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# An Examination of the Legal Regime of Corporate Governance in the Nigerian Banking Sector

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**Abstract**
The period heralding the new millennium witnessed great flurry of activities in the Nigerian banking industry. The activities, which were spearheaded by the statutory regulatory authority in the industry – the Central Bank of Nigeria - were claimed to be directed not only at expanding the service delivery frontiers of banks in the country in positioning them to meet the ever unfolding challenges of a volatile world economy, but targeted also at carrying out far reaching reforms in the banking sector which at that time had descended into the depth of seemingly irredeemable impasse. For all the stakeholders in the sector; spanning the regulated, the regulator, the customers and the board/management of the banks, it was a period, stressful in its roots, and harrowing in its magnitudes. What began at that time as a salutary step of purification may well be suitable at the present for an objective assessment of the proceeds. This paper seeks to discover the objectives of the reforms and whether the aims of the proponents and executors of the reforms been achieved or not, especially when juxtaposed against the background of damming allegations of self-serving and un-altruistic motive as impelling factors for the exercise. The discussions entertained in this article are presented with the aim of provoking further discussions about the future of the concept of corporate governance in Nigeria, especially in the banking sector. A desk-based review methodology of the literature on Nigerian banking history and laws to access public and industry perceptions on corporate governance of the banking industry would be employed and a thematic subtitling for the dissemination of findings divided into four broad sections, that is, concept analysis, historical trajectory of the business of banking particularly as extended to Nigeria, corporate governance and the challenges faced in its application in the Nigerian economic environment and a critical evaluation of the role played by regulatory authorities in respect of corporate bodies subject to dual regulation by the provisions of the CAMA and their own archetypical legislations would be employed. It is hoped that the ultimate aim of the article in inviting attention to the outcomes of the application of the principles of corporate governance to the banking industry in Nigeria would be achieved.
**Keywords:** Corporate Governance, Banking, Banking Sector in Nigeria

## 1. Introduction

The banking industry in Nigeria has recently but increasingly become a target of regulation by multi regulatory bodies. Currently, the sector has had to endure the regulatory roles played by three different federal statutory bodies but playing similar roles in the regulation of the affairs of Nigerian banks, not counting the existence of other mandatory regulatory frameworks that indirectly impact on the governance of banks in Nigeria such as the Banks and other Financial Institutions Act (BOFIA), and the Nigerian Deposit Insurance Corporation.

The Corporate Affairs Commission is the body set up under Nigerian law and charged with the function, *inter alia* to 'arrange and conduct an investigation into the affairs of any company where the interests of the shareholders and the public so demand'. The commission has been discharging its regulatory role in respect of companies registered under the Companies and Allied Matters Act (CAMA, 1990) – of which Nigerian banks share a prominent nature - through the application of relevant provisions of CAMA to the banks.

Consider also the 'moderating' role of the Securities and Exchange Commission – SEC - another statutory body set up under the Investment and Securities Act (ISA) to regulate investments and securities business in Nigeria and to register and regulate corporate and individual capital market operators.

Finally, the article turns to the consideration of the all-embracing regulatory role played by the Central Bank of Nigeria, a body whose principal objects have been expressed in the enabling statute *inter alia* to be to ensure monetary and price stability, issuance of legal tender currency in Nigeria, maintenance of external reserves to safeguard the international value of country's legal tender currency, promote a sound financial system in Nigeria, and to act as banker and provide economic and financial advice to the Federal Government of Nigeria.

All three statutory bodies considered above, anchor their existence on the exclusive legislative list which is contained in the second schedule to the Constitution of the Federal Republic of Nigeria, 1999. In the said legislative list, the subject of 'banks, banking, bills of exchange and promissory notes' is listed as item six (6) therein.

Increasingly, the Nigerian bank is entering into insurance and investment business. The multi-service bank or financial institution which constitute a common business model and a major feature on the European financial landscape (these are called financial conglomerate where more than one of banking, insurance, and investment services activities are carried out within the same group, (Niamh Moloney, 2008)) is gradually finding expression in Nigerian economic environment.

The period heralding the new millennium witnessed a great flurry of activities in the Nigerian banking industry. The activities which were spearheaded by the statutory regulatory authority in the industry – the Central Bank of Nigeria - were claimed to be directed not only at expanding the service delivery frontiers of banks in the country in positioning them to meet the ever unfolding challenges of a volatile world economy, but targeted also at carrying out far reaching reforms in the banking sector which at that time had descended into the depth of seemingly irredeemable impasse.

For all the stakeholders in the sector; spanning the regulated, the regulator, the customers and the board/management of the banks, it was a period, stressful in its roots, and harrowing in its magnitudes. What began at that time as a salutary step of purification may well be suitable at the present for an objective assessment of the proceeds.

Under Nigerian cultural and traditional property, proverbs occupy a prominent position. One of such proverbial expression is the extension of a handshake beyond the elbow as descriptive of an overbearing gesture of goodwill which a handshake represents but which when extended to and beyond that part of the body known as the elbow, connotes a declaration of hostility exemplified in a wrestling bout. This study turns on an examination of corporate governance in the banking sector in Nigeria and concludes that it typifies an initial expression of a good gesture which spilled-over into hostility.

This article examines the objectives of the reforms and whether the aims of the proponents and executors of the reforms been achieved or not, especially when juxtaposed against the background of damning allegations of contemptuous observation of law making process in the country and self-serving and un-altruistic motive as impelling factors for the exercise. The discussions entertained in this article are presented with the aim of provoking further discussions about the future of the concept of corporate governance in Nigeria, especially in the banking sector. The essential terms identified for further consideration in this paper are those highlighted in the keywords column above. These words shall be considered seriatim from their conceptual viewpoints for further exposition.

## 2. Conceptual Analysis

### *2.1 Corporate Governance*

The trajectory of the historical exegesis of corporations since the antecedents leading to the Bubble Act of 1720, has revealed a recourse to palliative or rescuing legislative and judicial interventions whenever there is a manifestation of the abuse of incorporation. The evolution of the idea of corporate governance suffers similar fate as a visible attempt to rescue shareholders from the vice grip of the organs of the company, hence the inevitable advent of the concept, now fast gaining the status of the doctrine of corporate governance.

The concept of corporate governance is fast gathering momentum because of various factors as well as the changing business environment. The regional economic blocs – EU, GATT and WTO – regulations have also contributed to the rising awareness and are compelling adherence to the thinking in terms of good governance practices. Corporate governance by the very nature of the concept cannot be exactly defined. However, there can be no two opinions that 'effective accountability to all stakeholders is the essence of corporate governance' (N. Gopalsamy, 2014).

### *2.2 U.K. Model*

The webpage on corporate governance on the website of the Department of Enterprise and Regulatory Reform ('DERR') defines corporate governance as being concerned with the systems by which companies are directed and controlled. This definition was first formulated in a 1992 report issued by the Committee on the Financial Aspects of Corporate Governance under the chairmanship of Sir Adrian Cadbury.

Corporate governance, a rather obscure subject prior to this point, generated in the wake of the Cadbury Report much academic debate, considerable press coverage, and a series of follow-up reports on UK corporate governance, namely, the Greenbury Report 1995, the Hampel Report 1998, and the Higgs Report in 2003. Corporate governance has also been in the limelight elsewhere, with an important catalyst being the widely publicised 2002 collapse of Enron, a US energy company (Brian R Cheffins, 2008).

The Cadbury Committee has defined the term ‘corporate governance’ to mean “the system by which companies are directed and controlled”. It may also be defined as a system of structuring, operating and controlling a company.

There are some identified models of the subject. Some take a ‘stakeholder’-oriented view of corporate governance. This view assumes the subject matter relates to the entire network of constituencies with a ‘stake’ in how companies are run, including employees, customers and local communities. Others treat the proper domain of corporate governance as being the relationship between managers and investors, with particular emphasis on promoting managerial accountability to shareholders in companies with publicly traded shares. The Cadbury, Hampel and Higgs reports used this narrower conception as their departure point and, in the UK, debates on corporate governance have generally followed the same pattern. In the UK, publicly quoted companies are managed by a small team of executives led by the chief executive officer.

The senior executives will typically own a small percentage of the shares, meaning they receive only a tiny fraction of returns generated by their efforts. Executives thus have incentives to advance their own interests at the expense of the shareholders, potentially imposing what economists refer to as ‘agency costs’ on investors.

The Cadbury, Hampel, and Higgs reports on corporate governance each made numerous recommendations concerning boards, with key themes being that non-executives should be well represented on the boards of publicly quoted companies and that board committees made up primarily or entirely of non-executives should be established to deal with topics where independent judgment is most crucial, such as nomination of future directors, supervision of accounting and auditing issues, and setting executive pay.

Recommendations in these reports have been implemented in the ‘Combined Code on Corporate Governance’, an annex to listing rules with which companies quoted on the London Stock Exchange must comply. Companies may depart from the Combined Code’s principles and provisions so long as they explain their reasons for doing so. This ‘comply or explain’ model, is an innovation of the 1992 Cadbury Report, and has been widely imitated around the world since it provides a way to encourage better corporate governance without imposing a restrictive ‘one size fits all’ set of mandatory rules on companies that vary widely.

Following on from recommendations made in the Cadbury and Hampel Reports, the Combined Code puts shareholders under an onus to take seriously their responsibilities as ‘owners’ of companies and to insist on high standards of corporate governance. Due to Combined Code guidance and numerous warnings from the government that institutional passivity is inappropriate, activism has been on the increase recently, manifested most obviously by institutional shareholders using their voting rights much more regularly than in the past (Brian R Cheffins, 2008).

*2.3 Corporate Governance in Canada and the United States*

In Canada and the United States, the respective principles-based and rules-based models of corporate governance hold sway. Under the Canadian “principles-based” approach, perhaps with the exception of mandatory rules relating to audit committees, companies are required to publicly disclose the extent of their compliance with the suggested “best practices” and, where a firm’s practices depart from such guidelines, to describe the procedures implemented to meet the same corporate governance objective. Hence, the Canadian approach is in the form of “comply or disclose”. In contrast, the U.S. “rules-based” approach is oriented toward mandatory compliance with legislation and stock exchange requirements, with much greater emphasis on regulatory enforcement rather than voluntary compliance.

 

The corporate governance model adopted by the U.S. has evolved through a combination of regulation, judicial interpretation and extensive self-help or volitional change and is not separated from her experience. In the 1930s, stock market trading abuse led to the formation of the Securities and Exchange Commission. In the 1970s, instances of managerial misconduct led to establishment of board audit committees comprised solely of directors independent of management. In the 1970s and 1980s, problems of economic performance revealed that many U.S. managers had lost their focus, and their companies had lost their competitiveness in a newly emerging global marketplace; partly in response to this situation, key court decisions in the 1990s empowered and legitimized the rise of active and independent board of directors. Activist boards with majorities of independent directors have begun to exercise a new kind of responsible oversight for their corporations by, for example, evaluating the CEO annually, determining the board agenda together with management, selecting candidates for the board, and drafting codes of best practice (Okechukwu & Unegbu, CIBN).

The different regulatory regimes in Canada and the United States has to a certain extent therefore, resulted in considerably different corporate governance practices between known geographical neighbours and economic, social and political allies. Research has shown that Canadian firms, in comparison with to U.S. firms; have smaller boards with fewer independent directors; have boards that hold more meetings; have directors that sit on a greater number of boards than directors of Nasdaq-listed firms, and sit on a fewer number of the board; and are less likely to have compensation, nominating and corporate governance committees, and the fraction of independent directors sitting on these committees is significantly lower.

The research conclude that there are pros and cons associated with both the principles-based and rules-based regimes. The extent to which the “made-in-Canada” approach to governance is found to be effective largely depends upon whether investors remain confident in regulation of the Canadian capital markets (Erin B Broshko & Kai Li, 2014).

### *2.4 Indian Model*

In India, the question of corporate governance has come up mainly in the wake of economic liberalisation and deregulation of industry and business as well as the demand for a new corporate ethos and stricter compliance with the laws of the land. In the context of the unique situation in India where the financial industry hold substantial stakes in companies, accountability of the director including non-executive directors and nominees, has come into sharp focus (N. Gopalsamy, 2014).

### *2.5 South African Concept*

The dynamics of corporate governance in South Africa has witnessed a paradigm shift in that country from the traditional viewpoint that directors are expected to manage a company in the best interests of the shareholders collectively, to answering the question as to whether directors should also consider the interests of other stakeholders, inter alia employees, creditors, the environment and the community.

As a result of the past racial circumstances in South Africa, The South African Broad Based Black Economic Empowerment Act 53 of 2003, was enacted to correct racial imbalances as well as to promote social investment and the empowerment of communities. By adhering to this act, directors will by implication consider the interests of the community and give effect to the triple-bottom line approach when managing a company (Irene-marie Esser & Adrette Dekker, 2008).

The traditional corporate governance principles viewpoint in South Africa relates to the practice by which companies are managed and controlled. This finds expression in the directors’ duties and the organs of a modern company, whereby directors are subject to various duties which include (a) statutory duties in terms of the Companies Act, for example, sections 234-240 deal with the disclosure of conflict of interests that a director may have in a contract; and (b) common law duties. These duties are categorized into fiduciary duties of good faith and the duty to act with necessary care and skill when performing his or her duties. Directors’ fiduciary duties can be categorized into four headings, namely that (1) directors should prevent a conflict of interests, (2) not exceed the limitation of their power, (3) maintain an unfettered discretion and (4) exercise their powers for the purpose for which they were conferred. The two main organs of the modern company in South Africa are: (a) the general meeting of shareholders and (b) the board of directors. Corporate governance was institutionalized in South Africa by the publication of the King Report on Corporate Governance in 1994. The King Committee was formed in 1992 under the auspices of the Institute of Directors. The purpose of the King Report was to promote good standards of corporate governance. The King Report of 1994 did not only provide guidelines on financial and regulatory matters, but also advocated for an inclusive approach. An inclusive approach in the parlance of South African corporate governance lexicon, stipulates that directors should have regard to a wide variety of interests when managing a company. Triple-bottom line management is important. The triple-bottom line approach refers to economic, social and environmental factors. Directors should consider all three if these factors when they manage a company. The economic aspect of this approach concerns financial and non-financial aspects of the business of the company. The environmental aspect relates to the effect on the environment caused by the products or services of the specific company. The social aspect embraces relationships with stakeholders, other than the company's shareholders.

King II contains a Code of Corporate Practice and Conduct which is applicable to all companies listed on the JSE Limited, banks, financial and insurance entities as defined in the applicable legislation and public sector enterprises and agencies. All other enterprises should also give due consideration to the provisions of the code.

It is important to note that the provisions in the Code are only recommendations and compliance is thus voluntary. Rather than being seen as a set of detailed rules on directors' conduct, the Code operates on a "comply or explain" basis, similar to the Canadian model considered above. If the enterprises listed above do not comply with the Code they need to explain their reasons.

The Code also contains recommendations on corporate governance whereby board of directors, directors, auditors and the company secretary are focused on and other recommendations relating to risk management, internal audit, integrated sustainability reporting and compliance. On 25 February 2009 a King III Report on Corporate Governance was published for public comment.

*2.6 The Malaysian Experience*

The Malaysian experience is exemplified in the corporate governance journey in the country. Due to the waning investor confidence in Malaysia in the wake of the 1997/98 Asian Financial Crisis, policy makers learnt valuable lessons and in recognition of the value of good governance, focused their attention, amongst others, on the need to raise and sustain a strong culture of corporate governance. This culminated in numerous initiatives including issuance of the Malaysian Code on Corporate Governance (Code) in the year 2000 which marked a significant milestone in an attempt to strengthen the country's corporate governance framework. The Code was later revised in 2007 (2007 Code) to strengthen the roles and responsibilities of the board of directors, audit committee and the internal audit function.

Since then, the Malaysian model has witnessed a continuous improvement on the corporate governance framework. The Code was revised and securities and companies laws were amended. The Audit Oversight Board was established to provide independent oversight over external auditors of companies. The Securities Industry Dispute Resolution Centre was established to facilitate the resolution of small claims by investors. Statutory derivative action was introduced to encourage private enforcement action by shareholders.

In 2011, the Securities Commission Malaysia issued the Corporate Governance Blueprint 2011 which outlines strategic initiatives aimed at reinforcing self and market discipline. The Malaysian Code on Corporate Governance 2012 (MCCG 2012) remains a key deliverable of the Blueprint.

The MCCG 2012, consistent with the Blueprint, retains the definition of corporate governance as set out in the High Level Finance Committee Report 1999. Corporate governance is defined as:

"The process and structure used to direct and manage the business and affairs of the company towards enhancing business prosperity and corporate accountability with the ultimate objective of realizing long-term shareholder value, whilst taking into account the interest of other stakeholders"

The MCCG 2012, which supersedes the 2007 Code sets out the broad principles and specific recommendations on structures and processes which companies should adopt in making good corporate governance an integral part of their business dealings and culture.

Like all corporate governance codes, the MCCG 2012 advocates the adoption of standards that go beyond the minimum prescribed by regulation. The observance of the 2012 Code by companies is voluntary. Listed companies are however required to report on their compliance with the 2012 Code in their annual reports. The Malaysian Code 2012 focuses on clarifying the role of the board in providing leadership, enhancing board effectiveness through strengthening its composition and reinforcing its independence. The 2012 Code also encourages companies to put in place corporate disclosure policies that embody principles of good disclosure. Companies are encouraged to make public their commitment to respecting shareholder rights.

## 3. Corporate Governance of Banking Industry in Nigeria

Legislation on corporate governance in Nigeria has followed the pattern laid down several decades ago in England following the collapse of enterprises due to fraudulent manipulation by corporate managers. The various laws are made to regulate the practice of a particular trade or profession in order to protect investors and ensure stable business environment. In Nigeria, there are quite a number of these laws. There is, the CBN Act, the Banks and Other Financial Institutions Act, Investment and Securities Act, the Nigeria Deposit Insurance Corporation Act and the Companies and Allied Matters Act. All the statutes referred to above contain direct provisions regulating the banking industry in Nigeria.

Modern banking was first introduced into the country nearly a century ago in 1892. Since then, Nigerian banking has come a long way. From eight commercial banks and 190 bank offices at independence in 1960, the institutional and other changes in the industry have been enormous, particularly since the adoption of the Structural Adjustment Programme in 1986 by the General Babangida's junta. In 1987, there were 33 commercial banks, 15 merchant banks, 90 insurance companies, 46 stock-broking firms and 5 re-insurance companies. As at the end of April 1990, there were 57 commercial and 40 merchant banks, 71 stock-broking firms, 101 insurance companies, 5 re-insurance companies, 56 insurance brokers, 20 investment/finance houses and 25 bureau de change.

These developments have resulted in very keen competition, poaching of men and deposits, stretching very thinly the available stock of trained and experienced manpower, and serious concern for effective management in the industry (Ola Vincent, 1991). The existence and continued existence of corporate bodies of the for-profit types is justified by the robust justification of the achievement of the objectives of the members thereof. In the case of banks elsewhere and in Nigeria, the justification for a bank's existence is anchored in the assessment of the services such bank offers and the satisfaction it brings to its shareholders.

Among the increasing number of services a modern bank offers, risk taking remains an unchanging fundamental nature of banking. In managing the risks, the bank has to satisfy five main constituencies: the surplus units from which it borrows (these units demand the best possible terms – in the rates of interest and maturity structures – and maximum liquidity to enable them to have the funds back when they want them, or as agreed. The second constituency is the deficit units which borrow from the banks. They want to borrow when they need funds as cheaply as possible.

Like the lenders, the borrowers also impose the obligation of maximum liquidity on the banks to enable them to obtain the funds when they need them. The shareholders must also be satisfied. These require maximum or adequate returns on their investments in order to remain invested in the bank and to be willing to continue to provide additional resources as and when needed. To these is added the fourth constituency, the regulatory authorities, whose interest is to ensure that the bank does not undertake excessive risks and that it operates prudently and within stipulated regulatory requirements.

There is finally the community at large. As the provider of the environment within which it operates, the bank owes an obligation to the community to be a good corporate citizen, capable of maximising the exploitation of the opportunities available and minimising the threats in the environment. In managing risks, bank management is faced with the arduous task of balancing and reconciling the above five obligations in such a way that the five constituencies are kept satisfied (G.U Nwankwo, 1991), especially the regulatory constituency whose influence and demands are becoming overbearing.

*3.1 Regulatory Authorities*

Regulation is a modern articulation of the idea of legislation as the expression of government policy. Legislation, be it substantive or subordinate, is the crystallization of an objective. That objective may have cultural, economic, political or social purposes. An idea becomes a policy. The policy, in government, becomes a principle by which government conducts its public affairs and this extends to legislation.

So, the policy of a piece of legislation is the general purpose considered by the government of the day as necessary for the welfare of the state and for the prosperity of the individuals in the state. A statute therefore represents in legislative form, a policy of the Executive arm of government (V.C. Crabbe, 2000). Regulation refer to legal rules which seek to steer the behaviour of mainly private citizens and companies but also of central and local government as well a public agencies (Bettina Lange, 2000). Regulatory agencies constitute the administrative vehicle through which regulations are enthroned in a society.

The term regulatory agencies refers to a range of organisations which shape and direct social behaviour so as to contribute to the attainment of whatever goals a society wishes to achieve. Its task is to monitor and oversee the conduct of designated social activities to ensure that they are carried out in the desired manner. In its most familiar form, a regulatory agency is a representative of the state, responsible for implementing and enforcing prescriptive controls over particular kinds of social and economic activities, if necessary through the application of sanctions (Karen Yeung, 2008).

In Nigeria, there are quite a few of these agencies whose actions impact on the various sectors of the economy. In relation to this study, the identified agencies are the CBN and the department of Banks and Other Financial Institutions of the CBN, the Securities and Exchange Commission, the Nigeria Deposit Insurance Corporation and the Corporate Affairs Commission. All these agencies apply and administer their respective enabling statutes which contain direct provisions impacting the regulation of banking sector in Nigeria.

*3.2 Central Bank of Nigeria*

The Central Bank of Nigeria is established under the enabling statute cited as the Central Bank of Nigeria Act, 2007. This piece of legislation repealed the Central Bank of Nigeria Act 1991 and other subsequent amendment legislations: Central Bank of Nigeria (Amendment) Act 1993; Central Bank of Nigeria (Amendment) Act 1997; Central Bank of Nigeria (Amendment) (N0.2) Act 1998; and Central Bank of Nigeria (Amendment) Act 1999 were also consequentially repealed. The principal objects of the bank has been expressed in the enabling statute *inter alia* to be to ensure monetary and price stability, issuance of legal tender currency in Nigeria, maintenance of external reserves to safeguard the international value of country's legal tender currency, promote a sound financial system in Nigeria, and to act as banker and provide economic and financial advice to the Federal Government of Nigeria as stipulated in the Central Bank Of Nigeria - CBN - Act, 2007).

In order to secure the achievement of its objects under the statute, the main organ of the bank, the Board of Directors is saddled with the responsibility for the policy and general administration of the affairs and business of the bank. The Board also has powers to make and alter rules and regulations for the good order and management of the bank. It was perhaps in exercise of its powers under the Act that in 2006, the CBN rolled out a Code of Corporate Governance for Banks and Discount Houses in Nigeria. A few years later, the CBN has seen the need to instate another Code of 2014, which supersedes that of 2006.
In making the code, the CBN did not give due regard to legislative process under the Constitution of the Federal Republic of Nigeria, 1999, which provides the legislative powers of the Federal Republic of Nigeria

> "Shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives. The National Assembly shall have power to make laws …with respect to any matter included in the Exclusive Legislative List set out in the second schedule to this Constitution; The House of Assembly of a State shall have powers to make laws for …the State or any part thereof with respect to …any matter not included in the Exclusive Legislative List set out in Part I of the second schedule to this Constitution."

For the avoidance of doubt, items six, twelve and thirty-two respectively in the Exclusive Legislative List relate to:

 

> "Banks, banking, bills of exchange and promissory notes; control of capital issues; and incorporation, regulation and winding up of bodies corporate…."

These are subject matters over which the States' legislative arms, the Houses of Assembly do not possess legislative power to enact laws over, not to talk of a statutory corporation such as the CBN that is not a component of the National Assembly nor does it have an enabling provision in its principal statute under which it can purport to exercise subsidiary legislative power.
The Code admits this much when it states further in the introductory part as follows: "However during the implementation of the code (the 2006 code), it was observed that certain provisions could not be implemented by banks in view of their ambiguity and or conflict with the provisions of the CAMA, 1990…."
A code is defined in the Black's Law Dictionary as

> "A systematic collection, compendium or revision of laws, rules, or regulations (e.g., Uniform Commercial Code). A private or official compilation of all permanent laws in force, including the common law and statutes as judicially interpreted, which have been compiled by code commissions and enacted by the legislatures (e.g. California Codes).

What the CBN has done with code of Corporate Governance Code presented by it goes beyond mere compilation of laws, and dwelled more in the realm of an enactment, both of which actions is beyond the powers of the CBN. It is therefore not surprising that while purporting to establish a code for the observation of banks in Nigeria, there is no cross-referencing indicating the section of law in the principal statute, the CBN Act of 2007, which empowers the promulgation of the code.

There can be no gratuitous interpretation of the CBN Board's powers to make and alter rules and regulations for the good order and management of the bank that will extend the power to *vires* on the part of the CBN to establish the code. In other words, the promulgation of the code is *ultra vires* the CBN. The code under reference is neither a compilation or even a subsidiary legislation but an act of principal law making by the CBN making no pretence of the intentions of the promulgators in intending it a principal legislation in the banking industry. A few examples from the wordings of the code will underscore this submission.

In the introduction part, the code is said to refer to rules, processes or laws by which institutions are operated, regulated and governed. This, it is submitted, is an unabashed usurpation of the functions of the Corporate Affairs Commission (CAC), whose place it is, by virtue of the Companies and Allied Matters Act, 2011, to function inter alia to "arrange or conduct an investigation into the affairs of any company where the interest of the shareholders and the public so demand; perform such other functions as may be specified by any Act or enactment; and undertake such other activities as are necessary or expedient for giving full effect to the provisions of this Act. It is only in respect of the powers, duties or jurisdiction of the Securities and Exchange Commission (SEC), established pursuant to the Investments and Securities Act (ISA), 1999 that the exercise of the functions of the CAC are deferred to.

In other words, the power to arrange or conduct investigation into the affairs of any company where the interest of the shareholders and the public so demand, or, the power to register and regulate corporate and individual capital market operators as defined in section 30 of the ISA, can only be exercised respectively by the CAC and the SEC and no one else. After the consolidation exercise carried out on banks in Nigeria in 2005, the surviving banks have all become public companies limited by shares who engage in securities business by having their shares traded in the Nigerian capital market. Such banking institutions are therefore subject to corporate governance regimes as specified by either the CAC or the SEC and no other.

Therefore, even if a bank is qualified on both scores in being a company registered under the CAMA, or one who participates in the Nigerian capital market, they can only be subject to any code of corporate governance where such a code is established by the CAC or the SEC. the code of corporate governance, purportedly established by the CBN is one code too many which infringes on the constitutional rights of the Nigerian banks. For instance, the introductory statement to the code has this to say:

> "Corporate governance has received increased attention because of high profile scandals involving abuse of corporate power and in some cases, alleged criminal activity by corporate officers. Following

 

> conclusion of consolidation in 2005, a Code of Corporate Governance for Banks in Nigeria was issued to banking industry in view of the fact that governance mechanism in banks was notably weak and Board members of financial institutions were unaware of their statutory and fiduciary responsibilities".

This statement is constitutionally prejudicial of the rights of the banks as contained in section 42 of the Nigerian constitution which provides:

> "A citizen of Nigeria of a particular community, ethnic groups, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person – be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or opinions are not made subject…"

The corporate body (in this case, a bank) is a citizen of Nigeria (a persona) by registration (having been registered under the CAMA) and belongs to a particular community (the banking community) in Nigeria. Therefore it ought not to be discriminated against (by the CBN Code which exists solely for the exclusive governance of members of the banking community).

Consolidation, the precursor of the 2006 CBN Code of Corporate Governance is in itself an abuse of corporate powers which the CBN exercised when it forced the mergers of banking institutions. In another clime, the CBN itself will be subject to a Code of Corporate Governance which in giving observations to would have necessitated a cautionary approach to the consolidation option handed down willy-nilly to banks at that period. It is noteworthy that issues that were thrown up at that time such as the acts of the organs of the banks, the Board of Directors and the company at General Meetings; Directors fiduciary duties; Officers liabilities, Schemes of Arrangements etc., are matters which are copiously provided for in the CAMA.

If however these provisions are inadequate, they ought to be improved upon and not that an un-empowered body like the CBN will step in to usurp the functions and powers of other statutory bodies such as the CAMA and SEC in contemptuous disregard for constitutionally stipulated legislative process.

Another departure from the international best practice of compliance with codes of corporate governance is also witnessed in the CBN code. Compliance is mandatory and a refusal to comply is at the pains of appropriate sanctions in accordance with section 60 Banks and other Financial Institutions Act as amended.

The U.K. model adopts a 'comply or explain' approach whereby companies may depart from the Combined Code's principles and provisions so long as they explain their reasons for doing so. This model, is an innovation of the 1992 Cadbury Report, and has been widely imitated around the world since it provides a way to encourage better corporate governance without imposing a restrictive 'one size fits all' set of mandatory rules on companies that vary widely.

The Canadian model also adopts a "principles-based" approach which, perhaps with the exception of mandatory rules relating to audit committees, companies are required to publicly disclose the extent of their compliance with the suggested "best practices" and, where a firm's practices depart from such guidelines, to describe the procedures implemented to meet the same corporate governance objective. Hence, the Canadian approach is in the form of "comply or disclose". This is not the case in Nigeria.

Apart from the Code, the CBN also provides Guidelines for Whistle Blowing for Banks in Nigeria. This subsidiary legislation provides that the: "prevalence of misconduct in organisations particularly banks and other financial institutions in the recent past underscores the need to institute rigorous policies to allow employees and other stakeholders bring unethical and illegal practices to the fore to minimise the damage such misconduct can cause to different stakeholders".

This Guidelines prescribes mandatory compliance by banks' External Auditors who shall report annually to the CBN and the banks themselves who shall establish whistle-blowing guidelines and send copies to the CBN within three months of the establishment of the guidelines, render quarterly returns. The view is taken in this study that this constitutes an unnecessary diversion for the banks from their onerous duties of positively balancing the interests of the stakeholders. All these further compound the banks' administrative expenses in terms of paying consultants and filing of documents with the CBN, a duty which they are already subject to under the CAMA.

It is the respectful view canvassed in this article that the Guidelines constitute an infringement of section 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999. The section provides: "Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a law of a State, or any subsidiary legislation or instrument under the provision of a law".

The Guidelines is not such subsidiary legislation that would have benefitted from the coverage of this constitutional provision. As a result, any sanction for an alleged infringement of the provisions of the Guidelines will amount to an unconstitutionality.

*3.3 The Securities and Exchange Commission (SEC) Code of Corporate Governance*

In the introduction statement to the Code of Corporate Governance issued by the SEC, the Commission has this to say:

> "It is generally agreed that weak corporate governance has been responsible for some recent corporate failures in Nigeria. In order to improve corporate governance, the Securities and Exchange Commission ('SEC"), in September 2008, the Securities and Exchange Commission (SEC) in Nigeria inaugurated a National Committee for the review of the 2003 Code of Corporate Governance for Public Companies in Nigeria to address its weaknesses and to improve the mechanism for its enforceability. In particular, the Committee was given the mandate to identify weaknesses in and constraints to good governance, and to advice on other issues that are relevant to promoting good corporate governance practices by public companies in Nigeria, and for aligning the Code with international best practices. The Board of SEC therefore believes that this new Code of Corporate Governance will ensure the highest standards of transparency, accountability and good governance, without unduly inhibiting enterprise and innovation. Whilst the Code is applicable to public companies not covered by the Code to use the principles set out in the Code, where appropriate, to guide them in the conduct of their affairs."

The thirty-seven section Code correlates with the spirit and letters of international best practices, of compliance especially as obtaining in South Africa, U.K., and Canada, by subscribing to the voluntary option of "comply or disclose" approach.

**4. Conclusion**

The salutary nature of corrective legislation as typified by the trending of codes of corporate governance in the body of laws at international level cannot be over-emphasised. However, as salutary as this may seem, compliance with constitutional stipulations for law making processes cannot be shunted aside on account of this 'convenience'.

An appraisal of corporate governance legislations as currently obtaining in Nigeria will reveal that the banking industry is subjected to 'double jeopardy' in having two sets of codes of governance to which it is subjected to emanating from two regulatory authorities. Both the CBN and SEC are statutorily empowered to regulate the affairs of banks in Nigeria just because banks in Nigeria partake of the dual nature of publicly companies as well as operators in the banking industry.

While the SEC and the CAC are statutorily empowered to fashion codes of governance for companies subject to their regulation, such cannot be said of the CBN which as it has been shown in the article is not clothed with the powers it exercised in establishing both the Code of Corporate Governance for Banks and Discount Houses in Nigeria and the Guidelines for whistle-blowing in the Nigerian Banking Industry.

Indeed, by section 47 of the CBN Act, 2007, the CBN is enjoined to seek the co-operation with banks in Nigeria in its efforts at promoting and maintaining adequate and reasonable financial services. This section suggests that even in areas where the CBN is empowered to act, cooperation is the modus operandi suggested for the achievement of statutory objectives. How much more in areas of legislative incompetence is the CBN enjoined to tread softly.

Corporate governance is necessary for the regulation of corporate bodies in Nigeria generally and the banking sector in particular. While the banking sector too is not insulated from regulation, yet it must not be subjected to overregulation, and due compliance must be given to the operative laws in the country, especially the constitution from which other laws of the land claim their legality.

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