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Corporate Governance in Nigeria: The Need for a Prescriptive Approach

Mohammed Suleh-Yusuf
Ph.D. Candidate/Researcher, Faculty of Law, Nasarawa State UniversityKeffi, Nigeria
Corresponding Author: Mohammed Suleh-Yusuf

Abstract: *Nigeria's approach to corporate governance and its regulation has taken the United Kingdom's path; as with most of its legal concepts. This approach is based on the self-regulating premise of 'comply or explain' enshrined in the United Kingdoms' Combined Codes of Corporate Governance; a parallel to the prescriptive regime in the United States. This Paper is of the opinion that the regulatory and operating environment in Nigeria is weak and lacks the capacity to effectively enforce a corporate governance regime that is voluntary and self-regulating. Hence, a more prescriptive approach, similar to the Sarbanes-Oxley Act of the United States, will be more suited for Nigeria's regulatory landscape.*

Key Words*: prescriptive, corporate, Code, governance, board, shareholders, self-regulating*

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I. Theories of Corporate Governance and Diverse Approaches to Enforcement

The concept of Corporate Governance has remained a recurring topic in every discourse within the business environment of every nation's economic climate and throughout the global financial system. It has been defined as the 'system by which business corporations are directed or controlled'.[1] It was also defined as a concept concerned with holding the balance between economic and social goals; and between individual and communal goals[2]. The definitions and approaches are not exactly similar or guided by the same theories. Therefore the nature, purpose and management of companies have remained a constant theme with different approaches by scholars with divergent theoretical frameworks.

The first theoretical school supported by most of the economic theories of the company; is grounded in the belief that the driving force and purpose of the company is the shareholder. Therefore the shareholder remains the focal point of corporate governance. RH Coase see a firm (a company) as a supersession of the price mechanism and an alternative method of coordinating production in any economy[3]. He referred to the manager of a company as 'entrepreneur co-coordinator'[4] that oversees assets in an 'organized supersession of wider price mechanism'.[5] He also characterized the shareholder as a person 'who takes the residual and floating income'[6] arising from the management of entrusted assets. We can deduct that Coase's approach to the concept of corporate governance bestows on the manager a controlling power over assets owned by shareholders. Therefore, he manages, governs and directs that company in the singular interest of its owners.

Coase's approach is also supported by Alchian and Demsetz[7]. They see a company as a 'highly specialized surrogate market'[8]. They also referred to a company as a gathering for team production with a 'specialized-monitor'[9]; who has a duty to monitor or 'meter' productivity to ensure and guarantee efficiency. Alchian and Demsetz were of the opinion that since shareholding of a company is diversified, it constitutes a barrier for the full participation of every equity holder in the operations of the company[10]. Therefore, the

1 OECD Principle on Corporate Governance,2004,pg2
2 Adrian Cadbury Report on the Financial Aspects of Corporate Governance,1992,pg1
3 RH Coase, 'The Nature of the Firm',(1937) Economica,Vol.4,No.16 at pg387
4 Ibid atpg388
5 Ibid at pg390
6 Ibid at pg395
7 A.Armen and H.Demsetz,'Production, Costs and Economic Organization',[1972]The American Economic Review,Vol.62,No.5 at pg778
8 Ibid at pg778
9 Ibid at pg778
10 Ibid at pg779

shareholder must transfer his/her decision-making authority to a small group of managers. Noteworthy, they referred to the shareholders as 'residual claimants'[11] to the company's profits.

The above school of thought places the maximization of shareholders' investment at the front row of corporate governance. Yet a company has other interests and stakes to protect and work for. There is no doubt the shareholder carries a huge risk that is only accompanied by the residual claim but the focus on that basis belittles corporate governance. It puts constant pressure on the managers to operate on a short-term basis; 'thus risk-taking increases sharply'[12]. In fact to the investors 'the sources of the profit matter much less than the profit themselves'[13]. Therefore managers continue to satisfy the thirst of shareholders for returns without qualms and no regards to the other stakeholders. Unfortunately, shareholders use stock prices and movement as a thermometer of corporate health. Yet in Enron's case, in the United States, the stock price was $81 in October 2001, by November it was down to 26 cents and the company filed for bankruptcy in December 2001[14].

The collapse of Enron also exposed the danger and risks other stakeholders, unrepresented in the board; face in the event something goes wrong. Though, the shareholders suffered considerably from Enron's collapse; they were not alone. Enron's 27,000 employees in 40 different countries lost their jobs and saw their retirement fund evaporated with stock value[15]. Arthur and Andersen, the Enron auditors, folded up and left the corporate world for good[16]. Likewise JP Morgan Chase and Citigroup, Enron investment bankers, paid $255 million to the Securities and Exchange Commission (SEC) as an out-of-court settlement for their part in Enron's collapse.[17] This case alone illustrates the risk other stakeholders face and is a point in the contention that they deserve a seat in the governance of the companies.

The second school departs from the first school's approach and sets a different parameter for corporate governance. Driver and Thompson looked at a company as an institution beyond just its shareholders[18]. They believed the company has stakeholders that have an interest in its management and governance. Driver and Thompson stated that shareholding 'encompasses a concern with corporate governance and performance but stretches to include social cohesion and inclusiveness…..'[19] Therefore, they believed that there are a number of possible stakeholders in the company 'reflecting societal context in which the firm is seen to exist….'[20] The basis of their conception is that other sectors of the society, other than the shareholders, have a stake in the company. They made reference to the employee who risks his lot because of firm-specific skills that may be jeopardized by corporate failure.[21] They also contended that the 'stakeholder conception broadens the ambit of the firm democracy'[22] which exhibit's the intent and purpose of corporate governance. The reason was that it 'promotes the interest of those traditionally excluded from any say in the organization of the firm'.[23]

Cassidy took the same road. He defined the concept of corporate governance as the:

''….creation and implementation of processes adopted by a properly authorized and constitute board seeking to optimize the return to shareholders whilst satisfying the legitimate expectations of stakeholders who include employees, suppliers and customers as well as members of those communities with whom their business activities interface".[24]

Clearly this definition has illustrated the stakeholder debate. It used the term 'optimize' rather than 'maximize' and referred to the 'legitimate expectations of stakeholders'. Cassidy also stated that the managers of the company must be guided by the need to enhance shareholders' investment through the 'optimization of

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11 Ibid at pg781

12 M.Agiletta and A.Reberioux, *Corporate Governance Adrift: A Critique of Shareholder Value*,(1stEdition,Cheltenham,London,2005)at pg242

13 Ibid at pg242

14 Ibid atpg224

15 Ibid at pg224

16 Ibid at pg224

17 Ibid at pg224

18 C.Driver and G.Thompson,'Corporate Governance and Democracy: The Stakeholder Debate Revisited',[2002]J.M.G,Vol.6,No.2 at pg111

19 Ibid at pg111

20 Ibid at pg111

21 Ibid at pg112

22 Ibid at pg124

23 Ibid at pg124

24 Denis Cassidy, 'Maximizing Shareholder Value: The Risks to Employees, Customers and the Community',(2003) Corp.Gov,Vol.3,Issue 2,pg33

profits'[25] as a means for 'long-term sustainable growth' [26]rather than 'short-term profit maximization'.[27]Cassidy also postured towards a near-practical direction for his conception of corporate governance as a stakeholder engagement. He suggested the development of the stakeholder concept of corporate governance that will encourage the board of companies, their shareholders, the customers, suppliers and communities to come together and seek consensual policies.[28]

Yet, in spite of its superiority over the first school on concept of corporate governance; the second school is not without flaws or criticism. First, the proponents of the school have difficulties in agreeing on the most basic of points on the application and implementation of the approach. By their own admission the "….most pressing problems for shareholders theory (are) to specify in more details other rights and responsibilities that each stakeholder group has and to suggest how the conflicting rights and responsibilities among stakeholders groups can be resolved" remains uncharted and hazy.[29] Though some proponents have made practical suggestion to the stakeholder theory; they lack the natural harmony of the manager-shareholder-asset triangle. Freeman sets out 'stakeholders enabling principle'[30] which states that 'corporations should be managed in the interest of its stakeholders'.[31] Yet it made no provision for the active involvement of the stakeholder. Rather it envisages an assurance that they will not be treated unfairly or as a means to an end. It is noteworthy that shareholders inertia had allowed boards to operate unmonitored and put a test on the possibility of 'no-role' participation by stakeholders. A second problem for the theory is the purpose of either ambiguity or rigidity of classification. If the stakeholders are clearly spelt out it will be exhaustive and exclusive; which might alienate other possible stakeholders. Yet an open-ended classification highlights the ambiguity and leaves everyone a possible stakeholder and no one classified as such. Unfortunately, none of the proponents have given the corporate governance debate a mid-road solution to this debacle

The analysis of the two schools of thoughts in the conception of corporate governance has shown the strength and flaws of each. This Paper believes the stakeholder approach still holds the ace in creating a durable scaffold for the sustenance of the best practice in corporate governance. The Organization for Economic Cooperation and Development (OECD) gave a functional definition of corporate governance and referred to the 'distribution of rights and responsibilities among different participants'[32] and it listed out some of these participants as 'shareholders and other stakeholders'.[33] The Commission on Global Governance aligned with the above approach and made reference to 'conflicting or diverse interests' accommodated in the management of the company. These definitions clearly show the necessity of an all-inclusive governance structure for companies. There is no doubt that the stakeholders approach is the way forward but there is a need for further study to create a practical applicability that will rival the widespread tyranny of the shareholders. Though the German dual-board system attempted a practical response, it still falls short because it only accommodated employees in the supervisory boards. But it can be a signpost for the way forward.

A study in Nigeria has shown a close relationship between firm performance and corporate governance[34]. The study, using eighty-nine firms on the Nigerian Stock Exchange, covered the period between 1996-2004[35].The study paid particular attention to the issues of board independence and their effect on firm performance. The report concluded that a firm that follows international best practices in corporate governance has a high performance level[36]. The study also stated that the policy implications of this finding is that the "country needs to strengthen policies to improve firm-level corporate governance"[37]. A study by Mckinsey and Company (2000) discovered that global investors were willing to pay a significant premium for companies that are well governed.[38] This shows that the environment of a given economy can excite or deflect investors'

25 Ibid at pg35

26 Ibid at pg35

27 Ibid at pg35

28 Ibid at pg35

29 RE Freeman, 'A Stakeholder Theory of the Modern Corporation' in Beauchamp and Bowie(eds),pg75

30 Ibid at pg75

31 Ibid at pg75

32 OECD(2004)op.cit.,pg3

33 Ibid at pg3

34 A.Sanda and Others, 'Board Independence and Firm Financial Performance',(2008) A paper Presented to the Centre for the Study of African Economies,Oxford,at pg21

35 Ibid at pg1

36 Ibid at pg1

37 Ibid at pg21

38 L.Klaper and I Love, 'Corporate Governance, Investor Protection and Performance in Emerging Markets',(2004) J.C.F,10,PG706

attention. A similar study by Harvard University covering the period 1990-1999 has discovered that the best governed S&P 500 Companies outperformed the worst governed by 8.5% per annum[39]. This indicates that individual companies have a tendency to perform better, make higher returns and outperform rivals if they are better governed by their managers. In a most recent report by the Credit Lyonnais Securities Asia (CLSA)[40]; it was concluded using index with corporate governance rankings for 495 firms across 25 emerging markets and 18 sectors. The description statistics presented in the CLSA report shows that companies ranked high on the governance index have better operating performance and higher stock returns.[41] The Report looked at two aspects of company's financial activities to determine or measure its operating performance.[42] They relied on the market valuation of the company and return on assets as measures of the company's operating performance. Likewise the Report cited financial discipline, corporate transparency, board independence, directional accountability, managerial responsibility, fairness to shareholders and its social awareness as the benchmark for measuring the best practices in corporate governance.[43]

There is a criticism of using the linkage between corporate performance and corporate governance to highlight its importance and relevance. The use of share price, progression and growth to determine corporate performance is illusionary and 'short-term'. The stock market places untenable and unnecessary weight on current profits and dividends.[44] The notorious Enron scandal can be a pointer here. The company's shares were selling for as high as $81 when it was hemorrhaging internally and sliding towards a financial coma. Secondly, the whole premise of the measurement of performance was aimed at the agency relationship between the manager and owner; there was no thought left for other stakeholders. A company is a sum of many factors and its performance is also tied to these factors. Therefore it is wrong to measure the company's performance based on shareholder satisfaction. The third criticism is that corporate governance is not restrictive but extensive to the company's financial performance, the best measure of its performance is to look at its long term health report delivered by independent auditors, managerial capacity and performance, profit and returns on investment, optimal gains by employees, communities, suppliers and other stakeholders. The United States Sarbanes-Oxley Act 2002, though a restrictive measure, outlines a broader corporate governance environment.[45] It regulates the activities of auditors, increase accountability and responsibility of directors, empower employers to whistle-blow and aims towards accurate financial reporting and effective corporate transparency.[46] Likewise the UK Combined Code of Corporate Governance[47] intends to hold companies to proper accounting and auditing.[48]Thus we should note that the issue of corporate governance goes beyond a single company's stock performance.

Li and Samsell presented a persuasive argument that the governance environment of a country is an important determinant of its trade flows.[49]Therefore, an effective corporate governance atmosphere enhances the potential of a country's cross border trade engagement. They stated that a company should be mindful of not only its trade partner's country but the governance environment prevailing there.[50] Therefore we cannot overlook the relevance and importance of corporate governance. Broadly speaking, when fully implemented, good corporate governance ensures that large corporations are well-run entities that sustain the confidence of investors and creditors. Likewise the process ensures safeguards against corruption and mismanagement, while promoting fundamental values of a market economy in a democratic society. These are quite critical for the transitional African economies that are struggling to attract Foreign Direct Investments (FDI). In a globalizing world economy, the implementation or otherwise of good corporate governance will increasingly determine the fate of individual companies and entire economies. Consequently, African countries in general and Nigeria in particular cannot ignore the relevance and importance of a good corporate governance regime in the continent and in the country.

39 Ibid at pg706

40 Ibid at pg708

41 Ibid at pg707

42 Ibid at pg708

43 Ibid at pg706

44 N.Dimsdale and M.Prevezer,*Capital Markets and Corporate Governance*,(1st Edition,OUP,Oxford,1994)at pg70

45 LE Ribstein, 'Market Vs Regulatory Response to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002' (2002) 28 J.Corp. L.,1.pg5

46 Ibid at pg5

47 United Kingdom Corporate Governance Code, Financial Reporting Council , September 2012

48 I.Macneil and X.Li, '"Comply or Explain": Market discipline and non-compliance with the Combined Code',(2006) Corp. Gov.,Vol.14,No.5,pg488

49 J.Solomon, *Corporate Governance and Accountability*, (2nd Edition, John Wiley,London,2007)pg49

50 Ibid at pg49

II. Current Regulatory and Statutory Regime for Corporate Governance in Quoted Companies in Nigeria

Nigeria's Company law and regulation has been historically influenced by the United Kingdom; basically as a result of the colonial heritage they share. Therefore Nigerian companies and their shareholders have in principle enjoyed most of the legal rights of their kind as in the dominant Anglo-American economies. The first corporate statute in Nigeria was enacted from a whole scale importation from the United Kingdom. Consequently, since the Companies ordinance of 1912 to the present Companies and Allied Matters Act 1990; the Nigerian system has toed that line.

The post-colonial Nigeria, like many developing countries, adopted an interventionist development strategy that involved restrictions on foreign ownership and an active role for the government in key economic sectors, especially infrastructure, oil and gas. In fact, the government then did not allow private participation in certain areas such as, electricity, telecommunication, portal and telegraphic services etc. Ironically this policy mirrors, though not exactly, the pre-Thatcher British economy. Unfortunately, due to a political culture of corruption, bribery, poorly functioning markets and lack of adequate infrastructure; many managers and directors of such companies have been able to use corporate opportunities and resources for their own personal benefit.

In recent years, international economic pressures have induced Nigeria to adopt a programme of economic liberalization and deregulation. These reforms were intended to generate economic growth, open up a passage for foreign direct investment and contribute to more responsible corporate governance. The Nigerian government made some bold moves. First, it replaced the old Companies Act 1968 with a more modern and 'Nigerianised' Companies and Allied Matters Act 1990. Secondly, the foreign ownership restricting Nigerian Enterprises Promotion Decree of 1974 was repealed and replaced with a business-friendly Nigerian Investment Promotion Council Decree No 16 of 1995. The new Act abolished foreign restrictions in ownership of Nigerian Companies and removed numerous roadblocks. Thirdly the government embarked on commercialization and privatization of most of the companies it has holdings in.

The new liberalization gave rise to new challenges for the Nigerian economy. The influx of foreign management and investments threw a searchlight on the Nigerian corporate governance environment. In spite of a vibrant stock market that proceeded Nigeria's Independence, Nigeria has no formal corporate governance scheme or structure outside its Companies Statute until 2003. Likewise as at 1999 out of the 500,000 registered companies in Nigeria less than 300 are listed on the stock exchange. In 2000, the two major regulators of the affairs of Nigerian companies and the stock market set up a Committee on corporate governance of public companies in Nigeria[51]. The Committee was asked to review the practices of corporate governance in Nigeria and also make recommendation on a code of best practices to be followed by public companies registered in Nigeria. The same Committee was also required to examine practices in other jurisdictions with a view to the adoption of international best practices in corporate governance. The Committee submitted a Report in April 2001 and made recommendations that are meant to focus on the transparency and accountability of the management and boards of public companies. The Committee recommended a UK-style self-regulatory Code of Corporate Governance. The regulators accepted and foisted the Code on all public companies in Nigeria[52].

The mimicking of the UK's Code lead to a failure to deal with corporate governance problems that were peculiar to Nigeria's socio-cultural and political environment. Likewise the imported Code did not address the rapid economic and commercial developments in Nigeria. Though Nigeria's legal system is Anglo-Saxon in nature; it is foolhardily to suggest it has climbed the pedestal attained by the United Kingdom. The Companies and Allied matters Act 1990 gives the required backbone to corporate governance. The Nigerian Code of Corporate Governance for Public Companies 2014[53] (first version was in 2003) allows public companies to self-regulate themselves in conjunction with other statutory prescriptions. Though it is worthy to note that there are other sector specific codes like the Code of Corporate Governance for Banks[54], Code of Corporate Governance for the Insurance Industry[55] and the Code of Corporate Governance for the Telecommunications Industry[56]. More importantly an agency of the Nigerian government, the Financial Reporting Council, formulated a National Code of Corporate Governance as a replacement of all the Sectoral codes; but it has been battling to get acceptability and compliance from all the sectors.

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[51]The Committee was Chaired by Atedo Peterside, a key player in Nigeria's fluid Private Sector; who left the Board of Stanbic IBTC Bank Nigeria in 2016

[52]Named the Code of Corporate Governance for Public Companies in Nigeria 2003 (later reviewed in 2014)

[53] The 2014 version was after the work of a Committee chaired by AB Mahmud reviewed the 2003 Code

[54] The Code is being managed by the Central Bank of Nigeria , the main Regulator of Banks in Nigeria

[55] The Code is being managed by the National Insurance Commission, the main Regulator of the Insurance Industry in Nigeria

[56] The Code is being managed by the Nigerian Communication Commission, the main Regulator of the Telecommunication Industry in Nigeria

The main legal framework for corporate governance in Nigeria is the Companies and Allied Matters Act 1990 (hereinafter referred to as CAMA 1990). The Act is divided into seventeen parts, with 696 sections and cuts across various aspects of company registration, regulation and management. It replaced the repealed Companies Act 1968; which was tailored towards the United Kingdom's legislation. In spite of claims of 'Nigerianisation', CAMA 1990 is still British in outlook, arrangements, provisions and principles. The above assertion can be discerned from the almost identical similarities between some parts of the UK Companies Act 2006 and CAMA 1990.Section 8(1) of CAMA 1990 and Section 1060 of UK Companies Act 2006 respectively provide for a registrar of companies, who serves as a regulator in the administration of companies. Though there are differences on appointment and powers; there is a complete unity of duties and functions. A second illustration can be found in Sections 211-243 and Sections 301-359 of CAMA 1990 and UK Companies Act 2006 respectively. They both provide similar provisions for company meetings, their types and resolutions. Importantly, this illustration can be supported by Section 79 of CAMA 1990 and Section 113 of UK Companies Act 2006; on the definitions and qualities of members of a company.

CAMA 1990 was promulgated by a military decree in 1990 to serve as an energizer of Nigeria's liberalization and deregulation. Thus, there was a deliberate attempt to make a legislation that will make the country attractive to investors. It has provisions on protection of minority shareholders; Section 299-330 of CAMA 1990 enshrined the rule in *Foss V Harbottle*[57] into Nigerian company realm. It also made provisions for audit committees, financial statements, annual returns, dividends and director's remuneration. There is no doubt that CAMA 1990 intended to cover all aspects of companies' regulation and management. The Act classified companies into private and public; but it has no provisions for classifying them on their stock market status; unlike UK Companies Act 2006 which classified them into Quoted or Unquoted. Likewise CAMA 1990 has a similar provision to sections 171-177 of UK Companies Act 2006 on director's fiduciary duties. CAMA 1990 in Section 279 incorporated the common law principle into a statute.

CAMA 1990 specifies that all companies shall appoint at their Annual General Meeting (AGM) auditor(s) to audit the financial statements of the company and hold such office until the next AGM. It also states that where no auditor are appointed or reappointed, the law empowers the directors to appoint a person to fill the vacancy. The Act also provides the procedure for reappointment of auditors without a resolution being passed at the AGM. To ensure the independence of the auditors, CAMA 1990 prohibits any other officer or servant of the company from being an auditor, likewise a partner or employee of any officer of the company or any person that offers consultancy services to it. The auditors are expected to form an opinion as to whether the company kept proper accounting records or proper returns that is adequate for their audit. The auditor is also expected to tell whether the company's balance sheet and profit and loss accounts are in agreement with the accounting records and returns.CAMA 1990 requires an auditor to make a report to the shareholders on the account examined by him. The Act also requires that the auditor's report be counter signed by a lawyer. In the case of a publicly listed company, apart from auditor's report, a committee comprising of equal number of directors and representatives of shareholders shall examine the auditor's report and make recommendations to the AGM as it deems fit. Furthermore, CAMA 1990 requires that the financial statement prepared by each company should conform with the accounting standard laid down by the statements of accounting standards issued from time to time by the Nigerian Accounting Standards Board; provided such standard are not in conflict with its provisions.

Section 1 of CAMA 1990 makes provision for the establishment of the Corporate Affairs Commission (CAC) and charges it with the responsibility of overseeing the 'regulation and supervision of the formation, incorporation, registration, management and winding up of the companies'. This provision is important because it bestows on the CAC all the regulatory powers in companies' administration and the office of Registrar-General was created as the head of the CAC. The Registrar-General monitors compliance with the requirements of the Act and enforce specified penalties. In Section 7(1), the CAC is also charged with the responsibility to 'arrange or conduct an investigation into the affairs of any company where the interest of the shareholders and the public so demands'.

Whilst CAMA 1990 appears to be quite comprehensive, the mechanisms for enforcement and compliance are very weak and ineffective. The Report on the Observance of Standards and Codes (ROSC) Nigeria, conducted in 2004 by a team from the World Bank arrived at a similar conclusion. The ROSC (2004) came to the conclusion that the CAC lacks the capacity to effectively fulfill its monitoring functions. They stated that in practice, the role of the CAC has remained 'perfunctory and ineffective'[58]. They also stated that some companies and even auditors do get away with flouting CAMA 1990. Thus, despite a requirement for companies to file a copy of their audited financial statements and director's report with the CAC, this is often not the case. In spite of the comprehensiveness of the Act, the CAC must be alive to give it life. ROSC 2004

[57](1843) 67 ER 189

[58] Report on the Observance of Standards and Codes (World Bank, 2004) pg 11

stated that 'there are sufficient weaknesses in the enforcement mechanism which is accentuated by a degree of corruption and poor record keeping by the Commission'[59]. If the CAC is to fulfill its role of adequately promoting good corporate governance, its monitoring role needs to be strengthened and its institutional structure cleansed and revitalized.

The second problem that CAMA 1990 faces is that of time. Due to passage of time some of its provisions have been overrun by the growth and development of the country. A good illustration is the issue of fines and penalties for flouting the provisions of the Act. The penalty in relation to defective financial statements for companies is a fine of 100 Nigerian Naira (equivalent to about Thirty Cents in United States Dollars). A second example is in Section 333 which provides that where an officer neglects or refuses to keep proper financial records of a company or refuses to disclose the true financial health of the company as required by Section 331; such person is guilty of an offence punishable with imprisonment not exceeding six month or a fine of 500 Nigerian Naira (which is equivalent to about One and a half United States Dollars). This is an indication of the danger any prescription law will face after twenty seven years of operation, without amendment or review. The two illustrations are symptomatic of other provisions on fines and penalties. The issue of digitalization of companies operations and other electronic developments has not been captured by CAMA 1990. Therefore the application of the Act is hindered and hampered by its static position.

Certainly, CAMA 1990 is more than just a mirror or reflection of the UK Companies legislation; the provision of the Act with regards to establishment of audit committees by all listed companies places Nigeria ahead of the UK in this regard. Before the Cadbury Committee in the UK was established in 1991, it had been incorporated in the Statute that all public companies in Nigeria should have audit Committees. CAMA 1990 also requires independent examination of company books by auditors; this is a way of enhancing confidence in corporate annual reports. Section 368(3) also makes a provision for the company or shareholder to sue auditors for negligence in the case of loss or damage. The provision of CAMA 1990 on audit and audit committees is similar to Part 16 of the UK Companies Act 2006. Likewise, it is comparatively similar to section 204 of the United States Sarbanes-Oxley Act 2002, which provides for audit reports presented to audit committee and Section 301 of the same Act on Public Companies Audit Committee. Therefore CAMA 1990 is not completely defective as a legislation but only suffers the injuries caused by growth without improvement. The inertia of the regulators can be changed by a more strengthened Companies Statute. Likewise a more 'modern' and time-conscious amendment of fines and penalties can help deter possible defaulters of its provisions.

The Nigerian Code of Corporate Governance for Public Companies 2014 (hereinafter referred to as the Nigerian Code) was formulated to make provisions for the best practices to be followed by Publicly Quoted companies, companies seeking funds through the Capital Market and companies classified as Public Companies by CAMA 1990. The Nigerian Code is also intended to determine the direction of the company, supervision of executive actions, the transparency and accountability in governance of companies; within the regulatory framework and the market. The Nigerian Code is a replica or an attempted reflection of the United Kingdom's Combined Codes on Corporate Governance of 1992, 2008 and 2012 (the subsisting version). Noteworthy, the Nigerian Code seems tailored exactly into the UK's Code description in both style and substance. In Part A the Nigerian Code highlighted its applicability to publicly quoted companies, companies seeking funds from the Capital Market and all companies considered public companies under CAMA 1990. In Part B the Code dealt with board of directors and their responsibilities in Section B2 and stated that the position of the Chairman and that of the Chief-Executive Officer 'should ideally be separated and held by different persons'[60]. This position is similar to the UK Combined Code 2012', which also stated in A.2.1 that the two portions should not be exercised by the same person. In the same part, the responsibilities of the Board were specified to include the responsibility for the 'formulation of policies and overseeing the management and conduct of the business[61]. In Section 3.1 of the Nigerian Code, the Board was enjoined to ensure integrity of financial reports, enshrine ethical standards and ensure compliance with laws of Nigeria.

The Nigerian Code also made provisions for non-executive directors and toed the UK line in trying to cage in executive remuneration[62]. It stated that the remuneration of executive directors should be fixed by the Board and not in shareholders meetings. It went further to state that companies should have remuneration committees, wholly or mainly composed of non-executive/ independent directors and chaired by a non-executive director. The remuneration committee is to recommend the remuneration of executive directors. This position clearly mirrors the status-quo under the UK Combined Code 2012, which stated in D.2.1 that such committee should be established and have at least three and in the case of smaller companies, two independent non-executive directors. The UK Combined Code 2012 also empowered the committee to set the remuneration for all executive directors and the chairman of the Board. The difference is that the UK Combined Code

[59] Ibid at pg22
[60] See Section 5.3.1 of the Nigerian Code
[61] See Section 3.1 of UK Combined Code 2012
[62] See Section 14.1 of the Nigerian Code

2012went further to ask the Committee in Section D.2.2 to also recommend and monitor the level and structure of remuneration for senior management.

Section 30 the Nigerian Code states that the Board should ensure that an objective and professional relationship is maintained with the auditors. In another subsection it tasks the directors to report on the effectiveness of the company's system of internal control in the annual report. The directors should also report that the business is a going concern, with supporting assumptions or qualifications, as necessary in compliance with the Companies and Allied Matters Act (CAMA) 1990. In Part D, the Code looked at shareholders' right and privileges. It provides that the company acting through the directors, should ensure that shareholders'' statutory and general rights are protected at all times. It asks the Board to ensure that all shareholders are treated equally and that no shareholder (however large, institutional or otherwise, vocal or passive) should be given preferential treatment or superior access to information.

In Part E, the Nigerian Code looked at the Audit Committee. It states that companies should establish an audit committee with the key objective of raising standards of corporate governance. It also added that audit committee should be comprised of strong independent persons. This position is similar to C.1.1 of the UK Combined Code 2012. The Nigerian Code also provided that the majority non-executives serving on the committee should be independent of the company. In C.14, the Code stated that the terms of the audit committee should be in line with Section 359(6) a-e of CAMA 1990. This is unlike the UK Combined Code 2006 which did not transfer that role to a statute; but rather made an elaborate list of terms for the audit Committee. The Nigerian Code enjoins the audit committee to review the financial reporting process, the system of internal control and management of financial risks. The Committee should also review the audit process and monitor the company's governance compliance with laws and regulations. It is noteworthy that in its schedule, the Nigerian Code, in spite of its clear surrender to statutory provisions; inserted a specimen term of reference for an audit committee, though clearly marked 'For guidance only'.

The Nigerian Code can be criticized from three dimensions. First, it was formulated without a foundation and built on a borrowed ideology and corporate standard. Its 'mothers', the UK Combined Codes, were greatly enriched by reports of committee populated by experts. Thus it has gained immensely from these and inputs from numerous but selectively formed committees over the years. A good illustration is the unarguable influence the Higg's Report[63] had on the 2003 version of the Combined Code. The Nigerian adventure was that of a singular committee formed to find and recommend a code that 'follows international best practices in corporate governance'. Therefore, the committee rather than report on a specific aspect of corporate governance as a foundation; went for a wholesome importation of a 'foreign' code. The Nigerian corporate governance world is a virgin territory and requires a nuts and bolts approach rather than such copying and imitation. The Committee that fathered the Nigerian Code also failed to take into account different and divergent stakeholders. The list of contributors in schedule 3 of the Code is restrictive, scanty and unrepresented. The contributors comprised three auditing firms, three law firms, four publicly owned companies, three professional institutes, four individuals and one shareholders Association.

The Second criticism is that of enforcement and implementation. The UK Combined Code 2012 stated that it is not a rigid set of rules but rather a guide to the components of good board practice; distilled from consultation[64]. Likewise, the Combined Code harped on the 'comply or explain' approach to its implementation and enforcement. This approach has been in existence since its inception in 1992. This principle has always been at the bedrock of the acclaimed flexibility of the Combined Codes. The Nigerian Code has no such principle and seems oblivious of the need for a similar mechanism to aid its existence. The Nigerian Code stated that while it expects 'voluntary compliance' and will encourage it; appropriate sanctions will be applied where necessary and applicable. It then stated that 'the Code is not intended as a rigid set of rules'[65] and placed the 'responsibility of ensuring compliance with or observance of the principles'[66] of the Code on the Board of Directors. But how will you determine compliance? How will you mete out sanctions? The Code stated that the Securities and Exchange Commission (SEC) of Nigeria and the Corporate Affairs Commission (CAC), the two main regulators of public companies; should give due consideration to the compliance or otherwise of the provisions of the code. This consideration is expected when 'treating issues concerning these companies brought before them'[67]. The Code seems unaware of the methods and strategy adopted by its surrogate mothers. It went further to state that 'all other regulatory and self-regulatory organizations'[68] should try and ensure that they incorporate relevant aspects of the Code in their rules and regulations. Unlike the UK Combined Code's

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[63]A Committee set up by the UK Government to Review the Role and Effectiveness on Non-Executive Directors chaired by Derek Higgs and it submitted its Report in January 2003

[64] Preface to the Combined Code

[65]See Section 1.3 (a) of the Nigerian Code

[66] See Section 1.3 (b) of the Nigerian Code

[67] Introduction to the Nigerian Code

[68] ibid

reliance on shareholders to discipline serial non-compliance; the Nigerian Code made no such reference. Even if it did, the passiveness of Nigeria's shareholders and their dispersal could have been an impediment. Another way the combined Code ensures compliance is through the listing Rules of the London Stock Exchange. The Rules in paragraph 9.8.6 R states that a listed company must incorporate in its annual report a statement of how it had applied the main principles set out in Section 1 of the Combined Code. This is to enable shareholders evaluate how the principles have been applied. Likewise it must include a statement as to whether the listed company has complied with all provisions or set out those it had not complied with; accompanied by reasons. Unfortunately the Nigerian listing Rules only made allusion to the 'enlistment of good corporate practice'. The2009 banking crises in Nigeria points to the inadequate monitoring and enforcement capacity of the Nigerian Code. Intercontinental Banking Group Nigeria, which claims to be the number five bank in Africa, number three hundred and fifty-five in the world top 500 banks and the second fastest growing bank in the world; had to be rescued from imminent collapse by the Nigerian government. Prior to the rescue, the bank stated that it has' one of the most stable and experienced boards'[69] in Nigeria; which is a clear testimony of the quality of their 'corporate governance policies'. But the giant fell.Inspite of a market capitalisation of about 827 billion Nigerian Naira(equivalent of about 3.5billion pounds[70]) and a profit before tax of 45.63billion Nigerian Naira(equivalent of about 175 million pounds) in 2008;an independent audit by the Central Bank of Nigeria found the bank on the verge of collapse. It is worth noting that the books of the banking group in 2008 were audited by Pricewaterhouse Coopers.

III. Is there a better approach?

Nigeria has implanted a UK-style corporate governance regime that uses both statutory prescription in its companies legislation and a Self-regulatory Code of Corporate Governance. The efficacy of this approach has been tested continuously but two occurrences can capture the essence of a good corporate governance regime and the impact of the path chosen by Nigeria. The first event, preceding the 2003 Code of Corporate Governance, highlights the need for the Code. The second event, came after the 2003 Code of Corporate Governance has been in operation for six years but before the 2014 review; it highlights the inadequacy or ineffectiveness of the code to address corporate governance issues in the country.

The first event concerns Cadbury Nigeria, a public listed company and a subsidiary of the world renowned multinational; Cadbury Schweppes. Concerns were raised particularly because of the company's high profile in the private sector and the domestic economy; it is also a major player on the Nigerian Stock exchange (NSE). The fact that it took the intervention of Cadbury Schweppes, the parent company, to discover the irregularities called to question the capacity of the Nigerian corporate governance environment and its framework. Cadbury has been listed on the NSE since 1976 and is in the top 10 of the 258 quoted companies by market capitalization as of the year 2003. Cadbury Schweppes, until then, had owned 46.3% of the equity of the company with the balance stock held by approximately 51000 individual and institutional shareholders. The Nigerian Cadbury also has 2000 employees and a sales turnover of \$150million in 2003. The company on the 12th December, 2006; released a statement admitting a significant and deliberate overstatement of the company's financial health over a number of years. Though the 'number of years' was between 1997-2003, the impact was only felt in 2006 after the parent company made the discovery; the company made an operating loss of around \$1-2 billion. The same year the Managing Director, Chief operating officer and financial director were removed and a complete overhaul of the company's business model was ordered. Shareholders lost a lot of money, the shares of the company declined from as high as 70 Nigerian Naira (about 36 US Cents) on the 18th of August 2006 to 32 Nigerian Naira (about a 15 US Cents) in December 2006; it was a reduction of about 46%. In figures the shareholders lost 41.3 billion Nigerian Naira (about 120 Million US Dollars) within four months of the discovery of the 'overstatement'. There is either negligence or complicity of the regulators; the Nigerian Stock Exchange, Securities and Exchange Commission and Corporate Affairs Commission jointly endorsed all the annual reports and financial statements that were 'overstated' over a 'number of years'. Ironically, the irregularities were only discovered after Cadbury Schweppes, the parent company, had increased its holding from 46% to 50%. This put to question not only the monitoring capacity of regulators but also the effectiveness of shareholders as checks and monitors of corporate governance and management behaviour.

The Second event occurred six years after the first Nigerian Code and five years before it was reviewed. The Governor of the Central Bank of Nigeria wielded the big stick and sacked the Board and management of five 'big' banks on the 14th of August, 2009. Amongst these banks in Union Bank, the 6th most capitalized Stock on the Nigerian Stock Exchange. The bank saw its shares drop from 42 Nigerian naira (equivalent to about 18 US Cents[71]) to 12.60 Nigerian Naira (less than 10 US Cents) as at 14th August, 2009.

[69] 2008 Annual Report of the Bank
[70] Using the Foreign Exchange Rates in 2009
[71] Based on the Exchange rate of N360/\$1 as at 1st July, 2017

Noteworthy, the company, audited by Akintola Williams Deloitte (one of Nigeria's foremost auditors), declared a profit of 29 billion Nigerian Naira (about 80 Million US Dollars) and stated earnings per share of 214 kobo in 2008. Secondly, Oceanic Bank, the recipient of Bank of the Year award consecutively in 2007 and 2008, was sadly badly managed. Its shares also plummeted within a single financial year. The bank also declared a profit before taxation of about 48 billion Nigerian Naira (about 140 Million US Dollars) and stated earnings per share of 35 kobo.

The Central Bank of Nigeria under a new leadership[72] conducted an examination of the banks and made mind boggling findings. The banks had excessively high level of non-performing loans, which were attributable to 'poor corporate governance practices'. These banks were exposed to certain volatile sectors; the capital market, oil and gas. But they suffered more due to a general weakness in risk management and corporate governance. Fortunately the Nigerian government had intervened and injected 400 billion Nigerian Naira (about 120Million US Dollars) into the five banks as capital and investment; repayable after stabilization and recapitalization. The injection was made through the Asset Management Company of Nigeria (AMCON), a Special Vehicle set up by an Act of Parliament to manage toxic assets of Non-Performing Loans (NPLs) and it is holding assets running into Trillions of Naira currently.

The banking debacle highlighted a larger problem of inaccurate financial reporting, refusal to even symbolically apply the 'toothless' Code of Corporate Governance 2003, the clay feet attitude of regulators, the inertia and silence of shareholders etc. Interestingly, the auditors of Nigerian Companies, particularly the troubled banks, included KPMG auditing Services, Pricewaterhouse Coopers and other international renowned firms. The Financial performance indices on the Nigerian Stock Exchange defy logic. While globally companies are grasping for breath, Nigerian Companies were swimming in a tide of prosperity. In 2008, Forty-five percent of companies listed on the Exchange declared profits and twenty-two percent of companies listed on the Exchange declared profits and twenty-two percent declared dividends for shareholders. Yet the exchange capitalization dropped from 12 trillion Nigerian Naira (about twenty billion British Pounds) in March 2009. While banks like Lehman Brothers, Citibank, Royal bank of Scotland and their likes were lining up for government bailouts; Nigerian banks were advertising their strength all over the global media. The reason why the bank troubles were disturbing is due to the importance of banks to the economy and their status on the Nigerian Stock Exchange. There are five banks in top ten companies on the exchange based on capitalization, six banks on the average top ten trades and Nigerian banks account for more than 60% of the market capitalization.

The two events above have shown how 'big' companies exploit both the absence of a Code and the presence of an ineffective one. Nigeria's approach to corporate has not created the needed framework to ensure the proper management and administration of public companies. This is more pertinent because recent research has shown that the lack of good financial reporting standards along with an ineffective corporate governance system is one of the grounds in explaining the inadequacy of Foreign Direct Investment (FDI) in emerging markets. Therefore if a country intends to reap the full benefits of the global capital market and if they are to attract long term capital; their corporate governance arrangements 'must be credible, well understood across borders and adhere to internationally accepted principles'. The system of corporate governance presiding in any country is determined by a wide range of internal factors such as the state of the economy, the legal system and government policies. Likewise some external influences are important such as capital inflows from other countries, the global economic climate and cross-border institutional investment.

Typically emerging markets tends to adopt the Anglo-Saxon model of corporate governance, despite the fact that such model is based on assumptions of efficient markets and equity financing of companies by strong Institutional Investors. The attempt by Nigeria to toe the same path is the reason why all its regulatory and statutory imperfections are being highlighted by corporate crises and scandals. The self-regulatory approach is based on self-policing with effective regulatory oversight. Thus, it is a critical component of this model that both external and internal oversights are credible. This point to the fact that the benchmark of a credible external oversight is effective monitoring and enforcement by regulators. The importance of monitoring and enforcement in the sphere of corporate governance cannot be over emphasized, particularly where the self-policing fails. The enforcement mechanism reaffirms the value and relevance of compliance by all subscribers to the self-regulation model. A statutorily strengthened and credible enforcement creates a standard for ethical principles against which companies may benchmark legal behaviours and evaluate the possible consequences of non-compliance.

The failure of the self-regulation approach in Nigeria turns the corporate barometer towards regulation. Yet Nigeria cannot afford the Commando-style ambush of Sarbanes-Oxley Act 2002 and seems unprepared for the costly compliance obligations it requires. The poor regulatory regime and the inadequate monitoring capacity of regulators makes it imperative for Nigeria to create a system that 'requires' rather than 'suggests'

[72] Sanusi Lamido Sanusi , a Risk manager, was appointed in 2009 and left in controversial circumstances in 2014

compliance. There is a temptation to recommend a ’renovation’ of the toothless Nigerian Code of Corporate Governance by importing the UK ’comply or explain’ principle. But Nigeria lacks the shareholders’ awareness that drives that principle. Therefore a solution must be in between the dominant Anglo-American models. The Nigerian Code seems good enough but ineffective because it lacks not just the bite but even the teeth.

The inadequacy of Nigeria’s regulatory regime can be cured by reform but Nigeria’s approach to corporate governance must change. The Regulators must give the Code an enforcement capacity. The Nigerian National Assembly should pass a Uniform Corporate Governance Act which will be based on the present code but expanded to meet up the suggested provisions of the OECD revised set of principles on corporate governance 2004 and the Commonwealth Principles on Corporate Governance 2002. The new legislated code will complement the Companies and Allied matters Act 1990 and make provisions on board composition, financial reporting, auditing, director’s interest, effective and stronger compliance criteria. Certainly, the legislation will not solve the entire identified problems but it will set the needed impetus to drive other reforms and changes. The failure of the self-regulatory approach in Nigeria is not an indictment of the model but rather an indication of the lack of preparation of Nigeria to such an approach. The weakness of the regulatory mechanism makes it difficult to have an unmonitored system that either lacks a proper mechanism for enforcement or a strengthened framework for regulation.

The Implant of a foreign model will always come with hiccups when adapting to local situation. Therefore the new Nigerian code should only view the OECD and Commonwealth principles as representing ‘a lowest common denominator’ of good corporate governance practice. A synergy of the principles and the present self-regulating Code will create the needed equality of treatment of shareholders, transparency and honest disclosures, good corporate reporting and auditing, effective board monitoring etc.

IV. Conclusion

The two dominant models of corporate governance have created a convergence of form across the globe. This means countries are either using the UK self-regulation model or the American-type Regulatory type. Yet not all countries are the same and each nation faces a different challenge from the other. But we cannot ignore the pedigree of the two models and how they were molded by the developed nature of the United States and United Kingdom economies. Therefore every nation wishing such a model on its environment must also take into cognizance its own frailties and inadequacies. The Nigerian ‘experimentation’ with the Self-regulation model has shown how frail and inadequate its regulatory and statutory mechanisms are. In spite of an Anglo-Saxon legal orientation; the Nigerian system was unable to cope with a transplant of a vital organ of corporate governance from its colonial ancestors. Rather evidence has shown as pointed out in this Paper, that due to passiveness of regulators, inertia of shareholders and ineffectiveness of a self-regulating Code; the system in Nigeria has been unresponsive. The ‘big’ companies are quite willing to act contrary to a code that has no enforcement mechanism before an uninspiring monitoring audience of inefficient regulators. Thus, the UK system has failed in Nigeria and a new approach seems reasonable and necessary.

Countries with weak institutional frameworks and ineffective enforcement mechanisms need a strong legislative framework to deter defaulters rather than persuade them. Therefore a code that ’suggests’ compliance may not have any effect. But a legislation will require, expect and enforce compliance; a language that will not only deter but ’encourage’ complete compliance. There is a temptation to cite the German approach to corporate governance as a middle road compromise to the two dominant models. The German Code of Corporate Governance uses terms such as ’shall’ and ’should’ to imply a ’directive’ or a ’suggestion’. Likewise its Companies Act enforces an obligation to comply. But such a temptation withers away when the realization dawns that emerging markets should have models that fit their systems rather than reflects just their aspirations.Nigeria should have a regulatory approach to corporate governance to fit the system in the country. The nature of the Nigerian economy, the behaviour of companies and the passiveness of regulators require a stronger response. Therefore instead of a self-regulating Code of Corporate governance; there should be an Act of the parliament with the full weight of the law. Unlike the Sarbanes-Oxley Act, the Nigerian Code should only create a framework and empower regulators. It should avoid ‘over prescription’ and take into cognizance matters of contracts and the vagaries of the market. Certainly the new approach will increase cost of compliance; but it is still cheaper than cost of corporate collapses.

Recent corporate crises in Nigeria are signs of the need for a new direction for corporate governance. In all the instances cited in this Paper there was never a time the regulators discovered ‘cooked’ financial statements. In Cadbury scandal, the parent company found out the bad corporate practices of its Nigerian subsidiary and its impact on the company’s balance sheet. In the second instance Nigerian banks with high ratings and robust financial statements were only ‘caught’ by a rejuvenated sub sector regulator. Therefore the change in Nigeria’s corporate governance approach is only possible if the regulators wake up to their responsibilities. This Paper is not oblivious of the fact that merely changing from Self-regulatory approach to statutory prescription may not be enough; it must be accompanied by regulatory and statutory reforms.

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