COMPANY LAW REFORM AS A DEVELOPMENTAL TOOL IN NIGERIA: A COMPARATIVE STUDY

(A SUMMARY)

BY

FASANYA WURAOLA PRECIOUS

A 4TH YEAR STUDENT

OF

THE FACULTY OF LAW, UNIVERSITY OF LAGOS,

AKOKA, LAGOS, NIGERIA

DURING HER RESEARCH AS AN INTERNATIONAL JUNIOR RESEARCH ASSOCIATE

IN THE UNIVERSITY OF SUSSEX, BRIGHTON, UNITED KINGDOM

FROM

THE 17TH OF JULY 2016 TO 2ND SEPTEMBER 2016

UNDER THE SUPERVISION OF

DR FEMI AMAO

OF

THE SUSSEX SCHOOL OF LAW,

FREEMAN BUILDING (F28),

UNIVERSITY OF SUSSEX, U.K.

ACKNOWLEGMENT

I wish to express my profound gratitude to the following persons whose inestimable contributions have accounted for the success of this work.

I thank the Almighty God for his grace and mercy. I could not have completed this work without his provision and guidance. He favoured me with good health, intellectual prowess and financial resources that made this project become a reality. May His name be glorified.

I also appreciate the administration of the University of Sussex for this opportunity. I am indeed grateful to Julie Carr, the Director of the International Junior Research Scheme and Georgie Chesman, the International Partnership Officer who took care of me during my stay in the university. You are both amazing.

To my supervisor, Dr Femi Amao, thank you for your invaluable contribution, patience and concern. You were always challenging me to be better. I am ever grateful.

To the Dean of my faculty back in the University of Lagos, Professor Ibidapo-Obe, thank you for the support you gave towards the success of my research, I really appreciate.

Lastly, may I acknowledge my father, Mr Salami Fasanya for his genuine love for me, Daddy, you are my hero. My mother Mrs Titilayo Fasanya for her proactive contributioins, Ademola Adedoyin for his support, care and patience, and Olubukola Lawanson for her concern and support. May I also acknowledge Mr and Mrs Akinmusire,Mr and Mrs Badaru, Omowunmi Ajagbe and all others who have one way or another supported me before or during the scheme. I am ever grateful to you all.

LIST OF CASES

1) Aghenghen v. Waghoreghor (1974) 3 SC 15
2) A.G. v. John Holt 1910, 2 NLR 1
3) Amaya v. Associated Contractors (1990) 6 SC NJ 49A
4) Bamford v. Bamford (1970) Ch. 212
5) BPR Ltd v. Awayewaserere (2002) 33 WRN 138
6) British Asbestos co v. Boyd (1912)Ch. 439
7) Dawodu v. Danmole [1962] 1 WLR 1053
8) Edwards v. Hallowell (1950) 2 all ER 1067
9) Foss v. Harbottle (1843) 2 Ha 461
10) Fulham Football Club Ltd v. Cabra Estates Plc (1992) BCC 863
11) Hogg v. Cramphorn ltd and others (1967)Ch. 254
12) Hutton v. Westcork Railway 1883 Ch. D, 654
13) IGP v. Kamara (1943) 2 WACA 185
14) Lewis v. Bankole (1908) 1NLR 81
15) Maxwell v. Department of Trade and Industry(1974) QB 523
16) Moriarty v. Regent's Garage and Engineering Co. Ltd (1921) 1 K.B. 423
17) Newton v. Birmingham Small Arms Ltd (1906) 2 Ch. 378
18) Okoiko v. Esedalue (1974) 3 SC 15
19) Omisade v Akande (1987)2 NWLR (pt.55), 155
20) O'Neill v. Philips(1999) 1 WLR 1092
21) Parke v. Daily news (1962) 3 WLR 566
22) Pavlides v. Jenson (1956) all ER 518
23) Percival v. Wright(1902) 2 Ch. 421
24) Regal (Hastings) Ltd v. Gulliver (1967) 2 AC 134n
25) Re Alma Skimming Co. (1880)16 Ch. D.413
26) Re City Equitable Fire Insurance Co. (1920) 1 Ch. 407
27) Re Forest of Dean Coal Mining Co. [1879]10 Ch.
28) Re Kingston Cotton Mill Co. (1996) 1 Ch. 6
29) Re London and General Bank (no 21895)
30) Re Smith v. Fawcett Ltd (1942) Ch. 30
31) Re Wels Bach Incandescent Gas Light Co. Ltd (1904) 1 Ch. 87
32) Re Westbourne Galleries (1973) AC 360
33) Salomon v. Salomon [1897] AC 22
34) Scottish Insurance Corp. v. Wilsons and Clyde Coal (1949) AC 462
35) Smith v. Anderson (1880) Ch. D.247
36) Tika-tore press Ltd v. Abina (1973) 12 S.C.(reprint) 67
37) Western Nigerian Finance Corporation v. West Coast Builders Ltd (1971) 1 U.I.L.R.

LIST OF STATUTES

1) Companies and Allied Matters Act 1990

2) Code of Corporate Governance for South Africa 2010

3) English Companies Act 2006

4) National Insurance Commission Code 5)

5) Pension Act Cap 346 Laws of the Federation

6) Pension Commission Code

7) Securities and Exchange Commission Code of Corporate Governance 2010

8) United Kingdom Corporate Governance Code

TABLE OF ABBREVIATION

1)	AC	-	Appeal cases
2)	All ER	-	All England Report
3)	FN	-	Foot Note
4)	KB	-	Kings Bench
5)	NLR	-	Nigerian Law Report
6)	WACA	-	West African Court of Appeal
7)	WLR	-	Western Law Report
8)	SC	-	Supreme Court

ABSTRACT

The main objective of this work is to consider how the company law framework could be utilised as a development tool in the context of developing countries. The research is done from a common law company law perspective. Nigeria is used as case study and the United Kingdom (the origin of common law) as a comparator. Insights were also drawn from other jurisdictions. This research article mainly employs historical, desktop and comparative law methodologies. It explores case law developments, statutory history and reforms, corporate governance innovations and corporate social responsibility. This research concludes that Nigeria is a budding state with its own set of values and identity. This research then postulates that in actualising development through company law, reference should be accorded to the importance of adapting some other jurisdictions policies into the Nigerian framework.

1. INTRODUCTION

Company law is the field of law concerning companies and other business organizations. These include corporations, partnerships, and other associations, which usually carry on some form of economic or charitable activity. It also includes the means of regulating the business market. It is also called law of business associations or corporate law. Law is the bedrock of every society. If there is a defect in the law, the society will not thrive. Companies operations and their regulation are crucial to economic development.

There are different types of business associations; some could be for profit making while others for adding social value. Primarily corporate law governs them. Therefore corporate law drives the economy and the economy affects the overall development of a nation.

Nigerian corporate law has not efficiently functioned rather it is characterized by a high degree of failed business modules, inter and intra firm corruption and different fraudulent misconducts. This leads to the questions:

What does this research article hope to achieve?

It hopes to address the issue of company law reform in Nigeria specifically looking into the issues of CSR, corporate governance innovations, statutory history of the Companies And Allied Matters Act 1900 and case law developments.

What methodologies will the article be using?

It will employ comparative, historical and desktop methodologies. It will use the United Kingdom as a comparator since Nigerian company law is largely modeled after English company law.

2. HISTORICAL DEVELOPMENT OF COMPANY LAW IN NIGERIA

Nigeria is the most populous Black Country in the world with an estimate of about 170 million people. It is influential both in sub-Saharan Africa and in the global economy. Nigeria is made up of about 250 distinct ethnic groups. Each of these has their own distinct culture. Before colonialism, Nigeria was a geographical entity made of these groups living separately but interconnected by marriage, trade and conquest. The idea and practice of law and justice was

centered on the traditional beliefs. For example, in the Yoruba region it was around the concept of "omoluabi" which literally means "of good character"[1].

Company law in Nigeria is largely substantive. Its main features include incorporation of companies and regulations of their conducts, stakeholders' rights, duties and liabilities, corporate social responsibility and many other concepts.

In the description of the history of African or in this case Nigerian company law, adequate reference is not given to the indigenous means of trade and practices of business associations. Indigenous in this context means customary methods of transaction peculiar to Africans as far back as 12th century before the colonial era and Christianization of Africans.

For instance, the modern systems of raising capitals through debentures, loans, interests, and credits; these were all available in indigenous Nigeria and are still available in customary practices today. People who wanted to do business had opportunities to raise capitals through what is called "Owo Ele" i.e. credits and interest, loans and debentures etc. In this case, there was usually an institution of person(s) who is the lender. Sometimes the agreement might include a guarantee by land as in the position of customary pledge as described in the case of Okoiko v Esedalue[2]. There was customary tenancy where occupational right over the land is granted by an overlord in the customary tenant in return for the grantee's recognition of the title of the grantor and payment of customary tribute.[3] These concepts are similar to modern concept of mortgage that is utilized in company practices.

Moreover, the payment of customary tribute could also be compared to the modern concept of taxation. This tribute is used for the administration and betterment of the village or tribe.

Also, in the indigenous Nigeria, some entities had some forms of perpetual succession and geographical dominance. This is similar to perpetual succession as a result of incorporation. It is also noteworthy that most of them even have geographical dominance. E.g., the Ojikutu Pileoro family have been known to be the master meat traders in Eko(Lagos) since about 1700s[4]. In the same vein, everybody knew that the Ijebus were master garri (cassava flakes) traders etc[5].

Furthermore, there was the principle of corporate social responsibility [CSR]. This principle is about the role a company should play in its relationship with its immediate community and environment.[6] Successful traders gave out food and clothes to the less privileged, particularly

---

[1] Interviews conducted during research.
[2] (1974) 3 SC 15
[3] Elias CJN in Aghenghen v. Waghoreghor (1974) 1 SC 1
[4] Interviews conducted for the research
[5] See FN 6
[6] Professor Joseph E.O. Abugu, Principles Of Corporate Law in Nigeria (published 2014) 610

during festive periods. They also held charity parties for these people. Business philosophy was not driven by profit maximization but the need to add value to the society at large.

The above are evidences of rudimentary business organizations. These forms are parallels to the English rudimentary business like the Guilds,[7]the Commenda and Societas.[8]

With the advent of colonialism, there were changes in the normal mode of doing things in all aspects of living. The United Africa Company (UAC), was one of the earliest modern firms that operated in the area that later became Nigeria[9]. It was this firm that received the British concession for control of areas surrounding the Niger River under the charter of the Royal Niger Company in 1886. There were also other large companies. The early companies in Nigeria were British based. By virtue of Colonial statutes enacted between 1876 and 1922, the law applicable to companies in Nigeria at this time was the 'common law, the doctrines of equity, and the statutes of general application in England on the first day of January, 1900' subject to any later relevant statute. The implication of this approach was that the common law concepts such as the concept of the separate and independent legal personality of companies as enunciated in Salomon v. Salomon[10] was received into the Nigeria Company law and has since remained part of the law.[11]. However with continued growth of trade, the colonialist felt it was necessary to promulgate laws to facilitate business activities locally. The first company law in Nigeria was the Companies Ordinance of 1912, which was a local enactment of the Companies (Consolidation) Act 1908 of England; and even the current company law of Nigeria[12]is largely modeled on the U.K.[13] Company Act, 1948.[14] Arguably, what we have now is a complex modernization of our indigenous system. It is quite tenable to state that this system is useful because of the increase and expansion in socio-economic activities.

3. SOURCES OF NIGERIAN COMPANY LAW

There are five sources of Nigerian Law. These are: Customary and Islamic law[15], Received English Law which includes the doctrines of Equity, Common law and Statutes of General

[7] FN 10 Page 46
[8] FN 10 Page 48
[9] Google
[10] [1897] AC 22
[11] Orojo ,Company Law and Practice In Nigeria (1992) page 17
[12] Companies and Allied Matters Act 1990, herein CAMA
[13] Herein means United Kingdom
[14] Guobadia,2000
[15] Lewis vs Bankole (1908) 1 NLR 81 at p. 83. See also Dawodu v.Danmole (1962) 1 WLR 1053

Application[16], Nigerian Local Legislation including Delegated Legislation, Judicial Precedents, Law reports and Textbooks.

3. SOME SPECIFIC ISSUES IN NIGERIAN COMPANY LAW: THE PROBLEMS, REVIEW AND RECOMMENDATIONS

According to the Nigerian Code of Corporate Covernance 2010, it is generally agreed that weak corporate governance has been responsible for some recent corporate failures in Nigeria. It is therefore of paramount importance to pay attention to the corporate sector in order to promote good practices and to align it with international best practices. These are:

3.1. Directors' Duties and Remuneration

As described by section 650 of CAMA, although a director he is an officer of the company, he is not a servant of the company. He could be said to be a trustee,[17]agent, controller of the companies affairs. Provisions accruing to the requisite number of directors,[18] their appointment,[19]share qualification, disqualification and vacation[20],removal[21] are contained in the CAMA or established by the articles and memorandum as vested by CAMA.

3.1.1. Director's duties and its review under Nigerian law.

The primary duty of managers of a company revolves around utilising the resources of the company efficiently with a view to achieving its corporate objectives.[22]These are well embedded in the broad categories of equitable fiduciary duty to act in utmost good faith always in the best interest of the company and a common law duty of care and skill.[23]

The CAMA in other sections like 270,280,291,283 and 284 expatiates more when read together with the Act and judicial case law on the subject.

Under the common law, a director must exercise skill and care in the execution of his duties. In Nigeria, the courts have not clearly the defined to what extent a director would be said to be

[16] A.G. v. John Holt 1910,2 NLR 1 at page 21; IGP v. Kamara (1943) 2 WACA 185
[17] See Jessel M.R. IN RE FOREST OF DEAN COAL MINING CO,(1879) 10 Ch. D 480 at 451-452
[18] Sec 246(1); Re Alma Skimming co (1880) 16 Ch. D 413; British asbestos co v. Boyd [1912] Ch 439.
[19] Sec 247 of CAMA
[20] Sec 257 and 258 of CAMA
[21] Sec 262 of CAMA
[22] See 2003 report of the committee on corporate governance of public companies in Nigeria
[23] The duties are owed to the company itself and not to individual shareholders; see Percival v. Wright [1902] 2 Ch. . 421.; section 279 of CAMA

acting with due care and skill.[24] Re City Equitable Fire Insurance co[25] formulated a three factor rule on this subject. These crafting of directors duties are either very general or framed in terms of prohibitions rather than affirmative statements.

Using U.K. as a comparator, there has been a proposed code that set out the basic principle but leaves room for the common law to develop in the light of but not necessarily limited by those principles. These principles where enunciated by the Company Law Review Steering group for which they put up a code.[26] The Steering group approach and recommendation is very substantial[27] but there would still be scope for some development to make the ideas fully adaptable to Nigerian context as well as the possibility or indeed likelihood of using existing case law to explain its meaning[28].

In Nigeria, the law is fairly comprehensible but given it dense legal crafting, it would appear hardly understandable to a non-lawyer. One of the primary purposes for this recommendation is to bring the law closer to the directors themselves, it would be then more appropriate to give a clearer indication of the same substance of what duty they may owe. Also, these duties should be expressed in a pluralistic tone as opposed to how this report expressed it in singular tone alone.

On the issues of corporate governance debate in Nigeria, Professor Abugu has argued that companies should include the following principles in conflict of interest situations:[29]

> "Directors should promptly disclose any real or potential conflict of interest…A director should abstain from discussions or voting where there is conflict of interest…If any question arises before the board as to the existence of a real or; perceived conflict, the board should by a simple majority determine if a conflict exist…Directors who are aware of a real, potential or perceive the conflict of interest have the responsibility to promptly raise the issue for clarification…Disclosure by a director of a real potential or perceived conflict of interest or a decision by the board as to whether a conflict of interest or a decision by the board as to whether a conflict of interest exist should be recorded in the minutes of the meeting."

---

[24] Section 282 CAMA
[25] [1920] 1 ch 407 at 427-430
[26] Modern company law for a competitive economy: final report volume 2(URN 01/943)-Published July 2001
[27] See the Reform of United Kingdom company law edited by John de lacy published 2006 at page 160
[28] See Modern Company Law for a Competitive Economy: *completing the frame work*,(URN 00/1335)- Published November 200 above n 7 at para 3.12.
[29] Principles of corporate law in Nigeria page 544

These are indeed laudable and when taken together with the Steering group's recommendations should be incorporated into law..

It is the then suggested that the code should set out the principle that directors are fiduciaries and as such are subjected to the long standing equitable rules.

Section 280 of CAMA forbids directors from taking unnecessary gifts. Gifts in this aspect should not be qualified. This paper opines that the word 'necessary' should be removed from the section.

5.1.2. Directors' remuneration and its review under Nigerian law

On the subject of director's remuneration, the formulation of director's remuneration under the Nigerian law lies in section 267 of CAMA. Section 268 does not offer any monitoring of the remuneration package of the managing director. A few but not all embracing statutory restraint are embedded in section 269(1) and (2). Also, where there is a mixture of dispersed and concentrated ownership as in the Nigerian companies, it is not certain that the members in the general meeting will have an effective say on the amount of remuneration.

Another aspect relating to remuneration is the golden goodbye or golden parachute practice. It is the practice of the board giving the departing managing director gratuitous benefits not usually under the terms of compensation even with his poor performance thus increasing agency cost and reducing the profit available to owners.

Professor Abugu's opinion based on Nigerian adaptability is instructive. He states thus:[30]

> "Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose .There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors…
>
> Corporate governance mechanisms in developing economies, Nigeria inclusive are weak particularly in the area of enforcement…Executive directors should not receive the sitting allowances or directors fees paid to non-executive directors….The board should approve the remuneration of each director individually including the managing director taking into consideration the direct relevance of skill and experience to the company at

[30] Principles of corporate law in Nigeria page 543-54

any time. Only non-executive directors should be involved in decisions regarding executive directors' remuneration or compensation, the board should ensure that they are not priced at a discount except with the authorisation of the SEC. Any such deferred compensation should not be exercisable until one year after the expiration of the minimum tenor of directorship. Share options limit should be set in a given financial year and subject to the approval of the general meeting. Compensation for non-executive directors should be fixed by the board and approved by shareholders in general meeting…. The company's remuneration policy and all material benefits and compensation paid to directors should be published in the company's annual report."

In conclusion, it is proposed that laws and codes should be formulated in areas needed to deal with these problematic issues. The wordings of the reform should be understandable with clearer notes of guidance to the ordinary person without specialised knowledge of legal language.

5.2. Nigerian Corporate Social Responsibility Policies: Its Framework and review

The corporate social responsibility[31] refers to the role if any that the modern company should play in its relationship with its immediate community and environment.[32]It's the deliberate inclusion of public interest into corporate decision-making.

Nigeria has abundant natural and human resources with a population of about 170 million. Its economy is largely dependent on its oil sector, which supplies 95% of its revenue. It is the largest oil producer in Africa, the 5th largest within OPEC and the eighth largest in the world. The major multinational companies (MNC) are in the oil and gas sector e.g. Shell, Chevron, etc. Despite her rich natural resources, Nigeria has per capita income of around $390 if not lower now as the value of Naira to dollar further decreases and life expectancy of 52 years, about 82% of its population living below $2 a day and inequality od distribution of wealth index of 43.0 according to world bank GDP and economies data 2015. Nigeria suffers from poor infrastructural development. The education system is underfunded and illiteracy rate is up to 40%. Nigeria has one of the worst healthcare systems in the world.

Noteworthy is the fact that the pressure to be engaged in CSR may not be so much on most Nigerian indigenous firms as none has multinational operations[33] and less than 20% of all registered companies are publicly quoted. Most are privately held, family owned and operate. This is not to say that only the oil and gas companies are needed in enhancing CSR in Nigeria. Indeed even this other companies outside the oil and gas sector have their roles to play in

[31] Herein referred to as CSR
[32] Principles of corporate law in Nigeria, page 611
[33] Although some have branches in neighboring West African countries

enhancing CSR in Nigeria, for example, some banks have engaged in the rehabilitation of infrastructures in the educational sector, donations to charity and sports activities amongst others.

Under the Nigerian company law, directors owe the company and its shareholders and have no responsibility to embark on public duty. The court seems to be following the principle that

> "…that there should be no cakes and ale except to the benefit of the company. Charity has no business to seat at the board of directors qua charity. There is however a kind of charitable dealing which is for the interest of those practicing it, and that extent in my garb charity may seat at the board but no other purposes." [34]

As noted by Amao in his article "... section 49(3) of the Nigerian constitution vests the entire property and control of oils and natural gas in the government of Nigeria to be managed for the benefits of Nigerians… chapter 2 under section 16 (b) and (c) to "control the national economy in such a manner as to secure the maximum welfare freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity" and "to manage and operate the major sector of the economy." It would thus seem that having passed the management of these resources i.e. through exploration and production to the MNCs the government has passed a function of a public nature to them". Therefore corporation in this context are more than a private interests.[35]The point here is that the Nigerian conception of corporation based on U.S. contractarian model is undermining the spirit of the Nigerian constitution.

It is important to note that although indigenous or startup companies that are not publicly quoted are not to be inadequately pressured, they also have a role to play in realizing CSR in Nigeria. Some have even started theirs; they use discount codes and sales promotion to ensure their commodity is equally distributed among the public. Discount codes use is a way in which discount are gotten by using the code gotten from a social person e.g. blogger, celebrity, etc. in agreement with the company. This method of CSR should be highly encouraged, as it has gone a long way in helping the public access goods and services.

It is important to note that a shift toward the E.U. model will not only be beneficial to stakeholders but also to corporations. A shift will also influence government policy decisions and legislations. Government could incentivize companies by reducing their cut from the production since these companies are already indirectly performing governmental duties. Stakeholders such as employees' representation on the board of the corporation could also be introduced as in other European countries like Germany.

---

[34] Hutton v. Westcork Railway [1883] Ch. d, 654;Parke v. Daily news [1962] 3 WLR 566

[35] H.C. 6698/95, Kaadan v. Israel Land Administration 54(1) P.D. 258

The United Nations has not been left behind.it has come up with the UN draft norms on The Responsibility of Transnational Companies and Other Business Enterprises with Regards to Human Rights. This establishes an international framework for mandatory standards of CSR.

It is important to state here that there is currently a bill on CSR before the Nigerian National assembly. It seeks to provide for a comprehensive relief of negatively affected communities and provide for penalty for any breach of CSR. It aims at establishing a supervisory organ that will mandate corporations to spend 3.5% of their profit before tax on CSR. This paper posits that not only is such law not recommendable it is also unnecessary and unduly expensive. Nigeria is a budding economy and to impose such on companies will not only make them flee form the country, it will reduce international investment and undermine corporate philanthropy. Nigeria has should rather consider increasing its breadth of taxation rather than width. Existing laws and their reformed version should be used to enforce CSR.

The president of the Lagos Chambers of Commerce and Industry Chief Solomon Onafowokan in his comment on the proposed bill pointed out correctly that laws are made to be enforced. Some provision of the bill e.g. part 3,5(1) on sanctions and part 5, 7(2 and 3) (2) on shutting down of companies are potentially dangerous and could be potentially unenforceable. Although the mind of the bill is worthy, the existing laws are well capable of ensuring that companies observe and apply CSR in their activities; what we need to do is to identify and rectify the lacunae in those laws in clear unambiguous language and put in place an efficient and impartial judicial forum for determination and resolution of disputes. E.g., amending the Code of Best Practices on Corporate Governance in Nigeria to include other non-shareholder stakeholders' issues.

In conclusion, today corporate social responsibility goes far beyond the old philanthropy of the past –donating money to good cause at the end of a fiscal year – and is instead an all year round responsibility that companies accept… where we judge results not just by inputs but by its outcomes: the difference we make to the world in which we live, and the contribution we make to poverty reduction.[36] It is in this light that this paper is urging a shift to the E.U. progressive model. Although the government is the traditional source of power, the MNCs wield a different kind of power which rivals the power of government, therefore with such power comes equal responsibility.

5.2.2. Use of modern technology

[36] Per Gordon Brown, Counsellor of the Exchequer of the U.K. government

Most developed countries have already made some reforms to their corporate law to accommodate the use of modern technologies and communication avenues. It is proposed that Nigeria follow suit. Shareholders may now communicate with the use of internet; the general meeting could even be held on air. This will allow shareholders more access to information and monitoring activities. This will reduce the cost of shareholders physically attending meeting.

5.3.4. Minority rights and mapping the boundaries to the doctrine of unfair prejudice

The pertinent question here is how we can ensure minority shareholders in small private companies have effective avenues for redress in cases of conflict with the majority owners, and also reduce the length, complexity and costs of litigation under the provision.

Under the provisions of CAMA it appears that all acts of the majority that deprives the company or its shareholders of rights or protection will be ground for action under the unfairly prejudicial, discriminatory and oppressive ground. This calls for judicial reform, as this position will open a floodgate of actions because every shareholder will able to maintain an action against every director, officer or fellow shareholders. Some minority might also be serving as a front for directors or major shareholders for selfish reasons.

In conclusion, it is submitted that the laws and judicial decisions should be reviewed in order to embrace growing developments and circumstances in Nigerian corporate sphere.

5.4. Financial statements and Auditing

In recent times, company failures have been due to mismanagement, manipulation of financial statements and lack of accountability. The Nigerian legal framework is modelled along the old English rules of disclosure, companies are required to keep accounting records.[37]

5.4.1. Auditors' Report and Accountability

Section 359 requires that an auditor's report should be attached to the balance sheet and it should stating whether the financial statement comply with the provisions of CAMA and whether it gives a true and fair view of the company affair in that financial year.[38] In the U.K. auditors of listed companies also have a duty to review the company's compliance with the combined code, and to obtain evidence to support the company's statement in the annual

[37] Section 331 of CAMA
[38] Section 360(2)

report. Also, listed companies are required by the combined code to include a compliance statement[39] in their annual report.

The concept of true and fair view is the standard of accounts preparation in Nigeria. The legal interpretation has always been different and in contrast with the accounting view. In Re London and General Bank (no. 21895) the purpose of the statutory audit was described as securing to shareholders independent and reliable information in relation to the true financial position of the company at the time of the audit.[40]

The accounting view holds that compliance with accepted accounting principles is prima facie evidence that accounts are true and fair. It will be devoid of such only where the statements contain information which is not sufficient in quality and quantity to satisfy the reasonable expectations of the readers to whom they are addressed. By signing the statements prepared by the directors, they are giving assurance to the general public as to the health of the company this view has always been devoid of substance of the true and fair concept but based on form and procedure.[41]

This makes "the view interpretation elusive, anachronistic and unrealistic in terms of contemporary corporate markets".[42] The professional view cannot form the basis of our understanding and stance on the subject as it is stereotyped and designed to protect auditors from their major responsibility which they have been statutorily imputed upon. This paper urges judges and lawyers to give precedence to the legal view in legal interpretation and arbitration.

There should be a codification of the amount of time auditor firms can engage in continuous service to a company. The code of corporate governance in paragraph 33 provides that external audit firms should be changed after ten-year continuous service and may be reappointed after another seven years since their disengagement. This paper opines that this may lead to unnecessary familiarity between the company and the audit firm, which is a brooding ground for joint fraudulent endeavours. Therefore, auditors should not act in that capacity for more than five (5) years.

5.4.2. Audit Committee and their Accountability

[39] Compliance statement is a report by listed companies showing if they have complied with the requirements of the National Code of Corporate Governance and if it did not, the ways in which it failed to do so and reasons as to such.

[40] At page 682 per Lindley, L.J.

[41] Principles of Nigerian Corporate law, page 702

[42] Principles of Nigerian corporate law, page 703

Another device created by CAMA is the audit committee. It was designed to be an instrument for accountability and transparency in public companies. It was thus made mandatory for public companies. Section 359(4) of CAMA provides that the audit committee shall consist of an equal number of directors and representatives of the shareholders. The members are not entitled to remuneration and are subject to re-election annually and in order to ensure adequate representation of the shareholders. This is reinforced by section 30(1) of the code of corporate governance in Nigeria 2011 and other industry-specific codes within their respective sectors. The functions of the audit committee are stated in section 359(6) of CAMA.

Firstly, the Act is silent as of the qualification or experience of audit committee members. The corporate governance code attempts to fill this lacuna in CAMA. NAICOM[43] code provides that it shall be composed of non-executive directors of which at least two of whom shall have requisite knowledge of accounting, financial analysis and financial reporting,[44] they need possess high level of integrity, commitment and discipline[45] and at least one member should have good understanding of the business of insurance.[46] The 2011 SEC in section 30(1) of the code at least one member should be financially literate. Also members should have basic financial literacy, be able to read financial statements.[47]

Furthermore, the training of the members is another problem that leads to waste in view of the fact that shareholder-members are elected annually. It is not beneficial to expend money on members that are not likely to be re-elected. The importance of training of which cannot be overemphasised has been demeaned especially in this present economic meltdown and difficult challenges and accounting policies facing the business sector. In some jurisdictions, tenure is not annual. It is subject to the board reconstituting its committee, and any member who does not perform well can be removed subject to annual performance appraisal. This leads to stability and certainty; it also allows the company to be positive about training them since the expertise would still be used for the good of the company.

Also, there is the problem concerning the provision of CAMA on audit committee officers. A major setback is the appointment of the chairman of the audit committee in respect of other companies other than banks and insurance related companies. It is opined that the board of directors cannot appoint the chairman of audit committees because such committee are typically not board committee in Nigeria. Also the decision of which shareholder is to serve is usually taken by shareholders in the general meeting. It would be better off if Nigeria corporate law could follow the lead of other jurisdiction where the committee is a committee of the

[43] National Insurance Code
[44] NAICOM code section 7(2)(ii)
[45] Ibid section 7(2)(iii)
[46] Ibid. ,section 7(2)(iv)
[47] 2011 SEC code section 30(2)

board, setup by the board and made up of board members because it is essentially to assist the board in its oversight responsibility over financial statements of the company[48] thereby reducing the extent of bureaucracy in the Nigerian corporate atmosphere.

On the issue of remuneration, the provision if section 359(4) that provides that remuneration should not be paid to the members except for other ancillary allowances is somewhat devoid of adequate reasoning as to the future developments. The effect of this is well stated by the Nigerian law reform commission in 2007 "... the probable rationale was to make membership non-lucrative and less attractive. However experience has shown that the opposite is the case…it has also been alleged by directors that non-executive directors pester directors for contracts, distributorship and even job for their relatives…it is suggested that a proviso to section359(4) be amended to permit a payment of a reasonable out-of-pocket expenses to members."

The committee should be vested with powers to seek external professional advice in specific areas in order to have first-hand knowledge needed to assist them with performance of their duty. Another aspect the law should be proactive about is the treatment of audit committee members as regards liability to third parties and the company. This issue is yet to be adjudicated upon by the court and it will be good to have a statutory requirement on this or a pronouncement of a reputable court in this area thereby increasing the efficiency of the committee.

In conclusion, it is highly recommended that the requisite laws be amended to correct the defects stated above.

5.5. Reforming the Corporate Affairs Commission (CAC)

The Corporate Affairs Commission[49] was established by section 1 of the Companies and Allied Matters Act as a corporate body with perpetual succession and a common seal, capable of suing and being sued in its corporate name, and of acquiring, holding or disposing of all types of property for the purpose of its functions,[50] power and duties[51].

In a bid to strive to be better, it is important to state the challenges facing the CAC. These challenges have to a large extent hindered its progress. They are:

---

[48] Section 3(1) of the U.K. Corporate Governance Code; Code of Corporate Governance for South Africa 2010 section 3(2)(1)
[49] Herein CAC
[50] Section 1(2) of CAMA
[51] Section 7 of CAMA

1) The electricity problem facing the country. As Mr Ahmed AL Mustapha, the Registrar-General of the Commission as he then was stated "computerization of the companies registry needs constant power, that lack of power with fluctuations on our computer, server and other equipment will shut themselves up and when they start themselves up frequently, thereby will be problem."[52]
2) There is also the problem of a non-existent central database. This is a challenge to ascertaining the veracity of information people produce at the point of registration of companies in the country.[53]
3) There is no regional autonomy, as companies need to be incorporated at the headquarters in Abuja. This makes the process cumbersome and slow with respect.
4) The Registrar-General also wields too much power, as he is the only person who can append his signature on the certificate of incorporation.
5) Corruption also serves as a hindrance. People register companies at the commission for the purpose of obtaining contracts; to this end they lack structure and audited annual report. The commission is also not able to register new companies who share the same or similar corporate names with these fake companies.
6) Poor postal services
7) High illiteracy level together with low computer and internet awareness
8) Inadequate infrastructure
9) Lack of sense of duty on the path of the CAC officers.

This paper therefore recommends the following in order to mitigate the problems facing the CAC:

1) The office and power of the registrar general should be decentralised so that incorporation of companies can be made a lot easier as branch offices would now be able to incorporate autonomously.
2) There should be a mechanism where incorporated companies are occasionally accessed and Companies that are dormant or bankrupt must be declared so. Such companies must within a reasonable or within a specific time prove that they are still healthily engaged in business.
3) The CAC should be included in the Schedule 2 of the Pensions Act.[54]All its officials should be entitled to pension as this will serve as an incentive to them. A system should be laid down stating the standard of diligence expected of them and if they are reported default they will be sacked or suspended. This will help to increase their sense of responsibility.

[52] www.cacnigeria.org, in his report in 2010
[53] Vanguard Newspaper on June 17, 2013
[54] Cap 346 Laws of the federation 1990

4) There should be massive computer and internet awareness. It is laudable and important to state here that the commission introduced security-proof certificate in 2010 as a safe guard to fraud and forgeries. This innovation and others to come should be frequently updated to meet up with global standards.
5) Financial provision should also be made by the government to commission to enable them provide for their needs and to increase its outputs and maximise efficiency.
6) On the powers of the CAC to investigate companies, the character and competence of such inspectors must be considered before appointing them such.[55]It would also be helpful if the company is empowered to require production of documents for inspection without ordering an investigation.[56]

In conclusion, the CAC is doing a reasonably good job at modernising corporate regulatory processes but there is always room for improvement that will help Nigeria measure up to international standards.

5.6.4. Decentralisation of the Economy

This is perhaps the most important recommendation outlined. The Nigerian economy is highly reliant on the oil industry with about 70% of total revenue gotten from it. With the current recession in the industry, the Nigerian economy is experiencing serious problems.

This reasoning of this paper is embraced in Mr Godwin Emefiele's[57]speech. He stated that "….Naira was now exchanging at 309 naira to one USD…the simple fact of the matter is that apart from oil account for over 90% of our revenue, we really don't have much of an economy. We hardly produce anything….Where are our Apples, Disneys….empire state buildings, JP Morgans, super bowls etc.?...there was a long time ago when Nigeria had a truly strong economy and the naira was one to the dollar- even exchanged for higher than the dollar…we had a booming economy. We were either the top or among the top exporter of timber, etc…we attracted international tourists…, we had different car assembly plants-Peugeot, Aramco etc… We had a thriving sport industry…we had the thriving Nigerian airways… Back then, it meant something to know book. Our textile industry was alive…however today we have destroyed everything. Every year we collectively burn billions of Naira being fans of football club that give us nothing back…even with our little money we all want to wear designers…we are no longer top exporter of anything and the demise of oil means we have zilch…were we a more serious people, the highly popular Kingsway stores of the past would probably have a thousand outlets pan Nigeria today supporting a massive agriculture industry among others…"

[55] Lord Denning in Maxwell v. Department of Trade and Industry [1974] Q-B 523
[56] Section 315(a) of CAMA
[57] The present CBN Governor

We need to decentralise our economy. We need to encourage agriculture and industry. We need to follow the footsteps of U.K., China etc. and protect our economy by looking internally and satisfying our needs through our internal productions and wealth creation. We have so many Nigerians doing so well abroad. They are unable to thrive in Nigeria because the facilities are not able to help them maximise their potentials.

Government needs to set up scheme to finance such innovative projects proposed by industrious Nigerians. Governments also need to set up corporations and stop using foreign owned contractors. Companies can also be encouraged by reducing their tax levies if they are locally owned. This will encourage people to set up businesses thereby decentralising and growing our economy.

5. CONCLUSION

In the introductory part of this paper, the role of company law in economic development was examined. It is observed that, CAMA, after 26 years of existence is inadequate to deal with the unanticipated challenges that arose after its enactment. This paper has examined these inadequacies and has made some recommendations concerning them. It used the U.K. law as a comparator because Nigerian company law is modelled on the U.K. law. It is hoped that this paper will influence corporate law reforms both in Nigeria and within Africa. It is also hoped that it would help achieve a better business environment thereby enhancing the Nigerian economy. In addition, this could help promote growth and development both nationally, within Africa and globally.

BIBLIOGRAGHY

TEXTBOOKS

1) Americanah by Chimamanda Ngozi Adichie published 2007

2) Anatomy of Corporate Law: A Comparative and Functional Approach , Reinier Kraakman, John Armour, Paul Davis, Luca Enrique, Henry Hansmaan, Garard Hertig, Klaus Hopt , Hideki Kanda and Edward Rock (Oxford University Press,2009)

3) Company Law and Practice in Nigeria by J. Olakunle Orojo (1992)

4) Companies and Allied Matters Act, Synoptic Guide by J. Olakunle Orojo, Lawlords publication (2006)

5) Gower's Principles of Modern Company Law,5th edition, (1992)

6) Principles of Corporate Law in Nigeria by Professor Joseph E.O. Abugu (2014)

7) The Reform of the United Kingdom Company Law edited by John de Lacy (2006)

LAW REVIEW PUBLICATIONS

1) M.B. Mahmoud Code of Corporate Governance 2010
2) Modern Company Law for a Competitive Economy: Final Report Volume 2(URN 01/943)- Published July 2001
3) Modern Company Law for a Competitive Economy: Completing the Framework,(URN 00/1335)
4) Modern Company Law for a Competitive Economy: The final Report (London, DTI, MARCH 1998)
5) The Jenkins Committee Report
6) The Report on the Financial Aspects of Corporate Governance (London, GEE, 1992)
7) 2003 Report of the Committee on Corporate Governance of Public Companies in Nigeria

ARTICLES

1) A review of CAMA 1990: Issues in Corporate Governance Audit Committee and Auditor Independence by Anthony Idigbe SAN
2) An appraisal of the Role of Corporate Affairs Commission as a Regulatory Body under Nigerian Company Law by John Osilama Erameh LLM/LAW/42226/2004-2005; LLM/LAW/07103/2009-2010
3) Olawoyin G.A., Status and Duties of Company Directors (University of Ile-Ife Press, Ile Ife,1981)
4) Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Practices by Kenneth M Amaeshi, Bongo C Adi, Chris Ogbechie and Olufemi O. Amao, Online Article No. 39-2006 ICCSR research paper series- ISSN 14795124
5) Nigerian Law Reform Commission, Investors Protection and Amendment of CAMA : An Appraisal by Ibe Uwaleke
6) Powers and Duties of the Corporate Affairs Commission as a Regulatory Body in Nigeria
7) Reform of Nigerian Company Law : Rethinking the Membership of Audit Committees of Public Companies by Nat Ofo (LLM, BL, ACIS)
8) Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria by Dr Olufemi Amao

NEWSPAPER

1) Vanguard newspaper, June 17, 2013