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An Overview of the Clogs in the Effective Corporate Governance in Nigeria

Olokooba S.M., Ph.D^{*} & Ojibara Hameenat Bukola^{**}

ABSTRACT

Corporate governance is an issue that has come to the forefront in the spate of financial/ company collapses which led to a greater awareness all over the World and the need to adopt simple rules both by law and self regulation. This paper examines the emergence of corporate governance with an insight into the development and growth of the corporate governance regimes in Nigeria. The paper further examines the legal framework of corporate governance and clogs to effective corporate governance in the country. The paper draws conclusion and make some practical recommendation for effective corporate governance in Nigeria.

INTRODUCTION

Contemporary exigencies due to globalization, the end of the cold war, the information technology and the bifurcation of world politics has led to the need for a rethink on the business-society relationship, and brought about the emergence of innovative business social responsibility and improved corporate governance. Corporate governance is not new and corporate bodies have always been concerned one way or the other with governance issues.¹

Thus, it is a fundamental concept that has been in existence since the inception of corporations but gained prominence in the 20th century as a result of the spectacular economic growth in the 'private sector. Also, in the spur of the various corporate scandals especially in the developed world involving major corporations ranging from Maxwell Communications, BCCI, Polly Peck, Enron, Parmalat, Worldcom, the issue of corporate governance further gained a high momentum.

The term corporate governance is a frequently used phrase in today's business world. It is a discipline which is evolving and is dynamic in nature even though it's underpinning frameworks date back in time.² Authors and academic have attempted discussing several aspects of corporate socio-legal interactions like, corporate social responsibility, corporate identity, corporate sustainability, corporate responsibility, and corporate social value. Unfortunately, the issue of corporate governance in Nigeria has not been adequately addressed.

In academics, corporate social responsibility has been examined especially in the fields of management and business ethics³, corporate social responsibility in Emerging market also received attention from both academics and practitioners.⁴ According to Pomeroy and Johnson⁵ spread and growing distrust of large corporations and that firms are increasingly turning to corporate image

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¹ Corporate Governance in the Public Sector- The role of risk management, <http://www.alarm-uk.org/PDF/corpgovsum.pdf> accessed 29 July, 2013

² Christine A. Mallin, *Corporate Governance* (3rd edn, Oxford University Press 2010).

³ See Carroll AB, Corporate and Social responsibility: Evolution of a definitional construction, 1999, *Business and Society* journal, 38, 268-296

⁴ Baskin J. Corporate Responsibility in Emerging Markets, *The journal of Corporate Citizenship* Winter Issue, No 24, 29-47, 2006, see also Mohammed N, Emerging Markets: Corporate Sustainability of Maximize Stakeholder Value? *International Journal of Humanities and Social Sciences*, vol. 3, no 5, 2013, p.91

⁵ Pomeroy, A. & Johnson I.W., ADVERTISING CRS Initiatives to Communicate Corporate Image, *Corporate Communications: An International Journal* Vol.14, No 4 420-439

advertising campaigns based on corporate social responsibility initiatives⁶, to met consumer demands for information on business's concern for and impacts on society.⁷ Invariably, corporate social responsibility is about companies going beyond legal obligations and their own interests to address and manage the impact.

Corporate governance is a central and dynamic aspect of corporate legal jurisprudence. The term 'governance' is derived from Latin word 'gubernare', meaning 'to steer', usually applying to the steering of a ship, which implies that corporate governance involves the function of direction rather than control.⁸ Effective corporate governance is either established through a well developed legal framework and an active capital market or through concentrated ownership. The systematic enforcement of law and regulation has helped create a culture of compliance that has shaped business culture and the management ethos of firms, spurning them to improve as a means of attracting human and financial resources on the best possible terms⁹. According to John¹⁰

The problem caused by corporate failures and their attendant consequences have demonstrated in no mistake terms that even strong companies lack transparent control, responsible boards and shareholders rights can collapse quite quickly as investors confidence collapse.

In recognition of these issues, the organisation for economic Cooperation and Development (OECD) came up with principles of corporate governance. These principles were endorsed by the OECD ministers in 1999 and have since become an international bench mark for policy makers, investors, corporations and other stakeholders worldwide¹¹. However, due to lack of adequate legal framework, the issue of corporate governance in Nigeria is far from meeting the international standard. Structured into six sections, the meaning and emergence of corporate governance follows this section. In section three, the focus is on the legal framework for corporate governance in Nigeria. In section four, the paper discusses clogs in the effective corporate governance in Nigeria, while section five contains the conclusion and recommendations.

MEANING AND EMERGENC OF CORPORATE GOVERNANCE

Meaning of Corporate Governance

Corporate governance is a term with many depths in which its meaning is usually been deduced from the references to which it is made or used. It is a fundamental or phenomenal concept that has an elaborate meaning and thus, has been attempted by several writers. Corporate governance refers to the way in which companies are governed, and to what purpose.¹² This purpose encompasses the practices and procedures for trying to ensure that a company is managed to achieve its aims and objectives. As a result, various companies have rules and guidelines set out to achieve these aims which are mainly to maximize the wealth of shareholders and putting in mind ethical/moral values of the company itself and the society at large.

⁶ Becker-olsen, K.L., et al. the impact of perceived corporate social responsibility on consumer behaviour, *journal of business research*, vol. 59 no 1, pp. 46-53

⁷ Dawkins J. Corporate responsibility: The communication challenge, *journal of communication management* vol. 9, no 2, pp 108-119

⁸ D.C. John An Examination of the Legal Principles of Corporate Governance in Nigeria, *Ahmadu Belo University Journal of Commercial Law*, Vol. 5, No 1, 2012, p.201

⁹ *ibid*

¹⁰ *ibid*

¹¹ *ibid*

¹² Coyle, B. *Corporate Governance Institute of Chartered Secretaries and Administrators Study text* (ICSA Publishing, London 4th Edition, 2006) p. 5

One of the foremost and influential codes of corporate governance; the UK Cadbury Report defines it as '...the system by which companies are directed and controlled...' ¹³. This definition is mainly an effort to align a balance between economic and social goals and as best as possible the interest of individuals, corporations and the society. ¹⁴

The Financial Times defines it as the management of a company 'in terms of the institutional systems and protocols meant to ensure accountability and sound ethics. The concept encompasses a variety of issues including disclosure of information to shareholders and board members, remuneration of senior executives, potential conflicts of interest among managers and directors, supervisory structures etc.' ¹⁵

The issue of incentive is a main problem resulting in these collapses, that is, the fact that the people who run the company are different from those who own the company (shareholder). Those who run the company are referred to as 'managers', these are hired professionals who act on behalf of the shareholders but also have their own self interest. Thus, the need to balance between this self interests and the need to achieve the aim of the company i.e. profit making; a system of checks and balances needs to be put in place. This system is referred to as 'Corporate governance'.

The organization for economic Co-operation and Development (OECD) states that corporate governance involves a set of relationship between a company's management, its board, its shareholders and stakeholders ¹⁶. Corporate governance is concerned with the processes, system, practices and procedures as well as the formal and informal rules that govern institutions, the manner in which these rules and regulations are applied and followed, the relationships that these rules and regulations determine or create and the nature of those relationships. ¹⁷

The governance system includes; the board of directors, the financial/external auditor and other constituents like the creditors, suppliers, customers, labours unions, regulators and the media, who all play an important role in ensuring that good governance is achieved. ¹⁸ A major example is that of Enron in which the executives lied about its financial status for years and their actions went undetected by the board, auditor, regulators, media and rating agencies not until it finally went bankrupt. From the above, it can be deduced that corporate governance encompasses the welfare of its employees, customers and the general public while putting into consideration the interests of the shareholders.

Emergence & Growth of Corporate Governance

The development of corporate governance was anticipated by emerging theories in various academic disciplines such as accounting, finance, economics, management and lately, law. The main theories are the agency theory, transaction cost economics, stakeholder theory and stewardship theory. The agency theory proposes the separation of ownership and control in which the principal delegates to its agent to act on its behalf; in the case of corporations, the shareholders are the principals while the directors are the agents. The other theories are a wider proposition to the agency theory and they propound a wider view to include the society rather than just the shareholders and also, directors should act in the best interest of the shareholder and ensure an effective governance structure to align existing interests. ¹⁹

¹³ Report of the Committee on the Financial Aspects of Corporate Governance, referred hereafter as 'Cadbury Report' 1992, para 2.5

¹⁴ Sir Adrian Cadbury, Corporate Governance overview, 1999 World Bank Report, cited in the Institute of Directors in Southern Africa, "Executive Summary of the King (King Committee on Corporate Governance) Report 2002, 6 available at www.iodsa.co.za assessed on 7 July, 2013

¹⁵ Financial Times Lexicon, <http://lexicon.ft.com/term?term=corporate-governance> assessed 23 July, 2013

¹⁶ John *op cit.* p. 206

¹⁷ *ibid*

¹⁸ Financial Times Lexicon, <http://lexicon.ft.com/term?term=corporate-governance> assessed 23 July, 2013

¹⁹ C. Mallin, *Corporate Governance* (3rd ed. OUP, US 2010) 11-21

In the developed nation, corporate governance gained eminence as a result of economic growth and numerous spectacular business failures²⁰ especially those of the UK banks and other financial institutions that contributed to the financial crises such as the Bank of Credit and Commerce International, Barings Bank, Polly Peck International in the 1980s and 1990s.²¹ These corporate excesses led to the world financial and economic crises and the poor performance of corporations as a result of massive expansion and diversification and also, the wide gap between the directors' interests and those of its shareholder was the last straw that broke the camel's back and led to the desperate call for 'new corporate ethos and stricter compliance'.²²

The growth of corporate governance regulation in UK began with the Cadbury committee of 1992 as a result of business failures which ensued in the private sector; this was followed by the Greenbury Report of 1995 which was a response to the problem of excessive remuneration packages awarded to some directors.²³ The Hampel Report of 1998 is a revision of the Cadbury and Greenbury Report to promote higher standards of corporate governance.²⁴ Also several other reports: the Turnbull Report of 1999²⁵, Higgs Report 2003²⁶, Smith Report 2003.²⁷ Tyson Report 2003²⁸. These codes were revised in the combined code 2003, 2006 and 2008 and the distinctive feature of the code is that it comprises a set of recommended principles in areas of remuneration, directors, non-executive directors, institutional investors and relations with shareholders, accountability and audit to serve as guidance as opposed to mandatory rules. It is referred to as the 'comply or explain' principle.²⁹ A new edition of the code was issued by the Financial Reporting Council (FRC) in May 2010 which took effect from 29th June, 2010 known as the 'UK Corporate Governance Code'.

The term corporate governance can be linked to the 1970s in the United States in the stir of the Watergate scandal and several other discrepancies going on in corporations at the time.³⁰ The development of corporate governance in the US gained speed in the spate of corporate scandals starting with Enron and Arthur Anderson in 2001 and this led to the Sarbanes-Oxley Act 2002.³¹ In today's business environment, companies, especially listed companies are required by law to disclose certain information to their shareholders. Amongst the expected listings are the annual report and account which discloses information on the company's financial performance and financial position.³² The Sarbanes-Oxley Act unlike the European codes with voluntary compliance is mandatory and has the most enduring implications beyond the shores of the US.³³

Nigeria like many other developing countries has the concept of corporation foreign to her indigenous business practice. The first corporate statute in Nigeria was enacted in 1912 and remained under the rule of the British colonial masters. The appearance of corporations can be linked to the post colonisation era through the British companies chartered in England around the end of the 19th century. Consequent to Nigeria's independence, the ideology of self-dependence in

²⁰ Corporate Governance in the Public Sector- The role of risk management. <http://www.alarin-uk.org/PDF/corpgovsum.pdf> accessed 29 July, 2013

²¹ Tara Hogg, Corporate Governance Reform, 2010, Vol. 160/ Issue 7400 NLJ 64

²² G. Aras & D. Crowther (Eds.), *A Handbook of Corporate Governance & Corporate Social Responsibility* (Gower Publishing Ltd, England 2010) 1.

²³ The Greenbury Report on Directors' remuneration chaired by Sir Richard Greenbury in 1995

²⁴ Committee on Corporate Governance <http://www.ecgi.org/codes/documents/hampel.pdf> accessed 29 July, 2010

²⁵ The Turnbull Report, Internal Control: Guidance for Directors on the Combined Code chaired by Sir Nigel Turnbull in 1999

²⁶ The Higgs Report 2003 chaired by Derek Higgs on the Review of the role and effectiveness of non-executive directors

²⁷ The Smith Report chaired by Sir Robert Smith in 2002 was concerned with auditors' independence and arose after the collapse of Enron in 2002 which was linked with the Arthur Anderson firm in US.

²⁸ The Tyson Report of June 2003 led by Professor Laura Tyson of the London Business School was commissioned by the Department of Trade & Industry following the publication of the Higgs Review in January 2003.

²⁹ I. Shear, R. Moulton, B. Price, N. Kay, 'Corporate governance in financial institutions' (2010) 74 COB 1-28

³⁰ J. Salacuse, 'Corporate Governance in the New Century' (2004) Comp. Law, 25[3], 69-83

³¹ B. Baysinger & H. Butler, 'Corporate Governance & the Board of Directors: Performance Effect of Changes in Board Composition' (2003) JLEO Vol 1, Issue 1, 101-121.

³² Brian Coyle, *Corporate Governance* (study text, 5th edn, ICSA Information & Training Ltd 2007), 7

³³ I. Clarke, *International Corporate Governance: A Comparative Approach* (Routledge: Taylor & Francis Group, London & New York, 2007) 154

relation to ownership and control of operation of business was practised. The two main types of business practised are: government absolute owned (state owned corporations which included social services) and were prohibited to foreigners including private and locally owned businesses. The second; government promoted ownership in other sectors (enterprises purely reserved for Nigerians and that in which foreigners could not have holdings more than 40%). This was to suit the apparent financial and administration needs of the country at the time.

LEGAL FRAMEWORK FOR CORPORATE GOVERNANCE IN NIGERIA

The first principal statute on corporate governance in Nigeria was the Companies Act 1968 modelled after the United Kingdom Companies Act of 1948. It was a comprehensive legislation that contained provisions regarding the running of companies in relation to the roles of directors and its members. This statute was not without its inadequacies and so suffered certain criticisms that led to its repeal and was then replaced in 1990 by the Companies & Allied Matters Act.³⁴ Today, foreigners can fully own businesses in Nigeria and the Companies & Allied Matters Act allows for the exemption of some foreign companies operating in Nigeria from incorporating in Nigeria but they carry on specified businesses under their exemption certificates³⁵ and must exclude any form of business that engages in the production of ammunitions, dealing in drugs and other related substances.

Basically, the main statute for corporate governance in Nigeria is the Companies & Allied Matters Act (CAMA).³⁶ However, there are other codes or regulations in force in which most of them are specifically for a purpose that is depending on the nature of the industry. There is the Code of Best Practices on Corporate Governance in Nigeria 2003 which was issued by the Securities & Exchange Commission (SEC);³⁷ the Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006 which was issued by the Central Bank of Nigeria (CBN);³⁸ also, the Code of Corporate Governance for Licensed Pensions Operators 2008,³⁹ issued by the Pension Commission; and then the Code of Corporate Governance of Insurance Industry in Nigeria 2009⁴⁰ issued by the National Insurance Commission (NIC).

The Securities & Exchange Commission (SEC) and the Corporate Affairs Commission (CAC) are main regulators of listed companies in Nigeria and registration of incorporated companies.

Corporate governance in Nigeria arose out of the need to put sound institutional structures and good governance practice in place to attract inward investment and protect against future financial crisis. It is obvious that the institutional and regulatory frameworks in relation to corporate governance are a wide reflection of the UK and US regulations. The CAMA is a replica for most provisions of the UK Companies Act 1985 with revised provisions incorporated into it.⁴¹ This Act established the Corporate Affairs Commission (CAC)⁴² which is saddled with the responsibility of regulating and supervising the formation, management and winding up of companies and other institutions created in accordance with the CAMA⁴³ thereby safeguarding the interests of the public and the helpless minorities in the company.

Several firms have adopted a plethora of rules of conduct and policies to guide their activities and maintain the integrity which is core to their business practices. Most of the codes are mainly from firms of the developed world which have been adopted by transnational corporations across borders and enlarged into a global dimension. Despite the diversity of principles, business standards have been harmonised (common definition of transparency, ethics and responsibility).

³⁴ Decree No. 1 of 1990 now 'CAMA', (Cap C20, Laws of the Federation of Nigeria 2004)

³⁵ S. 54 Companies & Allied Matters Act 1990

³⁶ Hereinafter referred to as 'CAMA', (Cap C20, Laws of the Federation of Nigeria 2004)

³⁷ Hereinafter referred to as the 'SEC Code 2003'

³⁸ Hereinafter referred to as the 'CBN Code 2006'

³⁹ PICOM Code 2008

⁴⁰ NAICOM Code 2009

⁴¹ For example: S. 359(6) CAMA predates the objectives & functions of the audit committee as stated in the Combined Code 1992 (U.K.)

⁴² S. 1 CAMA, 2004

⁴³ S. 7 ibid

Also, international organisations, for example the International Labour Organisation (ILO) have gained legitimacy through these codes and businesses now engage in dialogue with stakeholders, governments and other important bodies.⁴⁴

CLOGS IN THE EFFECTIVE CORPORATE GOVERNANCE IN NIGERIA

The 2008 global financial crisis precipitated in the US by corporate practices and corporate governance reveal the enormous effect to which an absence of international regulation can cause. Since that time, every countries of the world tried as much as possible to put in place adequate legal regulations and supervisions for the corporate governance in order to achieve global best practices. Unfortunately, to achieve this has been a herculean task in Nigeria.

Failure by most directors and other stake holders to adhere to the rule and best corporate practice is one of the clogs in effective corporate governance in Nigeria. Even though rules are meant to order behaviour, it is most unfortunate that not all rules or practices are adhered to by individual or corporations. Thus as rightly observed by John⁴⁵ the flaunting of rules, disregard to policies and suppressing of rights especially of shareholders as regards corporate governance provisions actually form the root of governance problem in Nigeria.

Furthermore, the inadequate publicity and the inability of the relevant authorities to publish a single document encompassing the corporate governance rules so that such document would inform any individual of the corporate provisions as it were⁴⁶ is another clog to the effective corporate governance in Nigeria.

Further still, ignorance on the part of shareholders and some stakeholders on the full benefit of corporate governance is also a clog. According to Lord Denning, M.R., in *Northwest Holst Ltd v Secretary of Trade & Others*⁴⁷

... It sometimes happens that public companies are conducted in a way which is beyond the control of the ordinary shareholders; the majority of the shares are in the hands of two or three individuals. These have the control of the company's affairs. The other shareholders know little or are told little. They receive glossy annual reports. Most of them throw them into waste paper basket. There is an annual general meeting but few of the shareholders attend. The whole management and control are in the hands of directors. They are self perpetuating oligarchies and are virtually unaccountable..."

Problem of one single individual chairing more than one corporation is also a great clog in the effective corporate governance. Though this problem is not peculiar to Nigeria, but lack of adequate and apt record keeping in Nigeria is making it more devastating in the Nigerian corporate world.

There is an endemic problem of enforcement of the proceeding of the Investment and Securities Tribunal and other administrative committee proceedings. Failure of making the decision of these bodies a full and final is eroding confidence of the stakeholders in corporate governance.

CONCLUSION AND RECOMMENDATIONS

From all aforesaid, it could be gleaned that, the need for corporate governance in the corporate existence of any country cannot be over emphasised. This paper explored the various corporate governance initiatives in different jurisdiction. The finding in this paper further confirms that corporate governance finds its root in the agency and other theories discussed. The paper further posits that separation of ownership and control in modern corporations and the mechanisms is a veritable tool that could be used to mitigate series of problems in the corporate sectors. These

⁴⁴ C Pedamon, CSR: A New Approach to Promoting Integrity and Responsibility, (2010) 31 (6), 174

⁴⁵ John D.C. *op.cit.*, p.214

⁴⁶ *ibid*

⁴⁷ (1978) 3 W.L.R. 73 at 223

mechanisms both internal and external interact with each other and so the board of directors' board committees and executives try to align the interests between shareholders and managers in dealing with market forces for corporate control.⁴⁸ It is therefore reasonable to conclude that to attain an absolutely effective regulatory system in the Nigerian corporate governance, the following recommendation is of essence:

- **General overhauling of the Nigerian law which have direct bearing on corporate governance in Nigeria**

All the Nigerian laws that have to do with corporate governance should generally be overhauled to be able to drive corporate governance regimes to an immutable state. Thus, codes should be consistently revised to keep them contemporary to meet the growing demands of the corporate environment.

- **There should be a universal code to regulate companies in the same sectors or that engage in similar practices.**

Since it is established in this paper that the corporate governance is of essence for good socio-economic development in a given economy, there is therefore a need for an internationally acceptable form of governance to meet with the best practice universally.

- **The regulatory authorities should make the proceedings of the investment and securities tribunal (IST) and the administrative proceedings committee (APC), full and final.**

The essence of this is that cases adjudicated by the above named institutions should not be open to appeal in the regular courts so that there would be quick dispensation of matters which would give confidence to all stakeholders in corporate governance⁴⁹.

- **Review of the provisions on qualification for appointment as director**

The provisions on qualification for appointment as director should be reviewed to include new standards for skills and competence, the parameters of which should include technical and professional competence.

⁴⁸ W Davidson III, S Sakr & H Wang, 'Trends in Corporate Governance' in G Aras & D Crowther (eds), *A Handbook of Corporate Governance & Corporate Social Responsibility* (Gower Publishing Ltd, England 2010) 135-137

⁴⁹ John D.C. *op cit*, p.214