proceeding for the change of auditor shall be without prejudice to any sanctions that the regulator might impose on such an erring auditor.[719] This provision of the code is a clear departure from the provision of CAMA, which preserves the traditional right of a shareholder to the shares held.

The Code also blacklists some functions which must not be rendered by the auditors to companies, especially external auditors, with the mandate of vetting internal audits.

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minutes of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, the resolution.

[717] Section 255 [3] CAMA 2004

[718] Duru, S., and Bashir, T., (n.d) "Unifying Nigeria's Sectoral Corporate Governance Regimes through a National Code of Corporate Governance for the Private Sector" Accessed on http://www.banwo-ighodalo.com/assets/grey-matter/0db6c12dffe498c79b6d3420b033a619.pdf 19/07/2017

[719] The National Code of Corporate Governance 2016 Part D section 19.8

The Code wants auditors to desist from rendering outsourced financial services, taxation services, investment banking services among others. The argument has been that the restriction on these functions would mitigate negligence by auditors in the performance of their functions as a result of overfamiliarity with the company, its processes, and officers and preserve the independence of the auditors.[720] However, the position of the current thesis is that FRC does not consider the fact that many accounting advisory services companies are performing some of these functions for the companies they are also auditing their accounts. Many of these blacklisted functions are common among the big consulting companies such as KPMG and PwC.[721]

The code provides that the Statutory and Board Audit Committees either independently or jointly shall have the primary responsibility for making a recommendation to the board on the appointment, reappointment, and removal of external auditors. The code provides that external auditors shall be retained for no longer than ten years [10] continuously and where disengaged after continuous services to a company for ten years may be considered for reappointment seven [7] years after their disengagement. However, in situations where an auditor's aggregate or cumulative tenure has already exceeded ten years at the date of the commencement of the code, such auditor shall cease to hold office as an auditor of the company at the end of the financial year [2016] that this code comes into force.[722] However, this

[720] Templars Law (2016) "Client Alert on National Code of Corporate Governance 2016" Accessed on http://www.templars-law.com/wp-content/uploads/2016/10/Templars-Client-Alert-on-National-Code-of-Corporate-Governance-2016.pdf 19/07/17
[721] Templars Law (2016) "Client Alert on National Code of Corporate Governance 2016" Accessed on http://www.templars-law.com/wp-content/uploads/2016/10/Templars-Client-Alert-on-National-Code-of-Corporate-Governance-2016.pdf 19/07/17
[722] The National Code of Corporate Governance 2016 Part D section 19.3

provision does not align with the provision of section 358[1] CAMA, [723] which already stated circumstances in which a person can be disqualified from being appointed as an external auditor.

As explained earlier, the SBA committees' recommendation on the appointment, reappointment, and removal of external auditors can only be overridden by a 75% vote of the board's full membership, and the fact of override should be disclosed in the annual report.[724] Alongside this, the code prescribed it mandatory for external audit firms to rotate audit partners assigned to undertake the external audit of the company shall be rotated every five years,[725] and to ensure independence, no retired partner of an audit firm shall be appointed as a director of any company that has been, or still being audited or investigated until five years after the disengagement of the firm from such audit or investigation and or the disengagement of the partner from the firm;[726] no partner or employee of an audit firm shall be employed by the company which the audit firm has audited until after a period of not less than three years after the person ceased to be in that position in that audit firm.[727]

Lastly, External auditors are mandated to report their discovery to the FRCN, where they discover or acquire information during an audit that leads them to believe that the company or anyone associated with it has committed an indictable offence under the Companies and Allied Matters Act, Cap C20 Laws of the Federation of Nigeria 2004, any other Statute, or regulation(s), they must report this to the Regulator,

[723] The provisions of the Institute of Chartered Accountants of Nigeria Act shall have effect in relation to any investigation or audit for the purpose of this Act so however that none of the following persons shall be qualified for appointment as auditor of a company, that is; (a) an officer or servant of the company; (b) a person who is a partner of or in the employment of an officer or servant of the company; or (c) a body corporate Section 358 [1] of CAMA 2004. http://www.placng.org/new/laws/C20.pdf

[724] The National Code of Corporate Governance 2016 Part D section 19.10

[725] The National Code of Corporate Governance 2016 Part D section 19.5

[726] The National Code of Corporate Governance 2016 Part D section 19.6[a]

[727] The National Code of Corporate Governance 2016 Part D section 19.6[b]

whether or not such matter is or will be included in the Management Letter.[728] Reporting any indictable offence by the external auditors seems impossible considering the possible financial inducement from the internal auditors or accountants who must have perfected such offence before the external auditors are engaged. The difficulty would be further aggravated when the external auditors also succumb to the wishes of the management when the personnel at the FRC failed to act appropriately after being briefed by the external auditors.

5.2.3 Executive and Board Remuneration

Table 5.3: Comparison of Select Provisions on Remuneration

Nigeria	**United Kingdom**	**OECD Countries**
Remuneration of the MD/CEO shall be determined by the remuneration committee[729] and may include a component that is long-term performance-related, stock options and bonuses, the details of which must be disclosed in the company's annual reports.[730]	Remuneration of the MD/CEO shall be determined by the remuneration committee and may include a component that is long-term performance-related, stock options and bonuses, the details of which must be disclosed in the company's annual	The board should fulfil certain vital functions which include aligning key executive and board remuneration with the longer-term interests of the company and its shareholders.[732]

[728] The National Code of Corporate Governance 2016 Part E section 19.11
[729] The National Code of Corporate Governance 2016 Part C section 6.5.6
[730] The National Code of Corporate Governance 2016 Part C section 6.5.7

	reports.[731]	
Executive directors' remuneration shall be structured to link rewards to corporate and individual performances.[733]	Executive directors' remuneration should be designed to promote the long-term success of the company. Performance-related elements should be transparent, stretching, and rigorously applied.[734]	

Source: Author's Compilation, 2019

Directors' remuneration has always been in question for years, and it has been identified as one of the areas of failure in corporate governance. The financial crisis highlighted that the ability of the board to effectively oversee executive remuneration appears to be a key challenge in practice and remains one of the central elements of the corporate governance debate in several jurisdictions.[735] The nature of that challenge goes beyond looking merely at the quantum of executive and director remuneration (which is often the focus of the public and political debate), and instead

[732] G20/OECD Principles of Corporate governance 2015 Part VI. Section D.4
[731] THE UK Corporate Governance Code 2018 Part 5 section 35 https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf
[733] The National Code of Corporate Governance 2016 Part C section 6.5.5
[734] THE UK Corporate Governance Code 2018 Part 5 section 36 https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf
[735] OECD (2009) "Corporate Governance and the Financial Crisis: Key Findings and Main Messages" http://www.oecd.org/corporate/ca/corporategovernanceprinciples/43056196.pdf accessed on 23/07/18

focussing on how remuneration and incentive arrangements are aligned with the longer-term interests of the company.[736] Many researchers and scholars have argued that executive compensation in institutions, most notably financial institutions has led to executives to take risks which in turn led to the financial crisis that occurred in the financial sectors. While others argue that weak corporate governance has been the motivating factors for executives to take excessive risk to maximise their compensation.[737] Executive compensation is composed of financial compensation and other non-financial awards received by an executive from their firm for their services to the organisation,[738] which is typically a mixture of salary, bonuses, shares of call options on the company stock, benefit, and perquisites, ideally configured to take into account government regulations, tax law, the desires of the organisation and the executive and rewards for performance.[739]

For this reason, different codes have been reformed and proposed recommendations on how to control directors' remuneration. The Greenbury Report of 1995 in the UK can be described as the landmark code to discuss about executive pay and stated that the key to encouraging enhanced performance by managers lies in remuneration packages which *link reward to performance*, by both company and individual; and

[736] OECD (2011) *Board Practices: Incentives and Governing Risks, Corporate Governance* OECD Publishing. Accessed on http://dx.doi.org/10.1787/9789264113534-en 23/07/18

[737] Yusuf, I., (2015) "Executive Compensation in Nigeria Banks: Regulations or Just More Disclosures?" *Business and Social Science Review* Accessed on https://poseidon01.ssrn.com/delivery.php?ID=309005119000108073090010085082071106038014065052025018106008070092113114127125074090119100011104103058029066080082085115092094103020047002042079064084083004072103077020014086118001107071124007122124030090006093124003012088116114070112011070064098083&EXT=pdf 16/08/18

[738] Shin, E.D., Lee, J., and Joo, I.K. (2009) "CEO compensation and US high tech and low-tech firms corporate performance" Contemporary Management Research, Volume 5, No 1 Pp93-106; Emmanuel, A., Michael, S.O., Akanfe, S.K., and Oladipo, O.J., (2017) "Executive Compensation and Firm Performance: Evidence From Nigeria Firms" *International Journal of Advanced Academic Research | Social & Management Sciences* Volume 3, Issue 7

[739] Emmanuel, A., Michael, S.O., Akanfe, S.K., and Oladipo, O.J., (2017) "Executive Compensation and Firm Performance: Evidence From Nigeria Firms" *International Journal of Advanced Academic Research | Social & Management Sciences* Volume 3, Issue 7
Accessed on http://www.ijaar.org/articles/Volume3-Number7/Social-Management-Sciences/ijaar-sms-v3n6-jn17-p12.pdf 16/08/18.

align the interests of managers and shareholders in promoting the company's progress.[740] To which many other codes that came after this have adopted this principle. The UK corporate governance code 2016 recommends this as one of its core principles where it states that 'Executive directors' remuneration should be designed to promote the long-term success of the company'[741], in other words, a performance-related remuneration ties managers' interest to those of the shareholders which in turn could lead long term sustainability of the firm. Despite this provision, in recent times, the UK has been witnessing executive pay crises across industries. In the jurisdiction, executive pay is no longer correspond with the performance, and the wealth gap since the 1980s has created the opportunity for debates on the factors that should be considered before setting allowances and other emoluments for the executives.

Meanwhile, performance remains one of the factors being used in the market. The Code states when this is being considered, it must be transparent, stretching, and rigorously applied[742]. The argument has been that executive remuneration should be related to the performance as long as executive attempts to improve performance in the face of global competition. This raises the question of how much companies should pay to executives to attract, motivate, and retain them to keep the business competitive and engender the attainment of shareholders' wealth maximisation goal. In Nigeria, scholars' position is that high performing executives are always in high demand and should be rewarded in the form of higher executive remuneration than

[740] Greenbury, R., (1995) Director*'s Remuneration: Report of a Study Group* ; Moore, M., and Petrin, M., (2017) *Corporate Governance: Law, Regulation and Theory* Palgrave

[741] The UK Corporate Governance Code (2016) Section D https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf

[742] Financial Reporting Council, The UK Corporate Governance Code Main Principle D.1, https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf accessed on 12/07/18

poor performing counterparts.[743] Businesses will continue to follow this approach because having the best executives has been seen as one of the significant ways to promote the image of the business of an organisation. Despite the crucial roles played by managers in terms of applying appropriate strategies and tactics towards sustainable revenue and profit generation, the remuneration for them has not been given much debate like executive pay. This issue is less debated among academics in many developing countries like Nigeria.

However, the new NCCG code followed suit with the provision of the UK code of corporate governance by stipulating that the remuneration of the MD/CEO shall be determined by the remuneration committee and may include a component that is long-term performance-related, stock options and bonuses, the details of which must be disclosed in the company's annual reports;[744] while Non-executive directors shall be entitled to be paid sitting allowances, directors' fees and reimbursable travel and hotel expenses. These payments, in addition to any other benefits made to non-executive directors, shall be disclosed in the company's annual report.[745] These provisions are in line with the core principle of the OECD principles which recommends that the board should fulfil certain key functions which include aligning key executive and board remuneration with the longer-term interests of the company and its shareholders.[746] In this regard, Nigeria has drawn from the UK and OECD countries the means of determining how executives should be remunerated. Though there are challenges in the two jurisdictions; the alignment has shown that Nigeria is

[743] Fama, E.F. (1980) "Agency problems and the theory of the firm" *Journal of Political Economy* Volume 88, Pp288 – 307; Ogbeide, S., and Akanji, B., (2016) "Executive Remuneration and the Financial Performance of Quoted Firms: The Nigerian Experience" *Management and Economic Review* Volume 1, Issue 2 Accessed on http://mer.ase.ro/files/2016-2/14.pdf 16/08/18
[744] The National Code of Corporate Governance 2016 Part C section 6.3.8
[745] The National Code of Corporate Governance 2016 Part C section 6.6.8
[746] Principle VI.D.4 G20 OECD Principles of Corporate Governance 2015. https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf Accessed 23/07/18

ready to follow global best practices at least to address some of the imbalances discovered through researches. According to a research that examines the impact of the CEO pay on the performance of 11 selected Nigerian quoted banks between 2005 and 2012, the study reveals that the CEO pay exerts significant but negative influence on bank performance in Nigeria. The study concludes that rather than measuring compensation with firm performance as an important corporate governance mechanism to align interests of CEO with those of shareholders, the CEO pay of Nigerian quoted banks is indeed part of the agency problems in the industry.[747] With the provision that the board should form a remuneration committee which has 2 out of the three independent non-executive directors and the chairman of the committee being an independent non-executive director, it seems that Nigeria is taking steps to address issues around CEO pay.[748] Accordingly, by requiring the absence of the executive directors on the committee that is entrusted with responsibility for determining senior executive remuneration arrangement, the code seeks to ensure that members of the executive management of a regulatory body who leave the services of the body are not appointed as directors or members of the top management of a company that has been supervised or regulated directly by the body until after three years of disengaging from the institution and awarding themselves high wages that does not match their performance could be avoided.

The new code equally provides that the remuneration committee should reflect the time commitment and responsibilities of non-executive directors in the level of its remuneration. The remuneration committee should carefully consider what

[747] Olalekan, O.C., and Bodunde, O.B. (2015) "Effect of CEO Pay on Bank Performance in Nigeria: Evidence from a Generalized Method of Moments" *British of Economics, Management and Trade* Volume 9, No 2, Pp1-12; Ogbeide, S., and Akanji, B., (2016) "Executive Remuneration and the Financial Performance of Quoted Firms: The Nigerian Experience" *Management and Economic Review* Volume 1, Issue 2 Accessed on http://mer.ase.ro/files/2016-2/14.pdf 16/08/18

[748] The National Code of Corporate Governance 2016 Part C section 8.13.1- 8.13.2

compensation commitments (including pension contributions and all other elements) their directors' terms of appointment would entail in the event of early termination. The aim should be to avoid rewarding poor performance. This provision is similar to the SEC and CBN provision which provides that the remuneration of executive directors should be set by a remuneration committee consisting wholly of non-executive directors while the CBN code states it should be fixed by a committee comprised of non-executive directors; while remunerations for non-executive directors are to be determined by the board and approved by the members in a general meeting.[749]

Hence, the problem which this provision will face in Nigeria is one of the problems discussed in Chapter 3 of this thesis which is that of corruption. As in the past, Nigeria has seen situations where the remuneration committee of listed companies appears to be easily influenced by the board of directors to determine the level of salary that best suits them without the interest of the shareholders taken as priority. Also, this provision does not have statutory backing as it is not expressed in the CAMA provision. It, however, contradicts the provision of CAMA which provides that the remuneration of the director shall, from time to time, be determined by the company in general meeting and such remuneration shall be deemed to accrue from day to day;[750] while the boards of directors shall determine the remuneration of the managing director[751].

However, the code limits the powers of the recommendation committee to make recommendations to boards on compensation payable to executive directors and

[749] Part 14.6 of SEC Code 2011, file:///C:/Users/Bliss%20Up/Downloads/CODE%20OF%20CORPORATE%20GOVERNANCE%20FOR%20PUBLIC%20COMPANIES%20(5).pdf
[750] Section 267 [1] of CAMA http://www.placng.org/new/laws/C20.pdf
[751] Section 268 [1] of CAMA http://www.placng.org/new/laws/C20.pdf

senior management employees for any loss of office or termination of appointment to ensure that it is consistent with contractual terms, fair, and not excessive.[752] The code provides that in situations like this, the committee may engage an independent remuneration consultant[753] at the expense of the company for the purpose of carrying out its responsibilities, particularly in special circumstances whereas stated earlier there has been a loss of office or termination of appointment. The name of such consultant must be disclosed in the annual report of the company.[754] This provision is good and appropriate in ensuring balanced decisions. Meanwhile, the conflict of interest will still occur because the committee is most likely to engage their preferred consultant, who would do their biddings.

Some have argued an unwholesome relationship can exist between remuneration committees' members and remuneration consultants; consultants are said to rely on committee members for current and future business and as a result, there exists an incentive on the part of consultants to please executives[755]. It has also been established that personal contacts play a critical role in the choice of consultants[756], and when one considers the fact that the use of consultants serves to legitimize the decision of the remuneration committee, services rendered to executives raise potential conflict of interest, though they are expected to be independent and legitimate in the process of delivering such service. Overall, studies that have

[752] The National Code of Corporate Governance 2016 Part C section 8.13.4[d]
[753] Compensation consultants are important part of the process of determining executive pay in big companies. Consultants play several roles as experts, including providing market data, and advising on plan, design and implementation
[754] The National Code of Corporate Governance 2016 Part C section 8.13.5
[755] Jensen, M. & Murphy, K. J. 2004. Remuneration: Where we've been, how we got to here, what are the problems, and how to fix them. ECGI Working Paper Series in Finance, 44/2004.
Bebchuk, L. & Fried, J. 2005. Pay without performance: Overview of the issues. Journal of Applied Corporate Finance, 17: 8–23
[756] R. Bender (2011), Paying for Advice: The Role of the Remuneration Consultants in UK Listed Companies, 64 Vanderbilt Law Review 361 Vol.64 Iss 2

focused on the role of remuneration consultants found a link between their use and increases in executive remuneration[757].

The code makes it mandatory for public companies to have a Board Audit Committee in addition to Statutory Audit Committee [prescribed by section 359[3] and [6] CAMA 2004],[758] with all members who shall have financial literacy and shall be able to read and interpret financial statement; at least one member shall be an expert and have current knowledge in accounting and financial management.[759] The effectiveness of these provisions depends on the extent to which members of the committee are trained on the nitty-gritty of reading and understanding financial statements. It requires that all private companies read out the account and other reports to all shareholders in an annual general meeting. Like the earlier position of the researcher, the efficacy of this provision would depend on whether they would be allowed to ask relevant questions while the financial statement is being read. The Board audit committee shall be composed of at least three members of non-executive directors, with majority of them being independent non-executive directors.[760] The code went further to provide that the chairman of the Board Audit Committee must be an independent non-executive director, while in the case of statutory audit committee, the chairman shall be either independent non-executive directors or an independent shareholder.[761] The Committee is to meet at least once every quarter.[762] Having a competent audit committee in a company strengthen the position of the internal audit

[757] Murphy, K. & Sandino, T. 2010. Executive Pay and "Independent" Compensation Consultants. Journal of Accounting and Economics, 49: 247–262.
Voulgaris, G., Stathopoulos, K., & Walker, M. 2010. Compensation Consultants and CEO Pay: UK evidence. Corporate Governance: An International Review, 18: 511–526.
[758] The National Code of Corporate Governance 2016 Part C section 8.14.2
[759] The National Code of Corporate Governance 2016 Part C section 8.14.3
[760] The National Code of Corporate Governance 2016 Part C section 8.14.4
[761] The National Code of Corporate Governance 2016 Part C section 8.14.5
[762] The National Code of Corporate Governance 2016 Part C section 8.14.6

function by providing an independent and supportive environment and review the effectiveness of the internal audit function.[763] For this to be effective, there is a need to devise a performance review mechanism for periodic evaluation of relevant activities carried out. Subsequently, both Statutory Audit Committee and Board Audit Committee have similar functions and are empowered to make recommendations to the board; either independently or jointly, where they co-exist, on the appointment and re-appointment and removal of external auditors; on the removal of the head of the internal audit where they co-exist, these overlapping dual powers may cause operational conflict between both committees, which ultimately will not be in the best interest of the company.[764] In the USA, the PCAOB created under the SOX is the agency which performs these functions for public companies.

5.2.4 Shareholders' Rights and Interests

Great emphasis had been laid on the rights and interests of shareholders. Shareholders enjoy a variety of rights depending on the type and volume of shares help. Apart from the right to pass resolutions (Special and Ordinary) the right to have a company's annual accounts audited, shareholders are accorded numerous other rights. Shareholders have a right to attend general meetings and vote at such meetings. Shareholders have the right to receive timely notice of general meetings and to attend them. They have the right to attend important company meetings including Annual General Meetings and Extraordinary General Meetings. However, these rights does not extend to other meetings such as the company directors' meetings.

[763] Karagiorgos, T., Drogalas, G., Gotzamanis, E., and Tampakoudis, L., (2010) "Internal Auditing as an Effective Tool for Corporate Governance" *Journal of Business Management* Volume 2 No 1

[764] Duru, S., and Bashir, T., (n.d) "Unifying Nigeria's Sectoral Corporate Governance Regimes through a National Code of Corporate Governance for the Private Sector" Accessed on http://www.banwo-ighodalo.com/assets/grey-matter/0db6c12dffe498c79b6d3420b033a619.pdf

There is also the right to receive a share of the company's profits in the form of dividends when profit is declared, although it must be said that this right is not absolute. A dividend is only paid from profits and even when the company is profitable directors are not obliged to declare dividend and when declared shareholders cannot vote to pay a dividend higher than what is declared. Other conditions are attached to dividend payment; as stated earlier, dividends are fixed but still, there may be variations depending again on the type or volume of shares held. Also, some categories of shares may have a right to receive dividends or may qualify only when certain conditions are met.

Shareholders have a right to receive certain documents from the company: shareholders have the right to be given access to company documents such as the Company's annual report and accounts. Shareholders also have the right to copies of any written resolutions by either directors or shareholders. Another document shareholders have a right to is the share certificate, in whatever form convenient for the company, meaning it does not necessarily have to be in paper form. However one document shareholders have a right to be listed on is the company's Register of Members, which is a legal requirement and a legal proof of holding a share in a company. Shareholders do not have a right to receive and are not able to demand to see other documents such as copies of management accounts prepared for the directors.

In the UK (as with most other countries), Company Act 2006 accords shareholders the right to inspect statutory books and constitutional documents. Statutory documents such as the terms of directors' service agreements (section 229), terms of directors' indemnity provisions (section 238), records of resolutions and minutes of general meetings, and indeed the Register of Members (under section 116 of the

Companies Act). Shareholders may also request access to the company's constitutional documents, which often contains an up to date memorandum and articles of association. These documents are important often contain details of additional rights to shareholders or even restrictions to the rights, as the case may be.

Shareholders have a right to any final distribution on the winding up of the company, that is, in the event the company is liquidated, shareholders have a right to receive a proportionate share of the company's assets, this will however be possible only creditors have been settled.

There have been several academic opinions on the role of shareholders within a company and their relationship with company managers and board as to whose rights prevail over others. Berle and Means in their theory of separation of ownership and control stated that the dispersed shareholders' phenomenon unfairly empowers managers which as a result made shareholders become less potent than they should be.[765] They, however, went further to argue that corporate powers are meant for the interest of shareholders.[766] Just as it has been argued that the only function of a firm was to maximise the wealth of its shareholders.[767] Others, on the contrary, do not support the view of Smith by arguing that a company has many other functions aside wealth maximisation of its shareholders, such as jobs for employees, quality products for customers, and more importantly, to perform its social responsibility for the welfare to the society. Essentially, Smith argues for a more responsible corporate entity that does not only uphold the rights and interests of shareholders but also protects the welfare of employees and guards the general well-being of the community within which it operates. To that end, corporate governance is

[765] Adolf Berle and Gardiner Means, The Modern Corporation and Private Property (MacMillan, New York 1932)
[766] Berle, A., (1931) "Corporate Powers as Powers in Trust" Volume 44 *Harvard Law Review* 1049.
[767] Smith, D.G., (1998) "The Shareholder Primacy Norm" Volume 23 *Journal of Corporation Law* 277

increasingly viewed as a means of ensuring that corporate economic power is steep in accountability fairness and a deep sense of responsibility to all those involved or are impacted by the activities of a corporation.

In Nigeria, shareholders' rights are not only protected in the codes of corporate governance, but they are also protected under the Company's Act [CAMA]. This should be seen as a good synergy for effective corporate governance practice. Under CAMA, shareholders are given powers to act in any matter if the members of the board of directors are unable to act appropriately or in situations where there is a deadlock in voting/decision making; power to institute proceedings in the name of or on behalf of the company where the board refuses to do so [derivative action];[768] the rights to receive annual reports and accounts and it is the duty of the directors to provide this annual financial statement to the shareholders and other stakeholders in a timely manner and to ensure it is true and fair; the rights to attend and vote at general meetings;[769] rights to share profits; the right to propose a resolution to be voted on at the annual general meeting; the right to decision making; appointment and removal rights; financial rights and intervention rights.[770] These rights are the basic shareholder's rights which are usually provided for in company law and the codes. The importance of these rights is to among others ensure governance checks and balances that lead to adequate monitoring of management by shareholders which helps in having some sound corporate decisions that have the potential to avert corporate failures.

[768] Sections 299, 310-312 of CAMA http://www.placng.org/new/laws/C20.pdf
[769] Sections 228 and section 81 of CAMA http://www.placng.org/new/laws/C20.pdf
[770] Section 256 of CAMA http://www.placng.org/new/laws/C20.pdf

A detailed framework and guideline of shareholders' rights are listed under the heading of the rights and treatment of shareholders under the OECD principles of corporate governance. The principle emphasis that for there to be a good regime of corporate governance, there should be governance that looks to protect and facilitates the exercise of shareholder's rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders.[771] It is essential to protect the rights of shareholders, and these rights include fundamental rights such as; secure methods of ownership registration; convey or transfer of shares; obtaining relevant and material information on the corporation on a timely and regular basis; fully participate and vote in general shareholder meetings; elect and remove members of the board; and share in the profits of the corporation.[772] The challenge for the new code, therefore is to device a means these rights are respected and easily enforceable so that we do not just have a list of rights that does nothing to advance shareholder interests.

This challenge is the thrust of Section two of the OECD principles which stipulates that a framework for corporate governance "should facilitate the exercise of shareholder rights and ensure equitable treatment of all shareholders, including minority and foreign shareholders."[773] This is more important in large corporations where institutional investors may play a dominant role in shaping the overall direction of the organisation. In such cases, where stocks are held predominantly by institutions, more often with short term investment horizon, the role of shareholder rights in constraining aggressive and opportunistic management of corporate earnings

[771] OECD Principles of Corporate Governance https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf
[772] II [a] OECD Principles of Corporate Governance https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf
[773] Revised OECD Principles of Corporate Governance (2015) https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf

is significantly diminished or rendered ineffective, while stronger shareholder rights are associated with higher earnings.[774] Indeed, shareholders, the board, and management have compatible interests, which is to obtain fair revenue for their investments. Therefore, it has been established that the ability to marry shareholder interests with overall organisational objectives contribute immensely to corporate long-term efficiency and progress.[775] In effect, this thesis argues that it is not only in the interest of shareholders that rights and interests are guaranteed and protected, it is also in the interest of the board and management in order to ensure long term interest and progress of the organisation is secured.

The NCCG in seeking to protect shareholder's rights followed suit by providing for the board to ensure that the statutory and general rights of shareholders are protected at all times and shall ensure that shareholders at annual general meetings preserve their effective powers to appoint and remove company directors; the right to share profits;[776] rights to propose a resolution to be voted on at the AGM if the shareholder holds at least 10 per cent of the company's voting share capital. It went further to provide that the rights of shareholders of a company should be protected and expressly provides that the board should ensure that all shareholders are treated fairly and equally; that no shareholder should be given preferential treatment or superior access to information or other materials; ensure that minority shareholders are treated fairly at all times and are adequately protected from abusive actions by controlling shareholders; ensure that company promptly renders to shareholders' documentary

[774] Jiang, W., and Anandarajan, A., (2009) "Shareholder rights, corporate governance and earnings quality: The influence of institutional investors" *Managerial Auditing Journal* Volume 24, Issue 8.

[775] Elena F Pérez Carrillo (2007) "Corporate Governance: Shareholders' Interests and Other Stakeholders' Interests" *Corporate Ownership and Control* Volume 4, Issue 4. SSRN Electronic Journal DOI: 10.2139/ssrn.2302532

[776] Section 143{1}{3} of CAMA http://www.placng.org/new/laws/C20.pdf

evidence of ownership interest in the company and related instruments.[777] However, it should be noted that these rights given to shareholders are to ensure their active participation in meetings and other activities of the company. The positive aspect of this is that it can boost and encourage investors to invest in corporations most especially foreign investors, while the cons of these rights can be said to detrimental to the company in situations where the shareholders in using their rights have not acted in an efficient manner in relation to the smooth running of the company.[778]

Despite this provision which has been repeated in previous codes of corporate governance in Nigeria, shareholders with dominant or substantial shareholdings in Nigerian companies still have the tendency to influence the board by virtue of the influence and control they have in the decision-making process.

Both the UK and Nigerian code saddle the board with the responsibility to establish an effective system of constant dialogue with shareholders, majority and minority, based on mutual understanding of the objectives of the company and in line with OECD principles Section Two, Part B. The board as a whole is responsible for ensuring that this dialogue with shareholders takes place.[779] Thus shareholders should be provided with information that is relevant and material about the firm, and this is to be done in a timely and regular manner through its annual general meetings.[780] Making the information available is necessary because of the need to ensure that every stakeholder or shareholder make a significant contribution to discussions during the meetings. In addition to the information provision, a certain level of the corporate

[777] The National Code of Corporate Governance 2016 Part E section 22
[778] Mohanty, K., and Subhankar, S., (2013) "OECD Principles of Corporate Governance: A Critical Evaluation" *Kathmandu Sch. L. Rev.* Volume 2 Pp132
[779] The National Code of Corporate Governance 2016 Part E section 20.1
[780] Stuart L. Gillan and Laura T. Starks 'Corporate governance proposals and shareholder activism: the role of institutional investors' Journal of Financial Economics, 2000, vol. 57, issue 2, 275-305

governance practice and strategies being employed to run companies are expected to be explained by the Chairman of the Board to both the majority and minority shareholders during meetings.[781] If it is enforced, this is capable of strengthening transparency and accountability in the Nigerian system. This position is further supported by the provision that stresses the need for having the meetings in an open manner to allow free discussions on all critical issues on the agenda.[782] The chairmen of all board committees and that of the Statutory Audit Committee shall be present at general meetings of the company to respond to shareholders' queries and questions.[783] This provision is similar to that which is provided for in paragraph E.1.1[784] and E.1.2[785] of the UK code of corporate governance.

However, these provisions are not very different from those of previous codes, which were mostly ineffective or unsuccessful in solving the problems faced by shareholders. It should be noted that despite these provisions repeated in previous codes of corporate governance in Nigeria, shareholders with dominant or significant investments still have the tendency to influence the board by virtue of their shareholding regardless of whether it is a private or public company. A fair treatment of shareholders and their ability to have their voices heard is major problem shareholders face in Nigeria, which the regulatory bodies have tried to address by implementing several codes emphasising on protections of shareholders' rights in the company. Therefore, history has shown that increased regulations can never cover all

[781] The National Code of Corporate Governance 2016 Part E section 20.2
[782] The National Code of Corporate Governance 2016 Part E section 21.3
[783] The National Code of Corporate Governance 2016 Part E section 21.5
[784] The UK code specifically addressed the issue of board's relationship with shareholders by stating that there should be a dialogue with shareholders based on the mutual understanding of objectives, and it is the responsibility of the board for ensuring a satisfactory dialogue takes place. The chairman, should ensure that the views of shareholders are communicated to the board.
[785] The board should state in the annual report the steps they have taken to ensure that members of the board, and the non-executive directors, develop an understanding of the views of major shareholders about the company

possible forms of corporate abuses.[786] However, there are at least two possible ways of achieving this aims of accountability: a country needs to reinvent its legal systems and other is for a country to introduce new corporate governance practices into the existing corporate governance system.[787] In line with this argument, the Nigerian legal system has failed in several aspects of enforcing the laid down laws to protect the rights of shareholders. CAMA provides that the main avenue for remedies for shareholders in Nigeria, and the Nigerian courts have been found wanting of being slow, ineffective, and expensive in resolving commercial disputes. The state of the judiciary has discouraged shareholders from approaching the courts for remedies against the breach of their rights or the wrongs done against the company. The fundamental solution to this is the reformation of the country's judicial system. Nigeria needs a system that stimulates people's interest in seeking redress whenever their rights are violated.

5.2.5 Minority Shareholder Protection

The code prohibits activities that may lead to minority interest expropriation, such as transfer of assets and profits out of a company for personal benefits or the benefit of those who run the company. Section 28.3 of the NCCG further provides that controlling shareholders have a fiduciary responsibility to minority shareholders to discuss via a general meeting any significant or extraordinary transaction that could have a material impact on the business of the company, such as acquisition, change of

[786] Thompson L. D. (2012) "The Corporate Scandals, Why They Happened and Why They May Not Happen Again" Chautauqua Institution Lecture Brookings; Adewale, A., (2013) "An evaluation of the limitations of the corporate governance codes in preventing corporate collapses in Nigeria" *Journal of Business and Management* Volume 7, Issue 2 Pp 110-118.

[787] Ruth V. Aguilera, Alvaro Cuervo-Cazurra Codes of Good Governance Worldwide: What is the Trigger? Volume: 25 issue: 3, page(s): 415-443

business model, capital restructuring or other such activities. Indeed, an effective corporate governance framework allows for derivative actions as a means of regulating directors' duties and behaviours. Minority shareholder protection is so vital that corporate governance can be viewed as a set of mechanisms through which outside investors protect themselves from expropriation by insiders.[788] Consequently, a framework with adequate provision for the protection of minority shareholders has been found to increase investor confidence and serve as pre-requisite or an enabling environment for dispersed ownership.[789]

Section 29 of the code deals with insider trading, which, as earlier stated, has the potential to undermine investor confidence in the market. [790] The code also makes provision which enables participation of minority shareholders in the decision-making process of the company, and inhibits domination by minority shareholders, as matters which are of interest to the minority shareholders can be transacted at Annual General Meetings.[791] Consequently, the code precludes insiders from buying and selling any security which may result in a breach of their fiduciary responsibilities while in possession of important information about the security. Despite this provision, minority shareholders appear to be the small fry in corporations as they are opened continuously to the threat of domination and marginalisation by both the majority shareholders on one hand and management on the other side. This treatment

[788] Kirkbride, J., Letza, S., and Smallman, C., (2009) "Minority Shareholders and Corporate Governance: Reflections on the Derivative Action in the UK, the USA and in China" *International Journal of Law and Management* Volume 51 Issue: 4, Pp206-219 Accessed on https://doi.org/10.1108/17542430910974031

[789] La Porta, R., Lopez de Silenes, F., Shleifer, A. and Vishny, R.W. (1999) ''Investor Protection and Corporate Governance'' *Journal of Financial Economies* Volume 58 No 3, Pp4.

[790] The National Code of Corporate Governance 2016 Part E section 29 to protect minority shareholders the code precludes insiders from buying and selling any security in breach of their fiduciary duty and other relationship of trust and confidence while in possession of material, privileged, non-public, and price-sensitive information about the security

[791] Templars Law (2016) "Client Alert on National Code of Corporate Governance" http://www.templars-law.com/wp-content/uploads/2016/10/Templars-Client-Alert-on-National-Code-of-Corporate-Governance-2016.pdf accessed on 12/03/17

of minority shareholders has been part of the factors responsible for the poor ranking of Nigeria in the Global Competitiveness Index every year within the strength of investor protection and protection of minority shareholders[792]. According to a research carried out by Okpara[793] 16 out of 20 interviewees indicated that top managers and the board abuse minority shareholders, one of them stated that 'A minority shareholder may not be allowed to express his/her views in a company general meeting if their views are contrary to the views of the management or the board'. Special treatment is often accorded large shareholders, aggrieved shareholders seldom have recourse, and shareholders who wish to speak at general company meetings are only allowed to speak if they are known to side with the board of directors. Based on these findings, one may surmise that while there are laws that protect shareholders' rights, minority shareholders' rights tend to be frequently violated and not respected.

This thesis thus argues that while there are legal and regulatory framework of corporate governance in place in Nigeria for the protection of shareholders' rights, these rights are often violated largely due to the weak monitoring and enforcement procedure. This position is backed by findings by Oyejide and Soyibo which indicated that there abound evidence of abuse of laws, rules, and regulations by several corporations in Nigeria and one of the main reasons some of the boards of directors can get away with not being as independent as the law mandates are that

[792] The Global Competitiveness Report 2018 Accessed on http://www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf accessed on 23/6/2019

[793] Okpara, J.O., (2011) "Corporate Governance in a Developing Economy: Barriers, Issues, and Implications for Firms" *Corporate Governance: The International Journal of Business in Society* Volume 11 Issue 2 Pp184-199

they have political connections.[794] Consequently, the enforcement mechanism in place need to be strengthened as aggrieved shareholders in reality, hardly or never exercise the powers guaranteed by the various legal and regulatory framework. The bodies responsible for the enforcement must live up to the expectations of the shareholders by creating awareness about the need of exploring existing legal and regulatory framework. Tracking system will equally go in a long way of ensuring the appropriation of the legal and regulatory apparatus. Regulatory agencies could achieve this when they work with civil society organisations and non-governmental organisations. It is imperative because experience has shown that minority shareholders prefer taking their cases to these organisations for remedies than approaching courts. The main reason has been fair of not getting true justice at the right time.

5.2.6 Disclosure and Transparency

Following growing numbers of scandal in several corporate organisations in the world and the subsequent widespread public and media outcry, a number of governance norms, codes, best practices, and standards have sprouted all over the world[795] which has led to different countries to take steps in addressing the outcry of shareholders and corporate bodies. More considerable attention has been focused on corporate governance transparency and disclosure [T&D] since the Asian financial crisis as it was generally agreed that the primary failure leading to the financial crisis

[794]Oyejide, T.A. and Soyibo, A. (2001), "Corporate governance in Nigeria" A paper presented at the Conference on Corporate Governance, Accra.

[795] Bhasin, M. L. (2010) "Corporate governance disclosure practices: The portrait of a developing country" *International Journal of Business and Management*, Volume 5, No 4; Dembo, A.M., and Rasaratnam, S., (2014) "Corporate Governance and Disclosure in Nigeria: An Empirical Study*" International Conference on Accounting Studies* 18-19 August 2014 Accessed on https://ac.els-cdn.com/S1877042814058844/1-s2.0-S1877042814058844-main.pdf?_tid=236475c9-cc58-484a-810a-03009d8f422a&acdnat=1534422376_1368ad3583c2b8f8539b1ea38d39c134 16/08/18

stemmed from the lack of financial disclosure and inadequate governance practices such as supervision and accountability of directors. This has also been the case in Nigeria over the years. When the companies deem it fit to be transparent and disclose their financial statements, sometimes, they present perfected statements to show that adequate governance practices have been followed. The Cadbury Code of 1990 was the first to address the issue of disclosure and transparency in companies which was then followed by the USA Sarbanes-Oxley and then the OECD principles of corporate governance. The Cadbury UK described disclosure as "a mechanism for accountability, emphasising the need to raise reporting standards in order to ward off the threat of regulation. Improved disclosure results in improved transparency, which is one of the essential elements of healthy corporate governance practices."[796] The importance of transparency has been widely recognised by both academics and regulators which has resulted in many rules and regulations being introduced overtime to ensure timely and reliable disclosure of financial information creating standards to which companies must adhere.[797] Managers have recognised that there are economic benefits to be derived when investors understand, obtain accurate and reliable information about the company for them to make an informed decision about the company.[798] For the companies that adhere to the information provided to every shareholder or stakeholder principle, the results have been significant in their

[796] Cadbury, A. (1992) *Report of the committee on the financial aspects of corporate governance* Accessed on http://www.ecgi.org/codes/documents/cadbury.pdf 16/07/18

[797] Fung, B., (2014) "The Demand and Need for Transparency and Disclosure in Corporate Governance" *Universal Journal of Management* Volume 2, No 2 Pp72-80 Accessed on http://www.hrpub.org/download/20140105/UJM3-12101630.pdf 23/06/18

[798] Ho, P.-L., Tower, G. and Barako, D. (2008) "Improving Governance Leads to Improve Corporate Communication" *Corporate Ownership and Control* Volume 5, No 4 Pp26-33.; Dembo, A.M., and Rasaratnam, S., (2014) "Corporate governance and disclosure in Nigeria: An empirical study*"* *International Conference on Accounting Studies* 18-19 August 2014 Accessed on https://ac.els-cdn.com/S1877042814058844/1-s2.0-S1877042814058844-main.pdf?_tid=236475c9-cc58-484a-810a-03009d8f422a&acdnat=1534422376_1368ad3583c2b8f8539b1ea38d39c134 accessed on 16/08/18

performance. It has made public to have some level of trust in them. For example, the disclosure of information has made equity investors to evaluate management performance. When the performance is satisfactory, firms have had the opportunity of attracting more capital.[799] The OECD principles require that the board should ensure that timely and accurate disclosure is made in all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.[800] The principle went further to explain that timely disclosure of all material developments that arise between regular reports which can be at a minimum, on an annual basis while some are required to make periodic disclosure on a semi-annual or quarterly basis, or even more frequently in the case of material development affecting the company. In making disclosures, companies must provide information regarding financial performance, liabilities, ownership, and corporate governance issues. While the UK code provides that the board should present a fair, balanced, and understandable assessment of the company's position and prospects.[801] They should explain in the annual report their responsibility for preparing the annual report and accounts, and state that they consider the annual report and accounts, taken is fair, balanced, and understandable and provides the information necessary for shareholders to assess the company's position and

[799] Chahine, S. and Filatotchev, I. (2008) "The effects of information disclosure and board independence on ipo discount" *Journal of Small Business Management* Volume 46, No.2, Pp219-241; Dembo, A.M., and Rasaratnam, S., (2014) "Corporate Governance and Disclosure in Nigeria: An Empirical Study*"* *International Conference on Accounting Studies* 18-19 August 2014 Accessed on https://ac.els-cdn.com/S1877042814058844/1-s2.0-S1877042814058844-main.pdf?_tid=236475c9-cc58-484a-810a-03009d8f422a&acdnat=1534422376_1368ad3583c2b8f8539b1ea38d39c134 16/08/18 Accounting Studies 2014, ICAS 2014, 18-19 August 2014. Accessed on https://ac.els-cdn.com/S1877042814058844/1-s2.0-S1877042814058844-main.pdf?_tid=236475c9-cc58-484a-810a-03009d8f422a&acdnat=1534422376_1368ad3583c2b8f8539b1ea38d39c134 16/08/18

[800] Principle V., (2015) "OECD Principles of Corporate Governance" Accessed on https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf 23/08/18

[801] Para C.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

performance, business model and strategy.[802] The Directors of the company are required to confirm in the annual report that they have carried out a robust assessment of the principal risks facing the company, including those that would threaten its business model, future performance, solvency, or liquidity. The directors[803] should describe those risks and explain how they are being managed or mitigated.[804] They are to monitor the company's risk management and internal control systems and, at least annually, carry out a review of their effectiveness, and report on that review in the annual report. The monitoring and review should cover all material controls, including financial, operational, and compliance controls.[805]

The NCCG 2016 has however followed suit by requesting every company to strive to achieve international best practices and engage in full disclosure of all the matters set out in the code.[806] These requirements are intended to be extended beyond requirements which are provided for under CAMA provisions. The CFO and CEO shall jointly state in writing to the board that the company's financial statement presents an accurate and fair view, in all material respects, of the company's financial condition and operational results that are in accordance with relevant accounting standards.[807]The financial statements of companies have in the past been identified not to be fairly presented due to intentional errors [as was seen in the Cadbury Nigeria case discussed in chapter 3 of the thesis] or situations where management

[802]Para B.2 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

[803]They are also required to state in annual and half yearly financial statement whether they consider it appropriate to adopt the going concern basis of accounting in preparing them, and identify any material uncertainties to the company's ability to continue to do so over a period of at least twelve months from the date of approval of the financial statements.

[804] Para C.2.1 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

[805] Para C.2.3 The UK Corporate Governance Code 2014 Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf 12/03/17

[806] The National Code of Corporate Governance 2016 Part H section 33.1

[807] The National Code of Corporate Governance 2016 Part H section 33.2

fails to provide certain information, of where they deliberately mislead shareholders about the company operation. To practice a good T&D a clear financial statement needs to be presented as this will help the investors, creditors and the market participants to evaluate the financial condition of companies for investors to make a better decision and create market confidence. There is no evidence that this has been carried out generally in Nigeria looking at the number of financial scandals that have taken place in the country most notably within the banking sector[808] regardless of the numerous regulations that are in place. In order for the country to attract investors to come into the country and boost the countries market, there is a need for companies to provide simple and transparent financial statements in their annual report as having a complex one gives no definite idea about the genuine risks involved and the real operation of the company. It has been argued that the levels of corporate governance disclosure tend to reflect the underlying institutional and environmental influences that affect managers and business firms in different countries.[809]

The code went further to state that, the board shall ensure that the company's annual report includes a corporate governance report that conveys to stakeholders clear information on the strength of the company's governance structures, policies, and practices.[810] The annual report of the company shall not only contain the financial statement of the company but also information about the company's capital structure such as; details of issuance of its share capital during the year; borrowings and

[808]Emukufia, E., Oghojafora, A., Olayemia, O.O., Okonjia, P.S., and Okolie, J.U., (2010) "Poor Corporate Governance and Its Consequences on the Nigerian Banking Sector" ; Fadare, S.O., (2011) "Banking Sector Liquidity and Financial Crisis in Nigeria" *International Journal of Economics and Finance* Volume 3, No. 5 doi:10.5539/ijef.v3n5p3; Sanusi, S.L., (2011) "Global Financial mMltdown and the Reforms in the Nigerian Banking Sector" *CBN Journal of Applied Statistics*, Volume 2, Issue 1 Pp93-108

[809] Adhikari, A., and Tondkar, R. H. (1992) "Environmental Factors Influencing Accounting Disclosure Requirements of Global Stock Exchanges" *Journal of International Financial Management and Accounting* Volume 4 Pp75-105.

[810] The National Code of Corporate Governance 2016 Part H section 33.4

maturity dates; details and reasons for share buy-backs during the year, if any; details of directors' and substantial shareholders' interests in the company and subsidiaries or associated companies; and all acquisitions and disposals (specifying dates, quantities, and values) of each director's, insider's and substantial shareholder's holdings in the company and its subsidiaries and associated companies; the company's sustainability policies and programmes covering social issues such as corruption, community service, including environmental protection, HIV/AIDS and matters of general corporate social responsibility.[811]

Every company shall carry out an annual corporate governance evaluation which shall be facilitated by an independent external consultant who must be registered by the regulator.[812] This aligns with the provision under risk management and audit, where companies are expected to have external auditors for vetting of financial statements. The code further stresses the need for not engaging external auditors already hired for the accounting and auditing functions. As such, ensuring that conflict of interest does not arise which has the tendency of comprising offering appropriate advice to the management on where and how to improve corporate governance practice.[813] It should be noted that the provision that the should be presented at the company's annual general meeting and a copy of the report sent to the regulator and made accessible on the investors' portal of the company further indicates Nigeria's readiness to prioritise and strengthen the conduct of general meetings using open manner approach.[814] Despite the excellent part of this provision and others in the previous codes on the transparency and disclosure, shareholders in Nigeria are still substantially left in the dark about the administration of their

[811] The National Code of Corporate Governance 2016 Part H section 33.4.p
[812] The National Code of Corporate Governance 2016 Part H section 34.1
[813] The National Code of Corporate Governance 2016 Part H section 34.2
[814] The National Code of Corporate Governance 2016 Part H section 34.3

corporations as the board doctor accounts and present annuals reports and accounts of the companies with less information to keep shareholders adequately informed about their companies. This in the past has led to many financial scandals in Nigeria, and it shows that the statutory provisions and codes in place concerning disclosure and transparency were no longer of international best practice. It has been widely accepted that an entity is more likely to achieve better result when corporate governance practices of T&D are given prominence within the organisation as firms with weak corporate governance strategies are more likely to underperform in the long term.[815] Therefore, for companies to perform better in their T&D practices and to ensure it is up to international best practice standard, the FRCN made compliance with the NCCG 2016 mandatory as it was to replace the Voluntary codes that were previously in use. However, this thesis argues that making this provision mandatory will not solve the myriad of challenges militating against effective corporate governance practice in Nigeria, which will be further discussed later in this chapter.

As a result, the Code provides that all companies shall adopt and implement a communication policy that enables the Board and Management to communicate, interact with and disseminate information regarding the operations and management of the company to shareholders, stakeholders, and the public.[816] Communicating and keeping shareholders informed of the way the company is run and managed in order for them to make a more informed investment decision. Moreover, this also helps to bridge the agency problem of information asymmetry between the stakeholders.

However, it should be noted that complete T&D cannot be fully achieved, most notably between management and investors of a company even in developed

[815] Fung, B., (2014) "The Demand and Need for Transparency and Disclosure in Corporate Governance" *Universal Journal of Management* Volume 2 No 2 Pp72-80, 2014 Accessed on http://www.hrpub.org/download/20140105/UJM3-12101630.pdf 23/06/18.

[816] The National Code of Corporate Governance 2016 Part H section 35.1

countries with the most efficient capital market.[817] Various factors have been identified that influence T&D practices by companies which includes the regulatory framework, capital markets, economic, enforcement and mechanisms, and culture.[818] For a complete T&D practice in Nigeria, there is a need for a complete reform of the political institutions, legal system, and freedom of the press as this has been classified as the external factors affecting corporation and the overall the internal mechanism which includes regulatory oversights, ownership concentration, share ownership by directors and managers and organisational structure of the corporation.[819] This will help in achieving the main aim of transparency which is to maximise the free flow of information as best as possible and make relevant information readily available for investors when needed.

In addition to this, companies are expected to ensure that shareholders have equal access to the company's information, the board is also expected to establish web sites and investors' portals where the communication policy as well as the company's annual reports for a minimum of five immediately preceding years and other relevant information about the company shall be published and made accessible in a downloadable format to the public.[820] It must be stated that there has been a lot of improvements within Nigerian companies in recent time due to changes such as

[817] Healy, Paul M., and Palepu, K.G., (2001) "Information Asymmetry, Corporate Disclosure, and the Capital Markets: A Review of the Empirical Disclosure Literature." *Journal of Accounting & Economics* Volume 31, No Volume 1-3 Pp405–440 Accessed on http://www.hbs.edu/faculty/product/10705

[818] Haniffa, R., and Cooke, T. E. (2002) "Culture, Corporate Governance and Disclosure in Malaysian Corporations" *Abacus* Volume 3 Pp317-349; Isukul, A.C., and Chizea, J.J., (2017) "Corporate Governance Disclosure in Developing Countries: A Comparative Analysis in Nigerian and South African Banks" Accessed on http://journals.sagepub.com/doi/pdf/10.1177/2158244017719112 23/08/18

[819] Haniffa, R., and Cooke, T. E. (2002) "Culture, Corporate Governance and Disclosure in Malaysian Corporations" *Abacus* Volume 3 Pp317-349; Isukul, A.C., and Chizea, J.J., (2017) "Corporate Governance Disclosure in Developing Countries: A Comparative Analysis in Nigerian and South African Banks" Accessed on http://journals.sagepub.com/doi/pdf/10.1177/2158244017719112 23/08/18

[820] The National Code of Corporate Governance 2016 Part H section 35.4

improved information communication technology and the availability of internet technology. These two provisions have helped with enhancing corporate governance disclosure as business organisations can place electronic copies of their annual reports online and also relevant corporate governance information relating to the company which are not necessarily included in the annual report. Since the emergence of the new code these provisions could be said to be effective because of the Nigerian Stock Exchange constant monitoring of businesses regarding the presentation of their annual reports to the Exchange and eventual publication on corporate websites to fulfil the information disclosure provision of the code. However, there is still a need for improvement among corporations in Nigeria. For instance, firms need to educate shareholders about corporate disclosures and appropriate communication channels such as the corporate website where the relevant information could be gleaned.

5.2.7 Compliance and Enforcement

The success of corporate governance can be enhanced by the levels of its compliance amongst the regulators and the boards of the companies. To enforce corporate governance codes, countries adopt either a principle-based or the rule-based approach of compliance. This has been pointed out earlier under the analysis of the four codes being examined in this thesis. Some countries adopt rule-based while others engage in the principle-based approach of corporate governance. While the principle-based approach can be likened to the soft laws which comes in the form of Codes which is in practice in the UK where the boards and stakeholders of the company are expected to justify the reasons why the rules of the Code has not complied. In the UK companies who fail to comply with the UK, Corporate Governance Codes are

expected to provide reasons for none compliance.[821] Such reasons must not only come from the management but also back by the views of the shareholders. With this, the acceptance of the reasons by the regulatory body is possible because the companies would be seen as corporations upholding other provisions of the code. This is what Nigeria code needs to propose since codes are guides to conduct and behaviour capable of enhancing personal and corporate achievement. However, while they are regarded as soft, merely developing corporate governance codes is not enough, there has to be a way of operationalising them to ensure that those affected by its provisions conduct themselves accordingly. This is purely a matter of approach to achieve compliance. Part J, Section 37 of the new harmonised FRCN code of corporate governance deals with enforcement and compliance. Section 37.1 of the code explicitly declared that:

> *Compliance with the provisions of this code is mandatory. Accordingly, any violations of the provisions of this code will occasion both personal sanctions against the persons directly involved in the violation, and sanctions against the companies or firms involved in such violations.*[822]

Besides, section 37.2 declared that primary responsibility for enforcement lies with the Financial Reporting Council of Nigeria (FRCN), or where applicable sectoral regulators, who may be required to proffer appropriate sanctions[823]. Compliance with the provision of this code is mandatory, failure to keep to the provision will occasion both personal sanctions against the person directly involved in the violation, and

[821] Shrives, P. J., and Brennan, N. M. (2015) "A typology for exploring the quality of explanations for non-compliance with UK corporate governance regulations" *The British Accounting Revie*w Volume 47 No 1 Pp1-15.
[822] The National Code of Corporate Governance 2016 Part H section 37.1
[823] The National Code of Corporate Governance 2016 Part H section 37.3

sanctions against the companies or firms involved in such violation.[824] This provision of the new code can be said to be a shift from the previous codes in Nigeria, which made compliance voluntary. However, it has been noted that despite the positive provisions of the code, its implementation or compliance were faced with several challenges due to the attitudes of the operators in complying with the provisions. Many have argued that the code relied on inputs developed and more relevant in other institutional climes,[825] with guidelines which are best suited to western and less corrupt countries in a non-conducive environment will be ineffective in Nigeria.[826] Others[827] have argued based on the rule-based approach in the USA which led to the conviction of the operators involved in the ENRON's Scandal to that of the punishment meted out to those involved in the Cadbury Nigeria [as discussed in chapter 3 of the thesis]. The question that can be raised based on this argument is whether the introduction of the Mandatory Code remains the solution to cure the shortcomings of compliance in Nigeria or whether the use of both rule and principle-based could be the possible compensation for the shortcomings of the weak legal institution in Nigeria as discussed in chapter 3.

Based on the issues identified this thesis argues that the blame for the non-compliance of the voluntary code can be said to be that of the weak regulatory institution, pervasive corruption levels in the country, poverty, and poor education.

However, this thesis argues that the introduction of a rule-based system/approach in Nigeria does not guarantee compliance as intended. The reason being the lack of an

[824] The National Code of Corporate Governance 2016 Part J section 37.1

[825] Adegbite, E., (2012) "Corporate governance regulation in Nigeria" *Corporate Governance* Volume 12 No 2 Pp257–276.

[826] Okike, E. N., (2007) "Corporate governance in Nigeria: The status quo" *Corporate Governance: An International Review* Volume 15 No 2 Pp173–193

[827] Abdullahi, M., Enyinna, O., and Ahunanya, S., (2010) "Transparency in Corporate Governance: A Comparative Study of Enron, USA and Cadbury PLC. Nigeria" *The Social Sciences* Volume 5 No 6 Pp471–476.

effective judicial system to enforce the rights given to shareholders and enforcing the duties imposed by CAMA which has traditionally increased the costs of contracting as well as making business activities much more risky ventures.[828] It has been established that the enforcement, more than regulations of voluntary codes, is fundamental to creating an effective business environment and good corporate governance in developing economies meaning not necessarily the approach in place in the country[829]. As looking at the history of corporate governance in Nigeria, Nigeria has not lacked the codes to embed good corporate governance practice in Nigeria, but the enforcement of these codes constitutes a significant challenge.[830]As argued earlier, concerned stakeholders need to collectively work on removing obstacles impeding effective enforcement of codes being churned out. The government must figure out a robust framework that will correct deficient processes being used by the regulatory body to ensure compliance. While doing this, attention should not be shifted from the fact that it is people that can make any framework functional. Strict rules need to be formulated and enforced on corrupt practices while educating shareholders should not be abandon at the expense of focusing on the processes and people who will carry out the enforcement of the code. Alongside this, the paper argues that CAMA is long overdue for an extensive review as this has not been done in relation to changes which has been seen in corporate governance over the years. The review is necessary because the private sector is gradually becoming the epitome of corruption in Nigeria, as politicians and officeholders have used

[828] La Porta, R. (1998), ‘‘Corporate Ownership Around the World, in Ahunwan, B. (2002) Corporate governance in Nigeria’’, Journal of Business Ethics, Vol. 37 No. 3, pp. 269-87.
[829] Berglöf, E., and Claessens, S., (2006) “Enforcement and Good Corporate Governance in Developing Countries and Transition Economies” . *The World Bank Research Observer* Volume 21, Issue 1, Pp123-150,
[830] Okpara, J.O., (2011) "Corporate Governance in a Developing Economy: Barriers, Issues, and Implications for Firms", *Corporate Governance: The international Journal of Business in Society* Volume 11 Issue 2, Pp184-199

government-owned companies to fuel political agendas directly or indirectly. According to a former CEO and Chairman of a large Nigerian corporation: 'Following the victory at the polls, politicians upon assuming office see themselves as dispensers of favours to individuals, groups or companies who have supported their parties. These supporters get more 'favours', ranging from government contracts to fast-tracking of trade licenses while denying other qualified individuals or companies, especially if they are perceived as oppositions'[831]

The code went further to provide that the FRC shall be responsible for the enforcement and sectoral regulator[832] [sectoral regulator shall in its guideline provide for sanction for violation of this code in respect of the sector it regulates].[833] The code does not provide the nature of these sanctions. Comparing this provision to what is applicable in countries that practice a rule base type of compliance, i.e. USA, it must be noted that the USA's rule-based code outlines the procedures for compliance which must be followed and has sanctions expressly outlined in case of non-compliance.[834] To which all of this is lacking in the NCCG 2016 as the code only states that the FRCN is responsible for enforcing the provision of the Code and violations of the code provision will result in personal sanctions against the persons directly involved, and sanctions against the companies or firms involved. The nature of these sanctions were not stated or provided for by the code. If Nigeria decides to go in this direction, it has to go the whole hog by totally abandoning the voluntary

[831] Adegbite, E., and Nakajima, C., (n.d) "Institutional Determinants of Good Corporate Governance: The Case of Nigeria's Firm-Level Internationalization, Regionalism and Globalization Accessed on https://link.springer.com/content/pdf/10.1057%2F9780230305106.pdf 24/01/18
[832] The National Code of Corporate Governance 2016 Part J section 37.2
[833] The National Code of Corporate Governance 2016 Part J section 37.3
[834] Section 06 of SOX provides criminal penalty of 20years or $5million in fines; Sections 302, 404, 401, 409, 802.

compliance approach and stipulating sanctions that apply when erring directors or board have flouted the provisions of the code.

On the contrary, both the UK Code and the OECD principles of corporate governance require that all companies quoted on the stock exchange to state in their annual reports whether or not they have implemented the codes in all aspect. This form of compliance was first introduced in the UK in the Cadbury Report (1992), when CG reform started in the UK, the voluntary approach of "comply or explain"[835] has been adopted as the preferred approach of regulation in the UK.[836] This form of compliance allows for more flexibility as compliance is not compulsory; however, disclosure related to compliance is.[837] The effectiveness of this provision depends on the extent to which the regulator is engaged in the challenges or factors preventing firms from appropriating the code. By engaging the regulator, it shows that corporations are ready to make the code effective because it would be easier for the regulatory to identify impending factors and proffer appropriate solutions towards effective corporate governance practice. It has been identified that for companies to be capable of complying with rules regardless of their size and circumstance, a minimum acceptable standard of compliance is usually set with the rules listed in the codes. This form of compliance helps set a benchmark of appropriate behaviour; it does not encourage companies to do more than the minimum as it understands that not all companies will achieve the rules set out immediately and that for some companies it may be more appropriate to take a different approach to protect the long-

[835] The Comply-or-explain rule which was issued by the Yellow book rule of the Stock Exchange has been said to form the basis of most of the UK's soft laws, aiming to solve the agency problem by creating dialogue between investors and directors.
[836] Solomon, J., (2010) *Corporate governance and accountability* (3th edition) Hoboken, NJ: Wiley
[837] MacNeil, I., and Li, X. (2006) "Comply or Explain": Market discipline and noncompliance with the Combined Code" *Corporate Governance: An International Review* Volume 14 No 5 Pp486–496

term interest of their owners.[838] The Flexibility is also thought to lie in its ability to encourage companies to adopt the spirit of the code, rather than the letter, whereas a more statutory regime like what is in practice in the US would lead to a 'box-ticking' approach that would fail to allow for sound deviations from the rule and would not foster investors' trust.[839] Introducing this form of compliance would lead to better governance, and its underlying premises has been adopted by several other countries like Austria and Germany. For an emerging market like Nigeria, the adoption would serve as one of the flexible means of ensuring effective corporate governance because firms and managers will consider it as an approach that prioritises unexpected internal factors capable of impeding compliance.

However, in a situation where the code has not been applied as specified by the Code, the company has to have an alternative to following a provision that might be justified in particular circumstances if good governance can be achieved by other means.[840] In providing an explanation, the code reveals three main elements for an explanation; the company should aim to illustrate how its actual practices are consistent with the principle to which the particular provision relates, contribute to good governance and promote the delivery of business objectives; set out the background, provide a clear rationale for the action it is taking and describe mitigating actions taken to address any additional risk and maintain conformity with the relevant principle; where deviation from a particular provision is for a limited

[838]Chris Hodge "The development of the UK corporate governance regime" *Corporate Governance for Main Market and AIM Companies* Accessed on http://www.londonstockexchange.com/companies-and-advisors/aim/publications/documents/corpgov.pdf 05/03/17

[839] Antoine Faure-Grimaud, Sridhar Arcot and Valentina Bruno 'Corporate Governance in the UK: is the Comply-or-Explain Approach Working?' Corporate Governance at LSE Discussion Paper Series No 001, November 2005. https://eprints.lse.ac.uk/24673/1/dp581_Corporate_Governance_at_LSE_001.pdf Accessed on 15/02/17

[840]https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf

time, the explanation should indicate when the company expects to conform with the provision.[841] There have been arguments against the Comply or Explain form of compliance. MacNeil and Li argued that despite the increased level of compliance over time, there is a significant occurrence of non-compliance. They argued that instead of investors examining the insufficient information and sometimes non-existent explanations, some investors use the financial performance of the company to decide whether non-compliance has been warranted.[842] Therefore, these investors will not engage in monitoring as long as the company is doing well financially. When performance is lacking, however, they may be more inclined to begin monitoring the board[843]. With this kind of attitude in place, even when useful explanations are being presented, they are not always assessed. Moore argues that the institutional investors often employ a box-ticking approach instead of comply or explain toward engagement, where investors may say they are monitoring, but in practice, no real effort is being made to engage and assess company disclosures.[844] Another argument is that it risks the directors or managers of companies failing to live up to the expectations of the investors.[845] Unlike the laws, regulations, and each company's constitution, the code is issued with an acknowledgement of flexibility; this is in recognition of the principle that no single governance regime would be appropriate in

[841] FRC CODE OF CORPROATE GOVERNANCE 2016 PG8 https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf

[842] MacNeil, I., and Li, X., (2006) "Comply or explain": market discipline and non-compliance with the Combined Code" *Corporate Governance: An International Review* Volume 14 No 5 Pp486

[843] O'Dwyer, A., (n.d) "Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board" Accessed on https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf 14/01/17

[844]Ibid.

[845]Ibid.

its entirety, for all companies[846]. This approach, however, relies on shareholder's engagement to challenge non-compliance with this system where appropriate. This approach has however been identified to deliver greater transparency and confidence in a company than formal regulations which are purely a matter of compliance.[847] A recent annual survey carried out by Grant Thornton in 2016, shows much improvement with Compliance as it found compliance to remain high with 90 per cent of FTSSE 350 companies reporting that they were either complying with all or all but one or two, of its 54 provisions.[848]

It should be noted that the softness of the Codes with its comply or explain approach does not mean that it can be completely disregarded as the compulsory disclosure regime, backed by the statutory rights given to shareholders to dismiss directors, provides the code with a greater bite. In situations where a company did not comply with the provisions of the code, they must explain why they have not complied, and the explanation should set out the background, provide a clear rationale for the action being taken, and describe any mitigation activities. Moreover, where the deviation from a provision is intended to be limited in time, the explanation should indicate when the company expects to meet the provision.[849] However, Companies that did not comply with provisions of the Code often do a poor job in explaining why they have not complied with it, and in situations where an explanation is provided, most of the time it fails to identify specific circumstances that could justify such a deviation

[846] Willem J L Calkoen (2014) The Corporate Governance Review https://www.slaughterandmay.com/media/2082941/the-corporate-governance-review-united-kingdom-chapter.pdf 14/01/17.
[847] Mallin, C.A., (2013) *Corporate Governance* (4th Edition), Oxford University Press
[848] 'Developments in Corporate Governance and Stewardship 2016' Accessed on https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewa-(2).pdf 07/03/17
[849] Ibid.

from the rule.[850] This approach is a market-based approach which aims to solve agency problem, where a company does not abide by the principles, its share price will likely drop due to potential shareholders choosing not to invest.[851] Such market reactions, therefore, allow a market sanction as opposed to a legal sanction and support the soft law approach. Thus, this thesis argues that having a mandatory Code is not the best way to ensure compliance to the NCCG because codes are soft laws that deliver the most result when not being applied by force or fiat. This is more so considering the inadequacies of the Nigerian Judicial system in enforcing formal rights and limitation of judicial remedies as was discussed in chapter 3 of the thesis. The thesis argues that the Principle-based approach, which is in practice in the UK makes compliance with the code voluntary. This approach adopts a comply or Explain the mode of compliance where companies are expected to either comply or explain where compliance cannot be achieved by justifying the basis for actions taken, in order to avoid reaction from their shareholders or stakeholders.

As PriceWaterCooper noted, the approach of the UK FRC (which plays a similar regulatory role to FRCN in Nigeria) is based on facilitation rather than dictation and on principle rather than rules which is what the code is to Company law of a country.[852] Codes are 'non-binding set of principles, standards, or best practices, issued by a collective body and relating to the internal governance of corporation'. It

[850] Faure-Grimaud, A., Arcot, S., and Bruno, V., (2005) "Corporate Governance in the UK: is the Comply-or-Explain Approach Working?" *Corporate Governance at LSE Discussion Paper Series* No 001, November 2005. Accessed on https://eprints.lse.ac.uk/24673/1/dp581_Corporate_Governance_at_LSE_001.pdf 15/02/17

[851] Keay, A., (2012) "Comply or Explain: In Need of Greater Regulatory Oversight?" *Working Paper* Pp4-5; O'Dwyer, A., (n.d) "Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board" Accessed on https://www.abdn.ac.uk/law/documents/Corporate_Governance_after_the_financial_crisis.pdf 14/01/17

[852]PwC's comment letter on the Financial Reporting Council (FRC) of Nigeria Exposure draft of National Code of Corporate Governance 2015 - Private sector Accessed on https://www.pwc.com/ng/en/assets/pdf/exposure-draft-unifiedcode-corporategovernance.pdf 13/12/17

was also noted that having a set of rules assume an unrealistic 'one size fits all' stance that generally does not work and are often ignored and disobeyed by operators.[853] In deciding to make the code mandatory as against the advice of stakeholders and organisation in Nigeria, the FRCN can be said to have delivered a significant disincentive for investors as this move cannot be working with the Government's drive to create an enabling environment for Foreign Direct Investment [FDI] into Nigeria and in achieving its 2020 goals. The Comply or Explain approach has been adopted and implemented by many other countries which have made it more acceptable globally an example is that of the New King IV code of corporate governance in South Africa which came into effect in 2017 adopts a principle-based approach of compliance. Hence, making NCCG 2016 mandatory will set us apart from other markets in the world which is not what is needed at the time where we are aiming to be top of Foreign Direct Investment destination.

However, for the FRC to live up to the responsibility of ensuring that the extensive provisions of these codes are implemented and complied with, there is a need for a total recognition that the structure and capacity of regulatory and judicial frameworks are an integral part of the corporate governance environment.[854] Therefore, there is a need to strengthen the enforcement mechanism of the regulatory institution. The role of the courts in this regard cannot be over-emphasised. It is essential to restore the confidence of the average shareholder in the capacity of the judicial system to help him enforce his rights. As some boards do get away with flouting company legislation because the enforcement mechanism is weak and ineffective. Therefore, is

[853]PwC's comment letter on the Financial Reporting Council (FRC) of Nigeria Exposure draft of National Code of Corporate Governance 2015 - Private sectorhttps://www.pwc.com/ng/en/assets/pdf/exposure-draft-unifiedcode-corporategovernance.pdf

[854] Okpara, J.O., (2011) "Corporate governance in a developing economy: barriers, issues, and implications for firms" *Corporate Governance: The international Journal of Business in Society*, Volume 11 Issue 2 Pp184-199.

not enough to establish a NCCG; equally important is the need for them to collaborate with the Corporate Affairs Commission [CAC], the Securities and Exchange Commission [SEC] as well as the Nigeran Stock Exchange Commission [NSEC] in order to effectively monitor entities within its sector and ensure compliance with the provision of the codes.

In situations where there is a conflict between the provisions of this code and any sectoral supplementary governance guideline, the provisions of the code shall to the extent of those inconsistencies prevail.[855] Therefore, stakeholders in the private sector are now required to look to and observe the requirements of the private sector code only subject to supplementary [and non-conflicting] corporate governance guidelines that may be issued from time to time by various regulators. Institutional shareholders are to demand compliance with the provisions of the code and report to the regulator where non-compliance is observed, however, there are varying and contradictory provisions of CAMA in most material respect which must be reconciled otherwise a breach of code but conformity with CAMA cannot be validly challenged as to where there is a conflict between an Act of the National Assembly and a regulation made by a body created pursuant to an Act of the national assembly, the provisions of the Act shall prevail.[856] Notwithstanding what the new Code says, the pre-existing sectoral codes are still operational as the sectoral operators have not issued directives indicating the discontinuation of those codes.[857] It is however believed that if proper enforcement mechanisms are put in place, the code of corporate governance for the

[855] The National Code of Corporate Governance 2016 Part k section 38.5

[856] To this extent, FRC's attempt to explore and develop Corporate Governance principles under Section 50 of it enabling statute, by regulation, cannot be interpreted and or enforced to contradict, amend or vary the more superior and extant provisions of the Companies and Allied Matters Act. And it begs the point that all provisions of the FRC Code which contradicts any provision of CAMA, shall to the extent of their inconsistency, be null and void.

[857] Banjo, V., (2017) "Corporate Governance and Board Effectiveness Coach" Accessed https://ethicalboardroom.com/nigerias-national-code-of-corporate-governance/ accessed on 05/05/17

private sector will give room for transparency, integrity, board efficiency, and improved corporate governance structure in Nigerian corporate sectors but this thesis does not think this will be achieved through the rule-based approach.

5.3 Conflicts of NCCG Provisions with CAMA

Having analysed some essential provisions of the new code in relation with the other markets, it is imperative to further examine specific contradiction between the new code and CAMA, which has been in existence for years and is still being referred to while discussing corporate governance practice in Nigeria. A review of the FRCN code reveals that it seeks to regulate every aspect relating to the composition and management of a company's Board of Directors, to that end, specific provisions were introduced regarding the minimum number of Directors on Boards, their tenure (both Executive and Non-Executive), as well as appointment and tenure of External Auditors among other areas. These are quite extensive provisions and thus present some challenges. The challenge with such extensive changes is that they are in stark contrast with the provisions of the Companies and Allied Matters Act ("CAMA"). Crucially and fundamentally, the provisions of a regulation or a code applied and or interpreted in law to amend the provision of an extant Act of law.

It is important to note with regards to the 1999 Constitution and other body of laws in Nigeria, and the FRCN Act is the first Act of the National Assembly that incorporates Corporate Governance into Nigerian Laws. However, the FRCN Act does not provide a measure or parameter of what constitutes Corporate Governance within it. Such ambiguity is one of the setbacks to effective corporate governance practice.

5.3.1 Board Structure

Section 5.4 of the code essentially makes it mandatory that all companies have a minimum of eight (8) directors on their board at any material time, while the minimum number of non-executive members must not be less than two-thirds of the total number of board members. It must be pointed out that this provision of the code runs contrary to that of Section 246[1] of CAMA,[858] which recommends a minimum of 2 members. Like other sections of the code facing similar loophole, this provision is confusing and may be ignored by companies who are conscious of not running afoul of the extant law governing corporate affairs in the country.

5.3.2 Remuneration

In section 6.3.8 the Code allows for the creation of a remuneration committee to determine the remuneration of the MD/CEO. CAMA, on the contrary, provides that the remuneration of such directors shall be the exclusive preserve of the general meeting while the board will determine that of the managing director. The NCCG provides that remuneration of MD/CEO shall be the responsibility of a remuneration committee and that details of such remuneration be disclosed in the company's annual report. This provision is apparently at variance with the position of CAMA which imbued the general meeting with the power to determine from time to time the remuneration of directors[859], whilst that of the Managing Director is to be determined by the Board[860], in order to ensure that such remuneration is in line with contractual

[858]Section 246[1] companies and Allied Matters Act (CAMA) (Cap 20, Laws of the Federal Republic of Nigeria 2004)
[859] Section 267(1) of CAMA
[860] Section 268 of CAMA

agreements, fair and not excessive.[861] In addition to the inconsistencies, it is also telling that the code seeks to dilute the powers of the Board as it currently exists under CAMA while attempting to strengthen the powers of committees of the Board.

5.3.3 Nomination for Directorship

Section 9.4 provides that "the nomination committee shall recommend names of prospective candidates for consideration for directorship positions. The board shall appoint directors subject to ratification by the relevant industry regulators where applicable." Again, this provision contradicts the provision of section 249 of CAMA[862] which makes the appointment of directors an exclusive preserve of members at an Annual General Meeting only in exceptional circumstances like death or resignation does CAMA permits the Board to fill such vacancies. However, such appointments will be subject to ratification at the next Annual General Meeting.

5.3.4 Decision Making by the Board

The code provides that 'where a majority of independent non-executive director's dissent on an issue decided by the board, such decision can only be valid where at least 75% of the full board (without preference to quorum) vote in favour of such a decision." This section of the code is in direct conflict to CAMA which provides a majority of votes shall decide issues arising from any meeting bordering on decisions

[861] Section 8.13.5 of FRCN code

[862]section 248 of CAMA allows for board of directors to give power to appoint new directors to fill any casual vacancy arising out of death, resignation, retirement or removal, and such appointments are subject to approval by the general meeting at the next annual general meeting; Section 249 [1][2] of CAMA. (1) The board of directors shall have power to appoint new directors to fill any casual vacancy arising out of death, resignation, retirement or removal. (2) Where a casual vacancy is filled by the directors, the person may be approved by the general meeting at the next annual general meeting, and if not so approved, he shall forthwith cease to be a director.

affecting the company, and where there is a deadlock, the chairman shall have a second vote.[863]

5.3.5 Relationship with shareholder

The NCCG provides that a notice of the general meeting shall be given to shareholders at least twenty-one days [21] from the date on which the meeting would be held. This provision of the code is at variance with section 217 [1] of CAMA which provides that twenty-one days [21] notice from the date on which the notice was sent out and that a general meeting of a company shall notwithstanding that it is called by a shorter notice than that specified in subsection (1) of this section, be deemed to have been duly called if it is so agreed.[864] The provision of the code, however, contradicts the provision of CAMA relating to shorter notice as the code did not make provision for shorter notices only allow for a strict twenty-one days' notice. This has called for the elimination of the principle of reduction of the number of days.

5.4 Conclusion.

In this chapter, the argument has been that there are similarities and differences in the codes of corporate governance and practices among Nigeria, the United Kingdom, the United States of America, and OECD countries. To understand the similarities and differences, the examination of the historical facts and existing pieces of evidence from the scholars' perspective is imperative in chapter 1. This is not sufficient for critical analysis of the focus of the thesis, which is the recommendation of appropriate ways of practising corporate governance based on lessons from developed countries

[863]Section 263 [2][9] of CAMA 2004.
[864] Section 217 [2] of CAMA 2004.

and organisation (OECD). Hence, the need to situate the past and present situations of corporate governance practice within the context of assumptions and propositions of corporate governance-related models and theories. The outcomes of the analysis increased the understanding of the concept and the markets and helped in the examination of the legal and regulatory environment of the case (Nigeria). This chapter eventually indicates that Nigeria needs to re-examine its codes by eliminating ineffective corporate governance practices. This is necessary for its quest of increasing Foreign Direct Investment and investors' confidence in the economy.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

Corporate governance is generally premised on three pillars, namely transparency, accountability, and fairness.[865] The central thesis of this work as established in chapter one is the need for the NCCG[866] to be reviewed in line with global practices, which in addition to the aforementioned pillars, involves a set standard of practice in relation to issues such as board composition and remuneration, audits and accountability as well as relations with shareholders.

6.2 Summary

Chapter one established the fact that all reference countries, UK, US, and those represented by the OECD from time to time have had to revise their corporate governance codes to reflect prevailing socio-economic realities as well as strengthen their business environment. It is important to point out that whilst the Nigerian Code was released only recently in 2016, the code has had to be suspended due to the plethora of issues identified with. These issues form part of the main reasons for embarking on this thesis work.

The recent effort commission a review of the NCCG is not out of place, rather it is in keeping with international best practices. Prior to releasing the 2016 code, there was

[865]Ans Kolk (2006) Sustainability, accountability and corporate governance: exploring multinationals' reporting practices, Business Strategy and The Environment Vol 17. P. 1-15 Available at: **https://doi.org/10.1002/bse.511**.

[866] The NCCG is the Nigerian Code of Corporate Governance released in 2016, but currently suspended pending a review.

no codified or generally applicable corporate governance regime. The void created b the absence of a generally applicable national code was to be filled or at least mitigated b the NCCG. However, the issue of multiplicity of codes has not been manifestly solved because the sectorial codes remained applicable even when the NCCG was operational; as the NCCG has not clarified whether the new code will supersede in areas of conflict with the numerous sector-based codes.

The code has also been embroiled in controversy controversies relating to its legality and its impact on the ease of doing business drive of the Nigerian government. Section 51(c) of the Financial Reporting Council of Nigeria (FRCN) Act 2011 mandates the FRCN to set up a "Committee on Corporate Governance", which will be charged with the responsibility of issuing and developing mechanism for periodic assessment of the code, while the FRCN itself is charged with monitoring compliance with the code. However, in releasing the code rather than appointing a committee to do so, the FRCN not only imbued itself with powers it does not possess but also puts the validity of the code in question.

Also, the scope of application has not been adequately defined, it is generally assumed that the code as derived from the FRCN Act applies to all companies in Nigeria or at least to all regulated companies, which include but not limited to companies that file returns with any regulated authority other than Corporate Affairs Commission (CAC) and the Federal Inland Revenue Service (FIRS)[867]. The issue around the applicability of the code to private companies is exemplified by the Federal High Court of Nigeria's ruling in Eko Hotels Limited v. Financial Reporting

[867] Footnote required Search file for ref.

Council of Nigeria[868] where the court declared that "the jurisprudential scope of the Act is restricted to public companies".

The need to avert failures of public and private companies that could impact micro and macroeconomic indices was gleaned as the main reason for the constant amendment and reformation, most importantly in developed markets such as the United Kingdom and the United States of America. Chapter one thus argued that the amendment of CG codes becomes imperative when the changes in social, economic, political, and legal spheres of countries are impacting the usage or practicability of the principles specified in codes of corporate governance. This was largely drawn from a close study of the country in focus (Nigeria) and existing empirical evidence and scholars' views in the fields of corporate governance and law. The thesis argued that a correlation exists between organisational governance and profitability, midwife by a well thought out corporate governance mechanism. The chapter also captured the essence of having a robust set of corporate governance codes in Nigeria in the face of pervasive corporate malfeasance and company collapse, which does not only result in loss of investment[869] but also a loss of confidence in the business environment and the stock market.[870] Consequently, the importance of board structure and composition, the need for appropriate balance and diversity, and the need for transparency and accountability as well as constant communication with stakeholders were all examined as they all play a crucial role in ensuring an excellent sustainable relationship between stakeholders and managers.

[868] 2012 Eko Hotels Limited v. Financial Reporting Council of Nigeria FHC/L/CS/1430/2012.
[869] Yakasai, G. A. (2001). Corporate Governance in a Third World Country with particular reference to Nigeria. Corporate Governance: An International Review, 9(3), 239– 240
[870] Okike, E. N.M., (2007) "Corporate Governance in Nigeria: the status quo" Corporate Governance An international Review Volume 15 Number 2

From the need for the study to the conceptual framework, the study was located within empirical evidences from the Nigerian perspective. The available empirical studies exposed the researcher to areas in Nigeria's corporate governance that needs evaluation and amendment for improved and effective corporate governance practice. This chapter equally presents the categories of people and entities that findings of the thesis would help in their course of advancing corporate governance practice in the country. It is expected that the thesis will contribute to the existing knowledge in corporate governance practices, most importantly, the corporate governance practice and reforms in the emerging economies. The chapter ends with the structure of the thesis, which specifies what each chapter entails. This was done with the aim of assisting the readers in navigating through the thesis seamlessly.

Chapter 2 examined corporate governance from various theoretical perspectives. It was established that a multi-theoretical framework is best suited to a study on corporate governance because a single theory approach will not account for the complex nature of the subject. The chapter examined multiple concepts, models, and theoretical assumptions underlying corporate governance practice with a view to understanding the nature and effectiveness of CG systems and practices.

The nexus of contract, agency, and stakeholder theories were examined considering the aims of the thesis, which is to make recommendations for reforming critical components of the NCCG; more specifically the structure and composition of the board, executive remuneration, disclosure, transparency, shareholders' rights, and interests as well as minority shareholder protection.

The nexus of contract theory views a corporation as a legal hub of various contractual relationships or as an avenue for contracting relations among principals and agents towards mutual benefits. Another principle of the theory is that relationships among

the various stakeholders, shareholders, and directors should be a bundle of contractual activities. Like the nexus of contract theory, the agency theory proposes supports that there should be a contractual link between the principals and the agents. In as much as the principals have less time to manage the resources of the corporation, the principals need to appoint and delegate some decision-making authorities to the agents. The theory has mostly been analysed within the "principal-agent" framework in relation to the outsider model of corporate governance. Another theory examined in the chapter is stakeholder theory, which highlights the need for managers to pay special attention to the interest of the stakeholders such as groups and individuals who could have a direct or indirect impact on the companies' core purpose of existing. These theories help provide a background dissecting two essential pillars of the work, namely shareholders' rights and interests as well as minority shareholder protection.

An analysis of the outsider and insider models was done, and it was discovered that on the one hand, the outsider model is premised on the appropriation of regulations to checkmate managers' activities and advancing the interest of shareholders, most especially minority shareholders. While on the other, the insider model emphasises owners to hold significant stakes, which enable them to monitor, oversee, and control the company within. Concessionary model is equally considered. As a German model, it is reputed for its relationship-based insider approach which enables employees to play more profound roles in the running of the organisation. Based on the discussions, it was established that the outsider model most relevant to the work as it best reflects approaches to CG in Nigeria as well as the reference countries; the UK and the US.

Despite the benefits or contributions of these models and theories to the corporate governance practice, shortcomings are hindering effective corporate governance practice. For instance, nexus of contract theory is preventing principals and agents from seeing corporations beyond economic value capturing. Theory does not prioritise other stakeholders such as shareholders and employees at a lower cadre of businesses. Emphasis is more on satisfying the members of the board, directors, and other principal employees at the expense of the minority shareholders and communities. In contrast, agency theory suggests that agents are most likely not to satisfy their principals' interests. This is on the fact that agents would do everything possible to have their interest protected than the principals, especially when the principals do not oversee operations or activities of the agents using the insider model. This challenge has resulted in the consideration of incentives that would encourage the agents to prioritise principals' interest and setting up an appropriate monitoring system. As agency theory challenges the nexus of contract theory, stakeholder theory also faults agency theory on the basis that businesses need to have broader value creation and ensure that every stakeholder capture from it, not shareholders alone. Since stakeholders are essential in corporate governance practice, efforts were made to pinpoint stakeholders' roles and expectations within the theories. For example, employees who are the critical resources used in value creation are expected to be protected and well catered for within the nexus of contract, stakeholder, and agency theories. However, the prioritisation should not be at the expense of other stakeholders at primary and secondary levels. When the needs of other stakeholders are abandoned for the employees' interest, there is the possibility of having issues that would impact the attainment of financial goals and objectives. On the other hand, the interest of the customers, institutional investors among others,

must not be prioritised at the detriment of the employees' interest. This indicates that agents and principals must ensure a balance in all ramifications.

An in-depth analysis of the challenges militating against effective implementation of the various codes and other challenges was carried out in chapter 3. The issues of weak legal and regulatory frameworks including corruption were discovered to be the main problems impeding businesses and agencies in the effective realisation of good and sustainable corporate governance practice. The evolution of different codes in the concerned jurisdiction (Nigeria) was done. The codes were those in operation at different times in various sectors. Discussion on the evolution of CG in Nigeria started from the forms of enterprise prevailing ownership structure. These include sole proprietorship, partnership, and the formation of a limited liability company registered under CAMA. History shows that both the corporate establishment and administration of businesses on behalf of the shareholders and stakeholders had recorded various high-profile corporate failures and corruption at corporate, business, and functional levels. These failures attracted the attention of the local and international actors, especially regulatory agencies. In addition to the evolution of tracing, specific attention was paid to the historical background of corporate governance in Nigeria. Before 1960, the year Nigeria got her independence, the Anglo-Saxon system of corporate law and regulation was used by the British administration. This system was mostly aligned with the outsider approach to governance. With this position from the British government, Nigeria inherited many corporate laws such as the Companies Ordinance of 1922, which was enacted by the British colonialists, was repealed and replaced by the 1968 Companies Act. The Act served as the principal Company law statute in Nigeria till the end of 1989. Problems such as corruption, inadequacies, and inefficiencies inherent in the main regulatory

framework; the Companies and Allied Matters Act (CAMA) facing effective corporate governance practices in Nigeria were similarly examined. The preceding discussion did not only provide a historical background to the state of CG in Nigeria, but it also presents the current state of affairs with regards to CG codes, compliance levels, and the effect of inadequate and inappropriate CG approach. Also, it further helps to confirm the necessity for an in-depth and robust reform of CG in Nigeria.

Chapter 4 presents a detailed analysis of relevant sections of the Nigerian Code of Corporate Governance (NCCG), with a view to unravelling the key areas where reforms might be needed. In addition, the chapter presents an analysis of CG codes in reference jurisdictions of the UK, US, and OECD, seeking to highlight approaches to CG taken in these jurisdictions. Due to the similarities in the legal and regulatory strategies in Nigeria and the UK, a brief discussion on the evolution of CG in the UK was undertaken to buttress the point that an effective CG approach is a journey with several stops along the way regardless of how advanced an economy might be. Also examined is the internationally acclaimed OECD principles of corporate governance. Cases of corporate failures occasioned by the poor corporate governance practice and weak legal and regulatory framework were examined. The recent Nigerian Code of Corporate Governance 2016 was analysed comparatively with the UK Code of Corporate Governance, alongside the United States system where necessary, with the Organisation for Economic Cooperation and Development principles providing guidance through the analysis. The central focus of the chapter was the discovery of what is applicable in developed nations like that of the UK and the USA with the internationally acclaimed OECD principles of corporate governance. Cases of corporate failures occasioned by the poor corporate governance practice and weak legal and regulatory framework were examined. Before the presentation of the cases,

the researcher first learnt that Nigeria's corporate governance system similar to the United Kingdom and Organisation for Economic Cooperation and Development countries. Nigeria and OECD countries are using a principle-based system, while the United States of America's practice is premised on rules-based. The principle-based approach of developing Nigeria's National Code of Corporate Governance is premised on the fact that the country has lineage with the country. The Enron Corporation case set the tone for the section. However, the emphasis was on the Cadbury case in Nigeria. The case was referenced to depict the enormity of the problem and stakeholders' position on it.

Chapter five presented an analysis of the identified section of the NCCG vis-à-vis the codes in operation in all reference countries. Comparative analysis was mostly employed to understand the case within the Nigerian system in relation to the systems in the United Kingdom, the United States, and the Organisation for Economic Cooperation and Development countries.

The current chapter presents a summary of the whole thesis. The central focus of the chapter is to report the salient findings from the study in line with the arguments and questions posed at the beginning of the study, and offer possible options for amendment and reforms of Nigeria's Code of Corporate Governance and its system.

6.3 Effectiveness of the Nigerian Approach of Mandatory Compliance in Comparison with the United Kingdom's Approach

How effective has the Nigerian approach of mandatory compliance been in comparison to the 'comply or explain' approach in operation in the UK? This is one of the questions that guide the thesis from the outset. It has been argued that for corporate governance principles to be effective, the full force of the law behind them

with stringent penalties should be applied when the law is breached.[871] The United States is an excellent example of a jurisdiction with a strict rule-based approach to corporate governance while the UK has always propagated a predominantly principle-based approach which allows organizations to comply with corporate governance codes voluntarily. In effect, what the NCCG has done in Part J, Section 37.1[872] is to align Nigeria with the United States approach where compliance is made mandatory, and any infraction or violations of the codes attract sanctions, not just against individuals or individuals involved but also the company. The critical appraisal of the country's code indicates that there are contradictions and repetition in Nigeria's code of corporate governance.[873] These were discovered to be the core impediment to the mandatory compliance approach to the use of the code against the 'comply or explain' approach is in use in the United Kingdom. The NAICOM, PENCOM, and CAMA are embedded with the provisions that prevent companies from the mandatory adherence to the code.[874] For instance, on the number of independent directors, the NAICOM is silent on it while PENCOM's provision aligns with the UK code of corporate governance. Despite the alignment, analysis reveals that the provision runs contrary to the provision of Companies and Allied Matters Act [CAMA] under section 246 [1].

[871]Proimos, A. (2005) 'Strengthening corporate governance regulations' Journal of Investment Compliance, 6 (4) 75-84.

[872] Nigerian Code of Corporate Governance Part J, Section 37.1: "*Compliance with the provisions of this code is mandatory. Accordingly, any violations of the provisions of this code will occasion both personal sanction against the person(s) directly involved in the violation, and sanctions against the companies or firms involved in such violations"*

[873]Section 246 [1] the Companies and Allied Matters Act ("CAMA") (Cap. C20, Laws of the Federation of Nigeria 2004 http://www.placng.org/new/laws/C20.pdf accessed on 12/05/17

[874]Atekebo, T., Okolo, O., and Longe, O., (2014) "Corporate Governance Board structures and directors' duties in 33 jurisdictions worldwide" Accessed on http://sskohn.com/wp-content/uploads/2015/09/CG2014-Nigeria.pdf

The analysis also reveals that Nigeria's code is full of a recast of corporate governance provisions in the existing commissions or bodies. On the directors' convergence, CAMA provides for the dispatching, adjourning, and regulating of meetings based on their discretions. The convergence was found to be a repetition of a section of previous codes of the bodies such as PENCOM, SEC, and CBN. In the United Kingdom, the enforcement of the code is voluntary in line with the Comply or Explain system. The comply or explain approach gives companies opportunities for listing and explaining the reasons for not complying with the code. In Nigeria, enforcement is premised on the mandatory principle. In this regard, analysis establishes that most companies are prioritising CAMA instead of code compliance. While the UK code is subtle on the sanction of the erring individuals and corporations, Nigeria's code is strict on it. The unclear provision about which agency should enforce the code is also a clog for the effectiveness of the code.

When it comes to corporate governance, an approach which seeks to rigidly or forcefully extract compliance is not likely to produce an optimal result as such the approach adopted by the FRCN runs contrary to the very idea of codes of corporate governance, which by its nature is regarded as 'soft regulation'[875] or 'soft law'.[876] To that end, while the UK approach seeks to elicit full corporation and participation of the firm in fulfilling the principles of corporate governance and allowing for explanation where deviation from such principles occur, the Nigerian approach seeks to forcefully extract compliance with no wriggle room, where such might be necessary and imposition of sanctions as punishment for non-compliance. The NCCG

[875]Sahlin-Andersson K. (2004) 'Emergent Cross-Sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative'. In: U. Mörth (ed) Soft Law in Governance and Regulation: An Interdisciplinary Analysis. Cheltenham: Edward Elgar

[876]Mörth, U. (ed) (2004) Soft Law in Governance and Regulation: An Interdisciplinary Analysis. Cheltenham: Edward Elgar.

presently assume an unrealistic rule-based one size fits all approach which experience suggests is often ignored or disobeyed hence does not work. On the contrary and the basis of evidence, codes work because they are not rules and more flexible than regulations and or laws but still strong enough indication to investors that corporate governance, transparency, and accountability are essential. Indeed, flexibility is a fundamental virtue of codes the absence of which erodes its benefits as operators and regulators focus more on ticking boxes rather than engaging in more in-depth analysis and application of the underlying principles.

6.4 Protection of Shareholders' Rights and Interests under the Nigerian System

Are shareholders' rights and interests adequately protected under the Nigerian system? The protection of shareholders' rights is the second question that guided the thesis. In some quarters, shareholders are considered an essential element in a corporation and have two fundamental rights- the right to elect directors and the right to sell shares[877], while to others, social interest is paramount.[878] Analysis reveals numerous provisions for the protection of shareholders in the code of corporate governance and under the CAMA. Most of the provisions are similar to the United Kingdom.[879]They are mainly formulated to ensure checks and balances that enhance effective monitoring of management by the shareholders. For instance, both the

[877] Julian Velasco, The Fundamental Rights of the Shareholder, 40 U.C. Davis L. Rev. 407 (2006-2007). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/311

[878] Eric Pichet (2008) Enlightened Shareholder Theory: whose interests should be served by the supporters of Corporate Governance? DOI: 10.22495/cocv8i2c3p3

[879]Para A.2 The UK Corporate Governance Code 2014 https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf accessed on 12/03/17; The National Code of Corporate Governance 2016 Part C section8.12.1; Section 249 [1][2] of CAMA. (1) The board of directors shall have power to appoint new directors to fill any casual vacancy arising out of death, resignation, retirement or removal. (2) Where a casual vacancy is filled by the directors, the person may be approved by the general meeting at the next annual general meeting, and if not so approved, he shall forthwith cease to be a director.

NCCG and CAMA allow the shareholders to be part of the appointment and removal of members of top management staff during the annual general meeting. In most cases, this avenue is expected to help shareholders in stopping managers and directors from perpetrating fraud. As good as this, there are situations where management had their ways during the meeting by inducing the representatives of the shareholders association ahead to prevent them from the critical examination of financial statements and other related information negating the expected openness for a free discussion on all issues on the agenda.[880] Poor shareholders' protection has resulted in Nigeria's poor ranking on fair conduct of shareholders' meetings when compared to other emerging markets in the Middle East and North Africa.[881]

Apart from the right to participate in annual general meeting, shareholders are also equipped with the right to vote on some issues, share profits, propose a resolution, and access to financial statements and annual reports. The essence of these rights is to avert minority interest expropriation and insider dealing capable of impacting the collective interests of the shareholders and leading to corporate failures. Despite these gains, the minority shareholders appear to be the small fry in corporate governance as they are opened continuously to the lent of domination and marginalisation by both the majority shareholders on the one hand and the management on the other. Evidence has shown that minority shareholders have been abused by top management and board. They have been prevented from expressing their views, especially when

[880]Section 21.4 of FRCN code

[881]Oyejide, T. A. and Soyibo, A. (2001). Corporate Governance in Nigeria. Paper Presented at the Conference on Corporate Governance, Accra, Ghana, 29 – 30 January, 2001; Amao, O. &Amaeshi, K. 2008, 'Galvanising Shareholder Activism: A Prerequisite for Effective Corporate Governance and Accountability in Nigeria', Journal of Business Ethics, vol. 82, no. 1, pp. 119-130.

such opinions are contrary to what the management and board want to prevail[882] . Special treatment is often accorded to large shareholders, aggrieved shareholders seldom have recourse, and shareholders who wish to speak at general company meetings are only allowed to speak if they are known to side with the board of directors. Based on these findings, one may surmise that while there are laws that protect shareholders' rights, minority shareholders' rights tend to be frequently violated and not respected.

The legal and regulatory framework of corporate governance in Nigeria, however, shows that we have a system in place for the protection of shareholders' rights, but they are often violated due to the weak monitoring and enforcement procedure in place. As a result, shareholder's rights are often violated. Abuse of law, rule, and regulations by corporations because of their political connections remain significant factors in not being as independent as the law mandates.[883] Above all, despite identifying the rights of minority shareholders, particularly shareholders' right to vote, a right considered as the shareholders' fundamental asset,[884] which gives shareholders a say in some of the most important decisions to be made by the corporation, the code does not have an adequate provision on proxy voting and polling. These two instruments of representation are essential in getting shareholders, particularly minority shareholders, involved in crucial decisions of the company. Proxy voting allows shareholders to protect their interests using their voting rights.

[882]John O. Okpara, (2011) "Corporate governance in a developing economy: barriers, issues, and implications for firms", Corporate Governance: The international journal of business in society, Vol. 11 Issue: 2, pp.184-199

[883]Oyejide, T.A. and Soyibo, A. (2001), ''Corporate governance in Nigeria'', paper presented at the Conference on Corporate Governance, Accra.

[884] Dubois, E (2011) Shareholders' General Meetings and the Role of Proxy Advisors in France and Japan

Kyushu Journal of International Legal Studies, Issue 4, p. 56, 2011

Therefore, analysis suggests that where large shares are concentrated in the hands of institutional shareholders and stronger individuals, the specific oversight roles of the shareholders to contain aggressive and opportunistic management of corporate resources would be dwindling. The decline could be linked to the fact that most businesses in Nigeria combine the chairman and chief executive officer roles.

Both the UK and Nigerian codes promote sufficient contact, communication, and accountability through constructive use of the AGM. The Nigerian code is however strikingly silent on the role of proxies during such meetings. On the other hand, the UK code provides a detailed description of the extent to which a proxy can take part in an AGM. The NCCG places a premium on members being present at AGM to participate in voting. However, there is still a role for dully authorised appointed proxy participation at AGMs. The NCCG needs to incorporate provisions that recognise proxy voting. Proxy voting is a way of fostering greater participation of shareholders who for whatever reason, may not be able to attend an AGM or any such gathering where vital issues affecting the corporation. A proxy like a shareholder is allowed a vote for and against a resolution by a show of hand when duly appointed by a shareholder. The UK code enables a member of the company to appoint a representative as their proxy to exercise all or any of their rights to attend, speak, and vote at a meeting of a company.

On the issue of dialogue/interaction with shareholders, the Nigerian code essentially provides that there be constant and adequate communication between shareholders and the board through whatever means possible in order for the board to understand the views held among shareholders about the company. However, instead of rolling outlaws and codes with threats of sanctions, regulators need to work more with

companies to device better internal mechanisms that allow for better shareholder interaction and more meaningful participation in the company's affairs.

6.5 The Nexus between Nigerian Legal Policy Framework and Global Practices

Based on the peculiarities between the UK and Nigeria, how can Nigeria benefit from the UK experience? From the analysis, it emerged that both the UK and Nigerian code saddle the board with the responsibility to establish an effective system of constant dialogue with shareholders, majority and minority, based on mutual understanding of the objectives of the company and in line with OECD principles Section Two, Part B.[885]The board as a whole is responsible for ensuring that this dialogue with shareholders takes place. On the board composition, the Nigerian code and UK code differ. When NCCG code stipulates a minimum of eight (8) executives, non-executives, and independent non-executive members, the UK code is silent on the number of members that should constitute the board but packed full of details on the process of appointment, which should be a formal, rigorous and transparent procedure for selecting new directors to the board. The code further provides for a board nomination committee, the majority of whom should be independent non-executive directors[886] as well as the responsibilities of the critical actors within the board.

On the remuneration, the Nigerian and UK code connect on the composition of the remuneration committee which should determine the right level of executive and board remuneration. However, different countries have different attitudes to

[885]The National Code of Corporate Governance 2016 Part E section 20.1
[886]Section B.2.1 of the UK code of corporate governance

directorial remuneration, which large multinationals take into account. International comparisons on pay are difficult to make reliably due to inconsistencies in the method of measurement. However, there is consistent evidence that the UK remains amongst the highest payers of CEOs in Europe. A survey carried out by the BIS[887] which found that in the UK, the average total pay of the FTSE 100 Chief Executive Officers for the period from 1998-2010 has risen to 13.6% per year from an average of £1million to £4.2 million, which is far higher than the 1.7% average annual increase in the FTSE 100 index and average remuneration levels for other employees for the same period.[888] Evidence abound that the difficulty of identifying causal effect (such as the lack of alignment between executive pay and company/share performance) responsible for the growth in CEO pay. It has also been established that high performing managers should be rewarded in the form of higher executive remuneration than their inferior performing counterparts.[889] Despite the difficulty in determining the appropriate remuneration, agency theory notes that when managers' wealth is not tied directly to firm value, managers may lack incentives to maximise shareholder interests and ensure good governance.[890] A significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance to reduce poor performance.[891]

[887] BIS is a UK government department known as the Business Innovation and Skills. A department charged with the responsibility of formulating policies in the areas of business regulation and support, corporate governance employment relations and so forth.

[888]Department for Business Innovation and Skills ("BIS"), "Executive remuneration discussion paper" (2011) 11https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31660/11-1287-executive-remuneration-discussion-paper.pdf

[889]Fama, E.F. (1980). Agency problems and the theory of the firm, Journal of Political Economy, 88, 288 – 307

[890] Jensen, M., &Meckling, W. (1976). Theory of the firm: Managerial behavior, agency cost, and ownership structure. Journal of Financial Economics, 3(4), 305–360; Adegbite, E. (2015) 'Good corporate governance in Nigeria : antecedents, propositions and peculiarities.', International business review., 24 (2). pp. 319-330

[891]http://pakacademicsearch.com/pdf-files/ech/519/65-77%20Vol%204,%20No%201%20(2013).pdf

However, unlike the Nigerian code, the UK code goes further to provide for how non-executive directors are to be remunerated, which according to section D.1.3 must reflect the time, commitment, and responsibilities of the role. Furthermore, such remuneration, it is stated, must not include share options or other performance-related elements, and when an exception is to be granted it must be after shareholder approval is secured.

This thesis, therefore, argues that executive remuneration should be rightly based on firm performance because when managers are adequately remunerated, they are motivated to put in their very best to positively influence the business they operate. They become more strategic, innovative, and continuously engage in envisioning, as well as efficient in the management of the scarce resources entrusted to them by the shareholders.[892] In addition, this has the capacity to improve the agent-principal relationship by ensuring that management pays more attention to shareholder interest, thus reducing the constant tension and potential for conflict between both parties. However, the role of the committee to determine remuneration packages that align with the interest of the management with that of the company has been criticised by academics. It has been suggested that aligning management interest with that of the company was not sufficient as the average pay of the remuneration committee members (mainly non-executive members who are executive members elsewhere) has a direct effect on executive pay set in organisations where they are non-executive members, which in turn pushes pay levels up.[893] Some have suggested that the management proposes a new payment arrangement while the Committee reviews them, which is the opposite of what is expected of the committee as provided by the

[892]Sunday OGBEIDE and Babatunde AKANJI 'Executive Remuneration and the Financial Performance of Quoted Firms: The Nigerian Experience' http://www.mer.ase.ro/files/2016-2/14.pdf
[893]Charles O'Reilly III, Brian Main and Greaf Crystal, 'CEO Compensation as Tournament and Social Comparison: A Tale of Two Theories' (1998) 33(2) Admin Sci Quart 257, 271

Code. Others have also criticised the idea of a remuneration committee for being ineffective in their role; they are seen as negotiating pay with the executive rather than reviewing the proposals from the executives.[894]

The UK code is found to be a code that attempts to facilitate the appropriation of people and processes towards sustainable value creation and prudent management that can deliver long-term benefits to the stakeholders and shareholders within the legislative, regulatory framework, and best practice standards. Managers of material and human resources on behalf of principals and shareholders are expected to institutionalise culture, values, and ethics primarily for the protection of capital providers and relevant stakeholders both in private and public companies.[895] Nigeria's code equally follows these paths. Despite the linkage, evidence revealed that abuse of laws, rules, and regulations by companies in Nigeria remains the main problem restricting the effectiveness and efficiency of the provisions in the corporate governance practice.[896]

As Nigeria struggles for the full enforcement of the code, the UK has a subtle provision that enhances compliance. It clearly states that where the board had refused to comply, they must make a definite statement of reasons why it was difficult for them (board) to comply. Compliance is lacking in the Nigerian system; however, analysis indicates that the failure of the directors or managers of the corporations to perform in accordance with investors' expectation remain the most significant challenge to this approach. Analysis suggests that companies that did not comply with

[894]Brain GM Main, Richard Belfied and Katherine Turner, 'Is there a Negotiation Process in UK Remuneration Committees?' (2011) Research Paper Retrieved 21st December 1, 13.http://homepages.ed.ac.uk/mainbg/images/Is%20there%20a%20Negotiation%20Process%20in%20UK%20Remuneration%20Committees%20-%2011-11-2011.pdf

[895]Financial Reporting Council (2016) *The United Kingdom Corporate Governance Code* London: The Financial Reporting Council Limited

[896]Oyejide, T.A. and Soyibo, A. (2001), ''Corporate governance in Nigeria'', A paper presented at the Conference on Corporate Governance, Accra.

provisions of the Code often do a poor job in explaining why they have not complied with it and in situations where an explanation is provided, most of the time it fails to identify specific circumstances that could justify such a deviation from the rule. In the UK system, increased non-executive director representation and the presence of board committees, and CEO duality reduction strengthen board composition and monitoring roles of the institutional investors. In addition, the periodic updates of the UK code through constant committees or commissions when the political and business environment shift, especially the significant decline in economic condition, improves the country's corporate governance practice. For instance, it enhances greater and more effective monitoring by the shareholders, stakeholders, and regulatory agency.

6.6 Enforcement of Code of Corporate Governance and Jurisdictions' Global Rankings

The outcomes of the analysis could be more understood within Nigeria and the United Kingdom's global competitiveness index scores.[897] GCI is released every year by the World Economic Forum, an organisation that conducts an in-depth analysis of socioeconomic and political issues throughout the world. With the yearly GCI report, one can determine the socioeconomic and political statuses of every country. From the average score for 3 years of using analysed code of corporate governance in Nigeria and the United Kingdom, it could be deduced that the UK was better than Nigeria in accountability, protection of minority shareholders' interest, strengthening of auditing and reporting standards, ethical behaviour of firms and ethics and corruption

[897] World Economic Forum (2017) Global Competitiveness Index Dataset http://www3.weforum.org/docs/GCR2017-2018/GCI_Dataset_2007-2017.xlsx accessed on 25/6/2019

6.7 Recommendations

6.7.1 Policy and Managerial Recommendations

In line with the lessons and conclusion drawn from the various sections of the thesis, the following recommendations are proffered for the beneficiaries of the study. The regulatory agencies, legal establishments, businesses, and individuals in Nigeria must implement the recommendations. This will go a long way in addressing the identified challenges in the country's corporate governance system and sustain the favourable provisions towards sustainable corporate governance practice that align with the best global practice.

6.7.2 Options for the Amendment and Reformation of Board Composition and Size

In terms of size[898], an average of 8-9 members on the Board of Directors Is regarded as optimal. This is generally in line with what obtains in the UK and much of the advanced world, and consistent with practice in Australia where 100 of the most prominent companies in the country were found to have an average of 8-9 board members with an optimal level of performance[899].

Since releasing the Cadbury report in 1992, corporate governance reforms in the UK have placed significant emphasis on independent directors as evident in the UK

[898] Section 2.1 (a) – (c) of the Code provides that it applies to all public companies (whether listed or not), all private companies that are holding companies or subsidiaries of public companies, and regulated private companies as defined in section 40.1.14 of the Code. "Regulated private companies" was defined under the Code as those private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission, except such companies with not more than eight (8) employees.

[899] Kang, H., Cheng, M and Gray, S. J. (2007) Corporate Governance and Board Composition: diversity and independence of Australian boards, https://doi.org/10.1111/j.1467-8683.2007.00554.x . Accessed 28/07/20

Corporate Governance Code 2012[900]. Independent board members are people who have no material interests in the company other than their directorship. An independent board of directors is normally made of members who have no material interests in a company. Most companies with such boards are publicly listed. The purpose of independents as part of the board is to have people around who are not influenced by interests in the company. They are there specifically to help a company run honestly and efficiently. Both the UK code and the US Sarbanes-Oxley Act of 2002 encourage the participation of independent members on company boards.

Allowing a greater role for independent directors delivers a number of benefits to the firm. It has been found that particularly from the agency perspective that independent directors play a crucial role in resolving agency problems between managers and shareholders. Their independence is believed to stand them in good stead to carry out better monitoring and exercise better judgement in assessing management performance.

Whilst this thesis advocates greater participation for independent directors, it is important to have necessary safeguards in place to ensure participation by independent directors that are either personally or economically involved with the firm or its management is either completely discouraged or effectively monitored. This is necessary because personally or economically tied independent directors have been found to display less incentive to challenge top management, possibly due to

[900] Hwa-Hsien Hsu, Chloe Yu-Hsuan Wu (2014) Board composition, grey directors and corporate failure in the UKThe British Accounting Review, Volume 46, Issue 3, pp. 215-227

having common interests, which in turn may lead to a conflict of interest with shareholders[901].

If the NCCG 2016 provision is implemented, it will compound problems confronting corporate governance practice in Nigeria because of the dominant family business ownership structure with a single majority. Therefore, under such an ownership pattern, it is impractical to have provisions that prevent family members from serving on the same board or specifying a minimum board size of as much as eight (8), the implication of which is that many companies currently operating in Nigeria will then have to embark on complex restructuring to be in compliance with the provisions of the code. Thus, there is a need for elaboration and clarification on the type of companies to whom the provision of the minimum of 8 directors applies while making exceptions for smaller companies just like what is in practice in the UK where smaller companies are required to have at least two independent non-executive directors. The UK made provision that smaller companies should have at least two independent non-executive directors. This should be visited by the Financial Reporting Council of Nigeria, the Nigeria Stock Exchange Commission, and other stakeholders. The smaller board size has the tendency of improving corporate governance practice.

For these provisions to be effective, that is a requirement for a minimum board size of as much as eight (8) persons, it should only be applicable to public or listed companies that are of a certain size, not all companies operating in the country regardless of their size. One way of achieving this is to adopt the UK approach which does not specify numbers for board membership, just as the code could be made more effective if it were more to elaborate on the process through which directors are to be

[901] Ibid 927

appointed. Alternatively, the code could be made more explicit in stating which type of company this provision applies to, making exceptions for smaller companies just like it is the case with the UK code. The UK code provides that smaller companies should have at least two independent non-executive directors.[902]

6.7.3 Options for the Amendment and Reformation of Board Roles and Remuneration

The Nigerian code could be much improved if it incorporates provisions that clearly define how board members are to emerge and the specific roles they are expected to play in running the company. The provisions of Sections A.1 through to A.4 of the UK code are particularly crucial in spelling out the roles and responsibilities of key actors like the chairman, non-executive directors as well as the board as a whole. Also, the provision on board composition needs to be looked at because as mentioned earlier, it does not appear to have taken the peculiar local business environment, which is dominated by family-owned small and medium-sized companies, into consideration. The code does not make a distinction between large corporations and medium, family-run businesses in stipulating provisions for board composition. Not making such distinctions particularly create problems for smaller organisations. To require such a company to comply with these provisions risk running most of them out of business as they will have to embark on some expensive and impractical, if not impossible re-organisation to be in compliance with provisions of the code. For an effective and efficient board, there is a need to amend the section of the Nigerian Code dealing with board composition and membership. The 8-member board size

[902]B.1.2. UK CODE OF CORPORATE GOVERNANCE 2016 Accessed on 04/09/17 https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf

should be restricted to public or listed companies that are of a specific size, or with a turn over bigger than regular medium to a small organisation can achieve and not all companies operating in the country regardless of their size. One way of achieving this is to adopt the UK approach which does not specify numbers for board membership, just as the code could be made more effective if it were more elaborate on the process through which directors are to be appointed.

Given that the new Nigerian code has accorded the non-executive director role some prominence, it would have been appropriate also to spell out how they are to be remunerated. Perhaps this could be done in line with the UK approach, which, as stated earlier, must reflect the time commitment and responsibilities the role entails. In addition, such remuneration package should not include share options or be performance related. The code allows for exceptions, and in such cases, exceptions must be ratified by shareholders in addition to other conditions attached for when exceptions are granted. Attractive remuneration would no doubt bring greater transparency and clarity to how their contributions are to be compensated. More importantly, there is a need to bring provisions in this section of the Nigerian code in line with the provisions of CAMA, as not doing so makes the operationalisation of the code problematic. Indeed, it must be pointed out that the issue of executive and non-executive remuneration remains a knotty issue, even in the United Kingdom despite several constant attempts at developing a corporate governance system that delivers for all. The provision that seems to allow executive access to excessive remuneration even sometimes at the expense of shareholders and the company itself have not only turned problematic but extremely controversial, as can be seen in recent insolvency cases, the most recent being that of Carillion where executive managed to find reasons to go home with huge remunerations packages while the company tilts

on the brink of collapse. However, while it can be argued that excellent remuneration packages can motivate and help attract talents, the central issue is that of moderation and control. Having employee representatives on the company board in addition to appointing a non-executive director to represent employees, and not just the latter as being suggested in the UK, might go a long way in providing some checks and balances. Such a representation is also an essential point for the Nigerian corporate governance policymakers to note as it would further introduce greater transparency and accountability to the way executive pay is determined.

6.7.4 Options for the Amendment and Reformation of Stakeholders and Shareholders' Interests Protection

The code needs a better framework for protecting the interest and rights of the shareholders. Such protection is necessary for the long term interest and progress of businesses in the country.

Critical to affirming shareholder's rights, the right of shareholders to vote on issues such as electing and removing directors as well as vote on fundamental corporate changes (such as mergers and acquisitions). These rights are however greatly curtailed in Nigeria by the proviso that directors are not bound to obey the directions or instructions of shareholders in a general meeting provided the directors' act in good faith and with due diligence.

Shareholders also have the right to bring court actions to restrain directors from entering into or conducting certain transactions or committing fraud, certain category of shareholders, for instance, those holding 5% or more of voting rights in the company, may circulate counter motion to be voted on thereby potentially stifling the voice of shareholders with lower voting rights. This brings to fore the vulnerability of minority shareholders.

Protecting the fundamental rights of shareholders within the context of checks and balances. Shareholders' protection engenders confidence in the ability of the agents (managers and other employees) in advancing the company's financial and non-financial performance. Apart from this, corporate failures would be averted when the rights to information of the shareholders is guaranteed from the management. As the main risk-takers, the interest of the board and management should be prioritised when it becomes evident that a principal-agent framework needs to be adopted before value could be created and delivered the value to the customers before capturing by the shareholders and stakeholders at all levels.

Whilst the foregoing highlights shareholder rights, it also points out the fact that there are limitations to such rights. More importantly, however, there is a need for the code to better protect minority shareholders from the abusive actions of controlling shareholders.

6.7.5 Options for the Amendment and Reformation of Enforcement Mechanisms

The enforcement mechanism needs to be strengthened to enable shareholders to exercise the powers guaranteed by the various legal and regulatory frameworks. This can be achieved by making the regulators themselves more accountable and subject to some higher authority on a regular basis as this will ensure a high level of public confidence in its regulatory and enforcement activities which is necessary in order to boost the confidence of a member of the public to make reports of suspected breach i.e. by making SEC accountable, it will help in mitigating corruption which may lead to loss of confidence in the regulators, prevent arbitrary abuse of power and ensure

that the interests of justice are met. From the analysis, it is clear that Nigeria needs to device a method that would help her in the effective appropriation of provisions in the code of corporate governance. The monitoring of the companies' compliance could be done considering categories such as small, medium, and large while effecting sanctions. In specific terms, the punishment should be aligned with the size of the businesses and the status of the individuals who violated specific provisions of the code. In addition, the listed companies on the Nigeria Stock Exchange should be mandated to state in their annual reports whether or not they have implemented the codes in all ramifications. In this regard, a monitoring body to assess company disclosures is essential to avert the demerit associated with the UK's Comply and Explain approach. Effective corporate governance could also happen when Nigeria abandon the voluntary compliance approach and clearly stipulating sanctions that applies when erring directors or board have flouted the provisions of the code. There is a need to strengthen the judicial system in order to achieve maximum compliance with the provisions and eliminate corruption from corporations and the regulatory bodies, especially FRCN. The forgery of published financial statements needs to be addressed using a sustainable mechanism such as setting up an investigative committee and auditors for the re-evaluation of accounts submitted by corporations to regulatory and non-regulatory bodies. The contradiction of specific provisions and repetition of provisions from the existing laws or codes need to be revisited.

Concerned stakeholders, most importantly the regulatory bodies such as the Corporate Affairs Commission and Financial Reporting Council of Nigeria need to create a platform where the provisions would be discussed towards mutual agreement on which provision should be retained or expunged. The outcome would be positive on the regulatory framework which will equally enhance compliance. However, these

recommendations will be incomplete without the mention of an overhaul of the current company law in Nigeria CAMA. There are several reasons why there is a need for the overhaul one of which is the question of sustainability of the Act in itself. CAMA which was introduced in the year 1990 is what is still in use in Nigeria, and It has been said to have mirrored the then UK's Companies Act. Many have argued that this Act does not put into consideration of the issues and challenges being faced in Nigeria which has inadvertently hampered its effectiveness. The issues such as corruption, institutional problems and regulatory weaknesses, and many more are more common and identified with Nigeria, which is not the same for the UK where the Act was copied from.

6.8 Contribution of the Study

The significant contribution of this study is the identification of critical areas of the new Nigeria Code of Corporate Governance (NCCG) that clash with the particular provisions in the primary company law of the country, the Company and Allied Matters Act (CAMA). It is a known fact that where a code or regulation runs contrary to the provisions of a law duly enshrined in the constitution, the extant provision of the constitution prevails. This renders the code largely ineffective and raises the need to amend either the NCCG in other to align with the present provisions of CAMA or making the affected provisions supersede the CAMA's sections to enhance corporate governance practice.

Another contribution of the study is the identification of the provisions of the code that need reform in order to bring them in line with international best practices. These provisions affect essential aspects of corporate governance such as the relationship

between the board and shareholders, protection of minority shareholders' interest as well as board remuneration and auditing and accountability. Therefore, the research has some practical implications on the activities of the regulators[903]as well as the regulatory framework itself. The approach of forcing all companies regardless of size and composition to comply with every aspect of the code needs to change, and such a change is bound to affect the power currently wielded by the FRCN as well as how the code is implemented.

The thesis has also revealed that Nigeria does not lack the needed legal and regulatory framework of corporate governance in place for the protection of shareholders' rights and implementation of the code. The main issue remains the absence of the political will and individual readiness to make significant contributions towards the best global practice. The effort of the Financial Reporting Council of Nigeria in providing a harmonised code of corporate governance to the private sector of the economy is a good one and laudable. It has been long for mostly by shareholders and other stakeholders who require greater accountability and transparency from their boards. This process has brought some form of standardisation to corporate governance code in Nigeria as the new code provides for minimum standards to which listed companies are expected to adhere. Moreover, it will help shareholders, stakeholders, minority shareholders, and other stakeholders to have an overall fair idea of what to expect in Nigeria's corporate governance system.

However, the major drawback of the code is its conflict with the provisions of CAMA which is the dominant company legislation in Nigeria. The code in its present form cannot operate to amend or repeal either FRCN Act or any other legislative

[903]The Financial Reporting Council of Nigeria (FRCN) was established by law to oversee and implement the new Nigeria Code of Corporate Governance.

enactment; and where any provisions of the code are inconsistent with the FRCN Act and/or any extant Nigerian Law, same stands the risk of being declared null and void, to the extent of their inconsistency by a law court. Certain provisions of the Code, which are inconsistent with extant legislation on relevant issues, may be difficult to enforce, where there is a conflict between an Act of the National Assembly and a regulation made by a body created pursuant to an Act of the national assembly, the provisions of the Act shall prevail. Unlike in other jurisdictions, the nature of Codes of corporate governance is generally supplementary and should not conflict with extant company legislation.

Notwithstanding its shortcomings, the Private Sector Code has some commendable provisions which will help strengthen governance and ensure accountability, corporate neutrality, and sustainability and improved risk management by the companies to which it applies, but the Code as it is will create certain compliance difficulties and overburden and over-regulated companies.

6.9 Limitations of the Thesis

This thesis is limited to the examination of Nigeria's code of corporate governance. The focus was not on the appraisal of the code of corporate governance in other African countries. The critical examination in terms of comparative analysis is also restricted to the adoption of the United Kingdom, the United States and OECD countries' systems to understand Nigeria's place in the corporate governance practice with a view to establishing a more efficient legal and regulatory framework. The thesis is equally restricted to the Code of Corporate Governance for the private sector; private companies that are holding companies or subsidiaries of public companies;

and regulated private companies as defined in section 40.1.14. The outcomes of the thesis need to be read with caution. This is imperative because of the interpretive research approach employed by the thesis. From the first to the fifth chapter, analyses were done using a personal understanding of the trends and problems of corporate governance practice drawn largely from existing empirical studies, codes, and views.

As at the time of conducting this research, there was no research (either academic or otherwise) done on the newly released NCCG. This meant that there was no academic work against which to benchmark this research. It also means that there was no research work relating to the NCCG from which one could draw analysis and conclusions. Another limitation is that the new code was in a state of constant flux. The code was suspended and unsuspended a few times with some slight changes. However, the version of the code analysed in this work is the one originally released and currently being considered for amendment.

6.10 Conclusion

The thesis has argued that there are legal and regulatory problems impeding the appropriation of some provisions in Nigeria's Code of Corporate Governance and affecting corporate governance practices in the country. From poor accountability, corruption, weak monitoring system, non-adherence to disclosures provisions to low confidence in mangers and top management staff, effective corporate governance practice is being retarded in Nigeria. With the contradiction among the existing laws or codes and repetition among the laws, weak judicial system and corruption in the

judiciary corporate governance practices remains ineffective in the country. These problems could be solved when the concerned stakeholders and corporate operators learn from other markets, especially the United Kingdom. Such lessons should be drawn towards the development of a robust and dynamic approach for a radical reform of the country's corporate governance system. This is imperative because of the link among corporate governance, firm and corporate failures' prevention which has been established in developed markets. The examination of corporate governance practice in other territories has shown that Nigeria needs to take a cue from the United Kingdom, the United States of America and OECD countries to align with international best practices because there are similarities and differences in the corporate governance systems and codes of corporate governance practices. The alignment must be positively on critical areas such as board composition, size, roles and remuneration. The stakeholders and shareholders' interests, and enforcement mechanism should also be protected and strongly considering the provisions and means helping the United Kingdom, and other markets examined practising good corporate governance.

However, the understanding of the similarities and differences in the Nigeria's code within the codes of the United Kingdom with the minimal reference to the United States of America and OECD countries has created the need for consideration of more jurisdictions in the future. These markets could be comparatively examined with other African countries or continents (with the exemption of developed countries). The research approach could also be shifted from the interpretive design to a qualitative approach that involves using interview and Focus Group Discussions, including survey (a quantitative approach). This will help in understanding the attitudes and practices of businesses and regulatory agencies or commissions from the

behavioural perspectives. The outcome would be the generation of robust insights for the better appreciation of corporate governance practice.

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