Annual Survey of International & Comparative Law

Volume 23 | Issue 1 Article 6

2019

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Professor Dr. S. Gozie Ogbodo
University of Benin

Dr. Godwin Luke Umoru
University of Benin

IMPERATIVES OF CORPORATE GOVERNANCE ON CORPORATE CITIZENSHIP IN NIGERIA

PROFESSOR DR. S. GOZIE OGBODO*
DR. GODWIN LUKE UMORU**

ABSTRACT

This paper seeks to examine and interrogate the conceptual ideas and frameworks of corporate governance; its relationship and relevance to corporate citizenship and the elements that describe what is meant by corporate citizenship. Various perspectives of the role which corporate governance plays as a major influence on corporate citizenship and corporate social responsibility were clearly shown. Also shown is the meaning which is ascribed to corporate governance, its core principles, the rhetoric and realities concerning the effect of a corporation's pursuit of power and profit on corporate citizenship, legal and social responsibilities and the significant paradigm shift. Situating the concept of corporate governance with corporate citizenship shows an interrelationship between the former and the latter. Consequently, this paper revealed that in the long run the market mechanism should be able to provide additional resources to

* LL.B. (Hons.), Akwa Ibom State University; B.L., Lagos; LL.M., Ph.D., Golden Gate University School of Law; Professor, Dept. of Public and Property Law, Faculty of Law, University of Benin, Benin City, Nigeria; Pioneer Dean, Faculty of Law, Godfrey Okoye University, Enugu, Nigeria.

** LL.B. (Hons.), University of Benin; B.L., Lagos; LL.M., Ph.D., Ambrose Alli University; Senior Lecturer, Dept. of Business Law, Faculty of Law, University of Benin, Benin City, Nigeria.

those companies which are best at maximizing and adhering to the principles of corporate governance for the promotion of good corporate citizenship.

INTRODUCTION

Research on corporate governance globally seems to have established common phenomenon despite the diversities of each country's economic systems. This is also without prejudice to the different systems of capital markets, irregular security issues, structures of corporate ownership, shareholders protection, dividend policies and efficiency of investment allocation.[1] These common observed phenomena can be attributed to how well the national laws protect outside investors. This is also because the protection of shareholders and creditors are functions of the legal system in place which invariably influences the understanding of the patterns of corporate finances of nations and cumulatively consist of both public and private finances.

Also, in a converging world where the gospel of free markets and democracy is resonating more than ever before, and given the far-reaching impact of companies' operations on the wealth of the nations, its biodiversity and the necessity for distribution of resources for economic well-being, it is becoming increasingly clear that the governance of companies[2] must matter, as does political governance and duties of its citizens.[3] In effect, the relevance of corporate governance principles in corporate administration is beyond any question, especially as the pervasive relevance of its principles has been largely attributable to the adverse consequences of non-compliance with the provisions of corporate governance codes all over the world.[4]

This paper, therefore, seeks to examine and interrogate the conceptual ideas and frameworks of corporate governance, its relationship and relevance to corporate citizenship and the elements that describe what is meant by corporate citizenship. Various perspectives of the role which corporate governance plays as a major influence on corporate citizenship and corporate social responsibility will be examined. The meaning which

1. R. La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 2-27 (2000).

2. Generally representing corporations, family owned businesses, small and medium scale enterprises and business associations.

3. O.O. Solanke, *Corporate Governance Issues in Financial Reporting – The Cadbury Challenge*, Business Law Conference of NBA (Mar. 12 – 14, 2007).

4. G.L. Umoru, Legal Imperatives of Corporate Citizenship and Responsibility in Nigeria 282 (2014) (unpublished Ph.D. thesis, Ambrose Alli University, Ekpoma, Nigeria).

is ascribed to corporate governance, its core principles, the rhetoric and realities concerning the effect of a corporation's pursuit of power and profit on corporate citizenship, legal and social responsibilities and any significant paradigm shift will be demonstrated. The ultimate goal is to situate the concept of corporate governance with corporate citizenship with a view to showing the inter-relationship between the former and the latter. It will also suggest a conceptual approach to bridge the two concepts.

The imperative of the above undertaking is premised on the presumption that the engagement of corporations in corporate social activities as corporate citizens depends a great deal on the nature of corporate governance. In order to appreciate this point, it is worthwhile to first examine the concept of corporate governance, corporate citizenship and their relationship with a view that it may invariably translate to good governance.

I. DEFINING AND UNDERSTANDING THE CONCEPT OF CORPORATE GOVERNANCE

There are diverse viewpoints or opinions about the term corporate governance by different scholars and researchers.[5] In one viewpoint, held by scholars L.C. Opara and A.J. Alade, corporate governance refers to the system by which corporations are directed and controlled. This is because governance structure specifies the distribution of rights and responsibilities among different participants in the corporation (such as the board of directors, managers, shareholders, creditors, auditors, regulators, and other stakeholders) and specifies the rules and procedures for making decisions in corporate affairs.[6] The term "corporate governance" describes also "the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled within corporations. The term also encompasses the mechanisms by which companies and those in control are held to account."[7] Good corpo-

5. *See generally* J. O. AMMUPITAN, CORPORATE GOVERNANCE: MODELS AND PRINCIPLES (Hilltop Publishers 2008); PRASAD KESHO, CORPORATE GOVERNANCE (Princtice-Hall of India Private Ltd. 2006); A. DUNLOP, CORPORATE GOVERNANCE AND CONTROL (The Chartered Institute of Management Accountants 1998); DONALD H. CHEW & STUART L. GILLAN, CORPORATE GOVERNANCE AT THE CROSSROADS (McGraw Hill/Irwin 2005); INVESTOR PROTECTION AND CORPORATE GOVERNANCE (A. Chong & Lopez-de-Silances eds., The Inter-American Development Bank 2007); HARVARD BUSINESS REVIEW ON CORPORATE GOVERNANCE (Harvard Business School Press 2000).

6. L.C. Opara & A.J. Alade, *The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis*, 26 J.L. POL'Y & GLOBALISATION 38 (2014).

7. Australia, HIH Royal Commission & Justice N. Owen, A Corporate Collapse and Its Lessons xxx (Commonwealth of Australia 2003).

rate governance promotes investor confidence, which is crucial to the ability of all listed entities in the stock exchange to compete for capital.

Corporate governance covers a large number of distinct concepts and phenomena, as evidenced from the globally adopted definition of the concept by the Organisation of Economic Corporation and Development (OECD) to the effect that corporate governance is:

> the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders and spells out the rules and procedures for making decisions in corporate affairs. By doing this, it also provides the structure through which the company objectives are set and the means of attaining those objects and monitoring performance.[8]

Even nations are not left out of the efforts to define the concept of corporate governance. According to the India's SEBI Committee on Corporate Governance, it defines corporate governance as the:

> acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company.[9]

Lately, corporate governance has been comprehensively defined as "a system of law and sound approaches by which corporations are directed and controlled focusing on the internal and external corporate structures with the intention of monitoring the actions of management and directors and thereby mitigating agency risks which may stem from the misdeeds of corporate officers."[10]

No doubt the various view points above invariably reflect their respective experiences and backgrounds. Another fallout from the above definitions

8. SEC. & EXCH. BD. INDIA, REPORT OF THE COMMITTEE ON CORPORATE GOVERNANCE (2003), http://www.sebi.gov.in/commreport/corpgov.pdf.

9. *Id.*

10. A. Sifuna, *Disclose or Abstain: The Prohibition of Insider Trading on Trial*, 12 J. INT'L BANKING L. & REG. 9 (2012).

will show that the corporate governance framework invariably consists of elements of first, explicit and implicit contracts between the company and the stakeholders for distribution of responsibilities, rights, and rewards. Secondly, it is a procedure for reconciling the sometimes conflicting interests of stakeholders in accordance with their duties, privileges, and roles. Thirdly, it is a procedure for proper supervision, control, and information-flows to serve as a system of checks-and-balances. In effect, the concept refers to the relationship that exists between the various corporate actors which helps in defining the direction and performance of a corporation.[11] The main actors are the chief executive officer (CEO); the board of directors and the shareholders. Other actors that can influence corporate governance are the staff, suppliers, customers, creditors, government and the community.

II. BASIS FOR CORPORATE GOVERNANCE

Over centuries, the concept of corporate governance has evolved usually in response to corporate failure such as the South Sea Bubble in the 1700s[12] that led to the revolutionized business laws and practices in England. By way of benefits, R. Kyte, a member of the World Bank Group, holds the views that good corporate governance practices instill in companies the essential vision, processes, and structures to make decisions that ensure longer-term sustainability.[13] He pointed out that, more than ever, we need companies that can be profitable and can achieve environmental, social and economic value for the society. In like manner, another scholar, A. Nkwachukwu, emphasized the growing consensus to the effect that corporate governance has a positive link to national economic growth and development.[14]

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11. Without prejudice to the exhaustive definition of a corporation in Chapter II, a corporation is an invincible, intangible and artificial body, which exists in the eyes of the law.

12. Going by the narratives of Ellen Castelow, in 1720, in return for a loan of £7 million to finance the war against France, the House of Lords passed the South Sea Bill, which allowed the South Sea Company a monopoly in trade with South America. The company underwrote the English National Debt, which stood at £30 million, on a promise of 5% interest from the government. Shares immediately rose to 10 times their value, speculation ran wild and all sorts of companies, some lunatic, some fraudulent or just optimistic were launched. The stocks crashed and people all over the country lost all of their money. Porters and ladies maids who had bought their own carriages became destitute almost overnight. The Clergy, Bishops and the Gentry lost their life savings; the whole country suffered a catastrophic loss of money and property. *The South Sea Bubble of 1720*, HISTORIC UK, http://www.historic-uk.com/HistoryUK/HistoryofEngland/south-sea-bubble/ (last visited Feb. 14, 2017).

13. WORLD BANK, NAVIGATING THROUGH CRISES: A HANDBOOK FOR BOARDS (International Finance Corp. 2010), *available at* http://documents.worldbank.org/curated/en/163831468161083824/Navigating-through-crises-a-handbook-for-boards.

14. A. Nwachukwu, Understanding Share Registration in Nigeria: Contemporary Issues on Management (America Ltd., 2007).

The checks and balances in organization he posited, are strengthened through the framework of the concept. Directors without corporate governance enforcement mechanism may paint a misleading picture of financial performance of their company to lure unsuspecting investors. Such window dressed accounts raised concern in different parts of the world for the past years, including the U.S. and Nigeria. In the U.S., stories portraying sad corporate ethics (or lack thereof) with the collapse of the energy corporation ENRON in 2001 which filed for bankruptcy after adjusting its accounts.[15] Other failed corporations include World Com, Global Crossing, Anderson,[16] Merrill Lynch, Martha Stewart, Qwest Communication, Tyco International, Adelphia Communications, Computer Associates, Parmalat, Putman, Boeing and Rite Aid. It is pertinent to state that each of these crises was often as a result of corporate failure occasioned by incompetence, fraud and abuse. On each occasion new elements of an improved system of corporate governance were also instituted. According to one scholar in the field, J.N. Dogo, in the process of continuous change, developed nations have had to establish a complex mosaic of laws, regulations, institutions and implementation strategies and capacity building of the government and private sector.[17] The systematic enforcement of law and regulation created a culture of compliance that has shaped business culture and the management of the ethos of firms, spurring them to improve as a means of attracting human financial resources on the best possible terms. This continuous process of change and adaptation has accelerated with the increasing diversity and complexity of shareholders and stakeholders. Globalization too, is forcing many companies to tap into international financial markets and to face greater competition. This has led to restructuring and a greater role for merger and acquisitions and to expanded markets for corporate control.

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15. Enron Corp. was a company that reached dramatic heights, only to face a dizzying collapse. The story ends with the bankruptcy of one of America's largest corporations. Enron's collapse affected the lives of thousands of employees and shook Wall Street to its core. At Enron's peak, its shares were worth $90.75, but after the company declared bankruptcy on December 2, 2001, they plummeted to $0.67 by January 2002. To this day, many wonder how such a powerful business disintegrated almost overnight and how it managed to fool the regulators with fake, off-the-books corporations for so long. *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA, http://www.investopedia.com/updates/enron-scandal-summary/#ixzz> (last visited Jan. 27, 2017).

16. Arthur Andersen, which signed off on Enron's and WorldCom's books, was the only firm convicted of obstruction of justice related to the scandals, and the once proud accounting giant was later to be prohibited from auditing public companies.

17. J.N. Dogo, An Appraisal of the Legal Framework for Corporate Governance in Nigeria 38 (2011) (unpublished LL.M. dissertation, Ahmadu Bello University, Zaria).

In Nigeria, the imperatives of corporate governance were emphasized by the Atedo Peterside Committee report to the effect that:

> the importance of effective governance to corporate and economic performance cannot be overemphasized in today's global market place. Companies perceived to be adopting international best corporate governance practice are more likely to attract international investors than those whose practices are perceived to be below international standards.[18]

The case of *Cadbury Nigeria Plc*, sent the first signal when, in October 2006, its board notified the public, including its shareholders and regulatory bodies, of the discovery of "overstatement" in its accounts, which according to the company, started in 2003.[19] Also in recent years, the Central Bank of Nigeria (CBN), under some intervention procedures, had to sack the boards of several banks like Spring Bank Plc and Wema Bank Plc, and take over the leadership of the said banks in order to assure the safety of depositor's funds and clip a threatened contagion from engulfing the Nigerian banking system. Amongst other reasons, this CBN step was necessitated by corporate governance failures in the affected financial institutions.

Some of the failures were attributable to falling stock markets, corporate failures, dubious accounting practices, and abuses of corporate power. Criminal investigations indicate that the entire economic system upon which investment returns have depended is showing signs of stress that have undermined investor confidence. The increasing incidence of corporate fraud relating to exaggerated and overstated accounts in what they term "financial engineering" has informed the renewed global emphasis on the need for effective corporate governance without being over-bloated. The Central Bank of Nigeria, in 2006, reported that despite the significance of good corporate governance to national economic development and growth, corporate governance was still at a rudimentary stage as only 40% of publicly quoted companies, including banks, had recognized corporate governance in place. However, the legitimacy or legal

18. A Joint Committee of SEC and CAC set up in 2000 to identify the weaknesses in the Nigerian Corporate Governance practices.

19. Cadbury Nigeria Plc, like another foreign owned firm before it, Lever Brothers Nigeria Plc (now Unilever), deviated from the norm. Following the discovery of irregularities in its audited accounts in October, 2006 and an independent audit carried out by PricewaterhouseCoopers (PWC), Cadbury had the decency in December, 2006 to admit a significant and deliberate overstatement of its financial statements since 2003.

justification for corporate citizenship often now and again raise some questions in relation to principles and models.

III. PRINCIPLES AND MODELS OF CORPORATE GOVERNANCE

A. Principles of Corporate Governance

Current discourse on corporate governance tends to refer to principles raised in three documents released since 1990. These are: the U.K. Cadbury Report 1992[20]; the U.S. Sarbanes-Oxley Act, 2002[21]; and the Organisation of Economic Cooperation and Development (OECD) Principles of Corporate Governance, 1998 and 2004.[22] The Cadbury and OECD reports informed the present general principles around which businesses are expected to operate to assure proper governance. The Sarbanes-Oxley Act, on the contrary, is an attempt by the federal government in the United States to legislate several of the principles recommended in the Cadbury and OECD reports. The principles formulated from the three reports above which compel companies to perform their social responsibilities as good corporate citizens are discussed below.

20. "The Committee on the Financial Aspects of Corporate Governance, forever after known as the Cadbury Committee, was established in May 1991 by the Financial Reporting Council, the London Stock Exchange, and the accountancy profession. The spur for the Committee's creation was an increasing lack of investor confidence in the honesty and accountability of listed companies, occasioned in particular by the sudden financial collapses of two companies, wallpaper group Coloroll and Asil Nadir's Polly Peck consortium: neither of these sudden failures was at all foreshadowed in their apparently healthy published accounts." *The Cadbury Report*, Univ. Cambridge Judge Bus. School, http://cadbury.cjbs.archios.info/report (last visited Oct. 27, 2017).

21. The Sarbanes-Oxley Act of 2002 (SOX) is an act passed by U.S. Congress in 2002 to protect investors from the possibility of fraudulent accounting activities by corporations. The SOX Act mandated strict reforms to improve financial disclosures from corporations and prevent accounting fraud. The SOX Act was created in response to accounting malpractice in the early 2000s, when public scandals such as Enron Corporation, Tyco International plc, and WorldCom shook investor confidence in financial statements and demanded an overhaul of regulatory standards.

22. "Originally developed by the OECD in 1999, then updated in 2004, the 2015 revision of the Principles of Corporate Governance addresses these and other emerging issues that are increasingly relevant. Building on the expertise and experience of policy makers, regulators, business and other stakeholders from around the world, the Principles provide an indispensable and globally recognized benchmark for assessing and improving corporate governance. The Principles have been adopted as one of the Financial Stability Board's key standards for sound financial systems, and have been used by the World Bank Group in more than 60 country reviews worldwide. They also serve as the basis for the guidelines on corporate governance of banks issued by the Basel Committee on Banking Supervision." Organization for Economic Cooperation and Development [OECD], *G20/OECD Principles of Corporate Governance* (2004), https://www.oecd.org/corporate/principles-corporate-governance.htm.

1. Rights and Equitable Treatment of Shareholders

Under this principle, organizations are expected to respect the rights of shareholders and help shareholders to exercise those rights. These rights include the right to participate and vote at annual general meetings, elect members of the board, obtain timely and regular information on the company and share in the profits of the company.[23] On the ethical treatment of shareholders, the concern here is particularly to ensure that the interests of minority and foreign shareholders are adequately protected. This is achievable through the installation of a system that prevents insiders, including managers and directors, from taking advantage of their positions through such practice as insider trading.

2. Interests of Other Stakeholders

This principle stipulates that organizations should recognize that they have legal, contractual, social, and market driven obligations to non-shareholders or stakeholders, including employees, investors, creditors, suppliers, local communities, customers, and policy makers.[24]

3. Role and Responsibilities of the Board

The board needs sufficient relevant skills and understanding to review and challenge management performance. It also needs adequate size and appropriate levels of independence and commitment.[25]

4. Integrity and Ethical Behavior

This principle expects that integrity should be a fundamental requirement in choosing corporate officers and board members. Organizations should develop a code of conduct for their directors and executives that promotes ethical and responsible decision making.[26]

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23. *See G20/OECD Principles of Corporate Governance*, arts. II, III; Adrian Cadbury, Committee on the Financial Aspects of Corporate Governance & Gee & Co. Ltd., Report of the Committee on the Financial Aspects of Corporate Governance § 3.4 (1992); Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2002).

24. *G20/OECD Principles of Corporate Governance*, *supra* note 22, pmbl., art. IV.

25. *See G20/OECD Principles of Corporate Governance*, *supra* note 22, art. VI; Cadbury, *supra* note 23, § 3.4.

26. Cadbury, *supra* note 23, §§ 3.2, 3.3, 4.33, 4.51, 7.4.

5. Disclosure and Transparency

The principle here calls for organizations to clarify and make publicly known the roles and responsibilities of board and management to provide stakeholders with a level of accountability. They should also implement procedures to independently verify and safeguard the integrity of the company's financial reporting. Disclosure of material matters concerning the organization should be timely and balanced to ensure that all investors have access to clear and factual information.[27]

B. Models of Corporate Governance

There are many different models of corporate governance around the world. They differ according to the variety of capitalism in which they are embedded. For instance, while the Anglo-American "model" tends to emphasize the interests of shareholders, the Coordinated or Multi-stakeholder Model is commonly associated with Continental Europe and Japan also recognizes the interests of workers, managers, suppliers, customers, and the community. Some scholars in the field have observed that the related distinction is between market-orientated and network-orientated models of corporate governance.[28] The distinctions between the models can be better appreciated as discussed herein.

1. Continental Europe

Some continental European countries, including Germany and the Netherlands, require a two-tiered board of directors as a means of improving corporate governance.[29] In the two-tiered board, the executive board, made up of company executives, is generally charged with the responsibility of day-to-day operations while the supervisory board, made up entirely of non-executive directors represents the shareholders and employees. They can hire and fire the members of the executive board, determine their compensation, and review major business decisions.[30]

27. *G20/OECD Principles of Corporate Governance*, *supra* note 22, arts. I, V.

28. S. Douma & H. Schreuder, Economic Approaches to Organisations ch. 15 (Pearson 5th ed. 2013).

29. T. Bob, Essentials for Board Directors: An A-Z Guide 35 (Bloomberg Press 2d ed. 2009).

30. The German Two-Tier Board (Aufsichtsrat), A German View on Corporate Governance, Comparative Corporate Governance: Essays and Materials (K.J. Hopt et al. eds., de Gruyter 1975).

2. India

The India's SEBI Committee on Corporate Governance definition suggested that the Indian approach is drawn from the Gandhian principle of trusteeship and the directive principles of the Indian Constitution, but this conceptualization of corporate objectives is also prevalent in Anglo-American and most other jurisdictions.[31]

3. United Kingdom & United States

The "Anglo-American model" of corporate governance which emphasizes the interests of shareholders, relies on a single-tiered board of directors that is normally dominated by non-executive directors elected by shareholders. As a result of this, it is also referred to as "the unitary system."[32] Within this system, many boards include some executives from the company (who are ex officio members of the board). Non-executive directors are expected to out-number executive directors and hold key posts, including audit and compensation committees. The United States differ from the United Kingdom and Nigeria in one critical respect with regard to corporate governance. In the United Kingdom and Nigeria, the CEO generally does not also serve as chairman of the board, whereas in the U.S. having the dual role is the norm, despite major misgivings regarding the impact on corporate governance.[33]

In the United States, corporations are directly governed by state laws, while the securities and stock exchange operations are governed by federal legislation. Many states in the U.S. have adopted the Model Business Corporation Act, but the dominant state law for publicly traded corporations is of Delaware, which continues to be the place of incorporation for the majority of publicly traded corporations.[34] Individual rules for corporations are based upon the corporate charter and, less authoritatively, the corporate by-laws. Shareholders cannot initiate changes in the corporate charter although they can initiate changes to the corporate by-laws.

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31. A. Afsharipour, *Corporate Governance Convergence: Lessons from Indian Experience*, 29 NW. J. INT'L L. & BUS. 16 (2009).

32. CADBURY, *supra* note 23. *See also* C.A. MALLIN, HANDBOOK ON INTERNATIONAL CORPORATE GOVERNANCE: A COUNTRY ANALYSES (Edwad Elgar Publishing 2d ed. 2011).

33. W.G. BOWEN, THE BOARD BOOK: AN INSIDER'S GUIDE FOR DIRECTORS AND TRUSTEES 121 (W.W. Norton & Co. 2008).

34. L.A. Bebchuk, *The Case for Increasing Shareholder Power*, 23 HARVARD L. REV. 118 (2004).

4. Nigerian Model

Nigeria has a legal framework derived from British common law and similar commercial codes to deal with issues relating to corporate governance.[35] The main corporate code is the Companies and Allied Matters Act (CAMA).[36] This Act contains several sections dealing with issues of corporate governance, from directors, shareholders and their rights.

Under section 334(1) of the Act, directors shall, in respect of each year of the company, prepare financial statements for the year. Also, section 334(2) lists what the financial statement should contain and necessary signatures are required under section 343(2)(b). Further, the Act requires, among other disclosures, the director's emoluments which shall be determined by the company in general meeting[37] and any interest the directors, including their relations, may have with the company in relation with any transaction. The accounts are also to be prepared in accordance with the Nigerian Standards, which an independent auditor so appointed from persons belonging to a body of accountants must audit.[38] It is also expected that in publicly listed companies, a report by the Audit Committee, of which not more than three executive directors and three non-executive directors must examine, review accounting and internal controls.

Nigeria has its own codes of corporate governance and they are four in number – Central Bank of Nigeria (CBN) 2006[39], National Pension Commission (PENCOM) 2008[40], for all listed pension operators, National Insurance Commission (NAICOM) 2009 and the Securities and Exchange Commission (SEC) 2011.[41] The basic guidelines on company listing and detailed regulations covered in the Nigerian Stock Exchange and the Securities and Exchange Commission are provided by CAMA and ISA. A code of best practices for public companies in Nigeria was

35. Dogo, *supra* note 17.

36. Companies and Allied Matters Act (1990) Cap. (C20) Laws of the Federation of Nigeria 2004, § 267.

37. *Id.* § 267.

38. *Id.* § 358.

39. For banks in Nigeria, post-consolidation is effective from April 3, 2006.

40. This is a code of corporate governance for licensed pension operators. The Code is based on internationally accepted principles of good corporate governance and its requirements are consistent with the provisions of the Pension Reform Act 2004, rules, regulations and guidelines issued by the Commission and are also considered transparent and enforceable.

41. Securities and Exchange Commission (2011) Cap. (C20) Laws of the Federation of Nigeria 2004.

also developed. The code is voluntary and aimed at clarifying the respective responsibilities of directors for listed companies.[42]

The above code contains some notable elements, including the separation of the roles of chairman and chief executive officer and a description of the duties, number and required caliber of non-executive directors.[43] Under the code, companies are required to form Audit Committees, remuneration committees and create an outline covering duties, appointment procedures, and constitutions of these committees.[44]

In 2006, the CBN also published a post-consolidation Code of Corporate Governance for banks in Nigeria. This code was made mandatory and in its introductory part emphasized the imperatives of corporate governance for fund mobilization for monetary implementation policy and the necessity for the consolidation in the banking policy industry.[45]

To align with international standards, the Nigerian Accounting Standards Board, which derived its powers from section 7 of its Act, issued standards which are in conformity with international accounting standards but adaptable to local conditions. The issuance of these standards by the Minister of Commerce and Industry was to ensure that the action plan and framework for smooth transition to the International Financial Reporting Standard[46] are complied with by all reporting entities by January 2, 2012.

Essentially, the Nigerian corporate governance legal framework is governed by the provisions of the Investment and Securities Act (ISA) 2007[47]; the Rules and Regulations of the Securities and Exchange Commission (SEC)[48];[49] the Companies and Allied Matters Act (CAMA)[50]; the PENCOM Code of Corporate Governance for Licensed Pension Ad-

42. The Code of Corporate Governance essentially aims to set out rules based on best practices to guide PFAs (including CPFAs) and PFCs on the structures and processes to be used towards achieving optimal governance set up.

43. Code of Corporate Governance Cap. (124) Laws of the Federation of Nigeria 2004 (repealed by Investment and Securities Act, 2007).

44. M. Maher & T. Andersson, OECD, *Corporate Governance: Effects on Firm Performance and Economic Growth*, at 12 (1999), https://www.oecd.org/sti/ind/2090569.pdf.

45. J. Moon, A. Crane & D. Matten, *Can Corporations Become Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society*, 15 Bus. Ethics Q. 427-51 (2005); Umoru, *supra* note 4.

46. Principles based on set of accounting standards to establish broad rules as well as to dictate specific treatment.

47. Investment and Securities Act (2007) Cap. (124) Laws of the Federation of Nigeria 2004, § 267.

48. The Securities and Exchange Commission [SEC] is a government agency mandated to regulate and develop the Nigerian Capital Market.

ministrators[51] and the Investment and Securities Act[52], 2004. The SEC Code of Corporate Governance in Nigeria, 2003, being voluntary, is implemented on a comply-and-explain basis with a promise that by 2007 they may become legally binding.

Based on the various models examined above, this paper agrees with the submission of Maher and Andersson that one of the most striking differences between corporate governance systems are the contrasts in the ownership and control of firms that exist across countries. Corporate governance system can be distinguished according to the degree of ownership concentration and the identity of controlling shareholder, just as it is also a factor of firm performance and economic growth.[53] Whichever governance practices a listed entity chooses to adopt is fundamentally a matter for its board of directors, the body charged with the legal responsibility for managing its businesses with due care and diligence and therefore, must ensure that it has appropriate governance arrangements in place to advance good corporate citizenship.

IV. CORPORATE CITIZENSHIP

Corporate citizenship in the context of this paper is a term used to describe a company's role in, or responsibility towards society. It is for this reason the term is sometimes used interchangeably with corporate social responsibility (CSR), business citizenship and so on. However, many also take it to mean that corporations should be regarded as citizens within a territory, that corporations should have citizenship of some sort.[54] This is usually based on the principle of corporate personhood, in that in certain legal jurisdictions, such as the United States, companies are afforded some of the same legal rights as individuals. If corporations are 'artificial persons' under the law, it is necessary to determine the extent to which they can also claim some of the entitlements, privileges and protection of citizenship, such as rights to freedom of expression and

49. *SEC Nigeria's Consolidated Rules and Regulations as at 2013*, SEC NIGERIA, http://sec.gov.ng/sec-nigerias consolidated-rules-and-regulations-as-at-2013/.

50. Companies and Allied Matters Act (1990) Cap. (C20) Laws of the Federation of Nigeria 2004.

51. The Code of Corporate Governance essentially aims to set out rules based on best practices to guide PFAs (including CPFAs) and PFCs on the structures and processes to be used towards achieving optimal governance set up.

52. Investment and Securities Act (2004) Cap. (124) Laws of the Federation of Nigeria 2004, *repealed by* Investment and Securities Act (2007).

53. Maher & Andersson, *supra* note 44.

54. Moon, Crane & Matten, *supra* note 45; Umoru, *supra* note 4.

speech and political participation.[55] Although this debate remains very active, a more recent approach to corporate citizenship has also stressed the political role of corporations in protecting or inhibiting the citizenship rights of individuals, such as by taking over previous governmental roles and functions[56] or direct political activity, such as lobbying and party financing. However, the debate on the concept was heightened by the high-profile collapse of a number of large U.S. firms such as Enron and MCI Inc. in 2001, occasioned by the global economic meltdown and the near collapse of the banking sector in Nigeria post-consolidation era. The major focus of the debate on the concept is on the principles of fairness, transparency and accountability.

In order to make these principles very effective, certain mechanisms have been designed by experts to control and reduce the inefficiencies that could arise from moral hazard and adverse selection in relation to corporate governance. For example, the behavior of managers can be monitored and checked by an independent third party in the name of an external auditor who can attest to the accuracy of the information provided by the management to investors. Other mechanisms of control for the effectiveness of these principles include monitoring by the board of directors, internal control procedures and internal auditors, balance of power, standard remuneration, competition, takeovers, whistleblowers, media pressure and surveillance, government regulation and so on.[57] Subsequent codes of corporate governance were issued and will be outlined later in this paper. However, these codes were not only ingenious, but also proactive as they appear to have mirrored almost all the duties of directors towards repositioning of corporations as citizens just as captured under sections 279 through 284 of CAMA, 2004 of Nigeria and sections 171 through 177 of the U.K. Companies Act 2006. Their influence on corporate governance vis-a-vis corporate citizenship will be discussed later in this paper.

V. LEGITIMACY OF CORPORATE CITIZENSHIP

Given that appropriate principles and models of corporate governance are in place, the question quite often raised is whether companies should engage at all in charitable giving as good corporate citizens. This question is often raised because, traditionally, corporations as legal entities

55. F. Green, Corporations as Persons, Citizens, and Possessors of Liberty, 94 U. PA. L. REV. 202-37 (l946).

56. Moon, Crane & Matten, *supra* note 45.

57. L. Oso & B. Semiu, *The Concept and Practice of Corporate Governance in Nigeria: The Need for Public Relations and Effective Corporate Communication*, 3 J. COMM. (2012).

were not afforded the same treatment as individuals, in that their capacity was viewed as being limited. The objects of a given corporation are usually well defined in its Memorandum of Association in order to establish the suitability of corporations to deliver on their set objectives. One scholar, A. Emiola, identified their variance and differentiated them to establish their suitability to carry out wider responsibilities.[58] This was after their legal personality and how their creation had been established. This was in order to differentiate their legal rights and obligations in countries where they operate.

In all the jurisdictions, the powers of corporations are defined by the statute or its constitutive instrument, but generally most, if not all, corporations are capable of bearing rights and discharging obligations as any other person. A corporation has this capacity because it is an artificial person and thus an abstraction without any mind of its own and can therefore only express its corporate will through the agency of human beings.[59] Therefore, any act inconsistent with the specified objects in the company's objects clause was considered to be void *ab initio* and was, by virtue of its being void, incapable of being rectified – even by 100 percent of the shareholders.[60] According to another scholar, Brandon Vaidyanathan, in the nineteenth century, several court rulings rendered the use of corporate funds for charitable purposes effectively illegal.[61] For instance, in *Charles River Bridge v. Warren Bridge*[62] the court ruled against the use of corporate funds for activities unrelated to the chartered aims of the corporation. The same verdict was arrived at in the cases of *Davis et al. v. Old Colony Railroad Co.* and *Hutton v. West Cork Railway Co.*[6364]

In spite of the above rulings, corporations have always attempted to justify making contributions to schools, libraries, and engaging employees from communities of their operations. According to scholar M. Sharfman[65], during the economic downturns, especially towards the end

58. A. Emiola, Corporate Social Responsibility: Company Law 25 (Emiola Publishers 2005).

59. Lennard's Carrying v. A.G. Leventis & Co. Ltd., [l976] 1 All NLR (Part 1) 94 (Nigeria).

60. B.R. Martin, *The Validity of Corporate Gifts*, 8 Philanthropist (Oct. 1, 1988), *available at* https://thephilanthropist.ca/original-pdfs/Philanthropist-8-1-710.pdf.

61. Brandon Vaidyanathan, Science of Generosity, Corporate Giving: A Literature Review 8 (Oct. 2008) (unpublished, on file with the Center for the Study of Religion and Society, University of Notre Dame).

62. Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

63. Hutton v. West Cork Railway Co., [1883] 23 Ch.D. 654 (Eng.).

64. M. Sharfman, *Changing Institutional Rules: The Evolution of Corporate Philanthropy 1883-1953*, 33 J. Bus. & Soc'y 245 (1994).

65. *Id.*

of the nineteenth century, corporations increasingly began to contribute funds towards charitable purposes, and were able to defend themselves against shareholders' *ultra vires* claims in court by arguing that these were legitimately business related, since they directly benefited employees.[66]

Even as recent as the twentieth century, debates about the legitimacy of such corporate giving continued to rage both in courts as well as in general discourse. Another scholar, R. Bremner, is of the opinion that the forces that influenced this discourse include anti-business sentiment in some contexts, which rejected corporate donations as being tainted or defiled.[67] Other factors that threaten the legitimacy of corporate giving, according to scholar M. Sharfman, and make it increasingly difficult for companies to ascertain criteria for donations are: the prevalence of *laissez-faire* arguments claiming that it was immoral for companies to give away shareholders' money; increasing scrutiny of corporate activities by journalists as well as the federal government; and a proliferation of charitable organizations.[68] It is not unlikely that this is why several courts still continue to rule against corporate charitable gestures. For instance, scholars, C.M. Sasse and R.T. Trahan[69], cited the ruling in *Dodge v. Ford Motor Co.*, which set the precedent for the norm of shareholder profit maximization.[70] The ruling insisted that a "corporation is organized and carried on primarily for the profit of the stockholders," which rendered inexcusable "the no distribution of profits among stockholders in order to devote them to other purposes."[71]

A twist came in the 1920s when both the federal and state governments began to pass legislation to make it easier for corporations to donate money. In general, there seemed to be growing public sentiment in favor of corporate philanthropy. This is evidenced in the words of a prominent business leader of the time in the U.S, in the person of Cyrus McCormick, who held fast to the belief that "every company or organization of men doing business in any community . . . is in duty bound to do something to help build that community aside from the things required by the law or the things beneficial to itself."[72] According to Epstein, "Business

66. Main v. C.B. & Q Railways, 166 U.S. 226 (1897).
67. R. BREMNER, AMERICA PHILANTHROPY 108 (Univ. of Chicago Press 1987).
68. *Id.*
69. C. M. Sasse & R.T. Trahan, *Rethinking the New Corporation Philanthropy*, 50 BUS. HORIZONS 29-38 (2006).
70. Dodge v. Ford Motor Co., 170 N.W. 668 (1919).
71. Sorenson v. Chicago Railway Co. (l924) 199 N.W. 534.
72. V. Brudneyt, *Corporate Charitable Donations: Shareholder Protection and Public Disclosure*, 52 COLUM. J.L. SOC. PROBS. 99 (1969).

must be accountable to interests both within and without it. The accountability is essential to corporate legitimacy and the preservation of a society that is democratic in fact as well as in theory."[73] Sharfman[74] pointed out the legal legitimization of corporate philanthropy was not established until 1953, with the ruling by the U.S. Supreme Court in the case of *A.P. Smith Manufacturing Co. v. Barlow et a*l.[75] This ruling seemed to reflect a growing perception of the positive role of the corporation in society. This era saw the proliferation of several books emphasizing the "social responsibilities" of business such as Bowen's *Social Responsibilities of the Business Man*[76], Eell's *Corporate Giving in a Free Society*[77] and Heald's *Management's Responsibility to Society*.[78] This notion of "corporate social responsibilities" became increasingly important, with several scholars attempting to clarify and explain the concept through more literature review on the subject matter, such as Carroll's extensive review of the early literature on CSR.[79]

In another account by Bella R. Martin,[80] modern cases have escaped the rigors of the "direct benefit" test in one of two ways. First, in one line of authority the courts have held that a contribution ostensibly made for the general welfare of society will be deemed to result, in fact, in profit maximization, meaning that socially responsible behavior creates goodwill.[81] The courts have even gone so far as to respect the business judgment of directors and have stated their preference not to interfere with a business decision (presumably based on the profit motive) in the absence of an allegation of fraud or illegality. For example, in the *Union Pacific v. Trustees* case,[82] Justice Henriod observed:

> There seems to be no good reason to challenge the convictions of these men, the bonafides of their support for the contribution in question or their belief that it was for the best interests of the company and its shareholders. If their personal judgment was

73. D.E. Schwartz, *Objective and Conduct of the Corporation – Defining the Corporate Objective*, GEO. WASH. L. REV. (1984).

74. Sharfman, *supra* note 64, at 255-56.

75. A.P. Smith Manufacturing Co. v. Barlow et al., 13 N.J. 145 (1953).

76. Established under the Financial Reporting Council of Nigeria Act No. 6, 2011.

77. R. EELLS, CORPORATE GIVING IN A FREE SOCIETY (Harper Brothers 1956).

78. M. HEALD, MANAGEMENT'S RESPONSIBILITY TO SOCIETY: THE GROWTH OF AN IDEA (Case Western Reserve Univ. Press 1957).

79. A. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y. 268-295 (1999).

80. Martin, *supra* note 60.

81. Shlensky v. Wrigley, 237 N.E.2d 776 (III. App. Ct. l968).

82. Union Pacific v. Trustees, 67 Que.S.C. 539, 539 (1929).

> unsound, it is not reflected in their record, in the expressed national and state legislative encouragement of such practice, in the expressed opinions and thinking of members of legal groups concerned with the matter, nor by the mushrooming statistics dating from 1940 that clearly reflect an ever-increasing belief on the part of those who manage and run institutions flying a corporate ensign that it is sound business to contribute to agencies fostering charity, church, science and school.[83]

Secondly, another line of authority supports the view that corporate philanthropy is a legitimate end in and of itself, but subject to a limit of "reasonableness."[84] Reasonableness is generally assessed by having regard to the customary level of such expenditures by companies of like worth, and the strength of the link between the use of corporate resources and the corporation's business.[85] The decision of the Quebec Superior Court in *Hamilton v. Bank of Montreal* aptly captured it thus: "It is not beyond the powers of the directors of a bank to adopt resolutions granting certain sums to hospitals, the more so when such directors are acting in good faith and in accordance with a long established custom throughout the country."[86] Having rested positively the justification for corporations to be socially responsible, the financial dispositions of such corporations are often a factor of the regulatory framework.

VI. CORPORATE GOVERNANCE AND ITS REGULATORY FRAMEWORK

The regulatory framework of corporate governance is a global phenomenon. Consequently, just as there are universal codes for the practice of the concept, there are also national codes. Such national codes are usually based on local peculiarities and needs, as well as the unique characteristics of each nation. Regardless of whether it is global or national, the regulatory framework of corporate governance can be viewed from two broad perspectives: voluntary and mandatory.[87]

One such voluntary code is the Code of Best Practice of Public Companies in Nigeria. Mandatory codes are those relating to banks, as con-

83. *Id.*
84. Sorenson v. Chicago Railway Co., 199 N.W. 534 (l924).
85. Brudneyt, *supra* note 72.
86. Union Pacific v. Trustees, 67 Que.S.C. at 539.
87. I. Wilson, *Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation*, 12 NIGERIAN ECON. SUMMIT GROUP ECON. INDICATORS 1-10 (2006); Oso & Semiu, *supra* note 57, at 6.

tained in the following: CAMA 2004, the Banks and other Financial Institutions Acts (BOFIA)[88] 1991, the Investment and Securities Act (ISA) 2007, the Security and Exchange Commission Act (SECA) 1988, the Central Bank of Nigeria Code of Conduct for Directors of Licensed Banks and Financial Institutions and the Financial Reporting Council of Nigeria.(FRCN).[89] The FRCN, until its recent suspension, issued the National Code of Corporate Governance 2016. The Code, which was made pursuant to the powers of the FRCN under sections 50 and 51 of the Act, had a commencement date of October 17, 2016. The Code is essentially a consolidation and refinement of different sectoral codes on corporate governance and has been issued in three parts: The Code of Corporate Governance for Private Sector; the Code of Governance for Not-for-Profit Entities[90]; and the Code of Governance for the Public Sector.[91] The Code of Corporate Governance for the Private Sector is mandatory, while that for the not-for-profit entities will become operative on a "comply or justify non-compliance" basis in a manner similar to the United Kingdom's Corporate Governance Code. On the other hand, the Code of Governance for the Public Sector will not become immediately operative until an executive directive is secured from the federal government for that Code to take effect. Noteworthy is the directive that following the harmonization and unification of the various codes that the codes for the private sector will, with effect from October 17, 2016, supersede any other corporate governance code in force in Nigeria before that date, and that in the case of a conflict between the provisions of the private sector code and any sectoral code or supplement thereto, the provisions of the private sector code shall prevail to the extent of those inconsistencies.[92]

At the global level, there are three identified codes of corporate governance that are often cited and explicitly referred to in the development of national codes. These are: Principles of Corporate Governance (1999) by the OECD, Principles of Corporate Governance by the Commonwealth

88. Banks and other Financial Institutions Act (1991) Cap. (B3) Laws of the Federation of Nigeria 2004.

89. Established under the Financial Reporting Council of Nigeria Act No. (6) (2011).

90. This Code was recently suspended due to the protest of most religious bodies in the country for non-compliance with due process.

91. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2011) 681 final (Oct. 25, 2011), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf.

92. For the avoidance of doubt, the issuance of the Private Sector Code does not prevent or otherwise circumscribe the powers of the various sector regulators to issue new codes or corporate governance or to supplement their existing codes. The Private Sector Code recognizes that such regulators remain empowered to issue corporate governance guidelines on specific matters save that such guidelines must be consistent with the Private Sector Code or be void.

Association for Corporate Governance (CACG) and the King Report on Corporate Governance for South Africa by the Institute of Directors of South Africa (IoD), 1991.[93] Countries that have drawn from the above three codes include Kenya (Private Sector Corporate Governance Trust, 1999), Ghana (Manual on Corporate Governance, 2000), Nigeria (Codes of Corporate Governance in Nigeria, 2003), South Africa (IoD, 1994 and 2004), Tanzania (Steering Committee on Corporate Governance in Tanzania, 2000), Uganda (Manual on Corporate Governance and Code of Conduct), Zambia (IoD of Zambia, 2000) and Zimbabwe (Principles for Corporate Governance in Zimbabwe).[94]

It is interesting to note also that all the existing codes and laws in Nigeria, which entrust the Corporate Affairs Commission (CAC), Security and Exchange Commission (SEC) and the Central Bank of Nigeria (CBN) with the responsibility of regulating corporate governance, reflect the key elements of the OECD and other global codes. These key elements include: separating the CEO and the board chairman; prescription of non-executive and executive directors on the board; improving the quality and performance of board membership; introducing merit as criteria to hold top management positions; introducing transparency, due process and disclosure requirements; transparency on financial and non-financial reporting; protection of shareholders rights and privileges and defining the composition, roles and duties of the Audit Committee. Some of these key elements will be further discussed hereunder.

A. Separating the Role of the CEO and the Board Chairman

The management of a company's affairs are ordinarily and ultimately entrusted to its directors, some of whom may either be chief executive officer (CEO) or chairman or a combination of both, commonly referred to as chairman/chief executive officer in the business parlance. Separating the roles of chairman and CEO is not only internationally applicable, but is also beneficial for the company. For example, the U.K. Combined Code 2003 stipulates that "there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for running the company's business. No one individual should have unfettered powers of decision."[95] It is also statutorily provided that a director owes fiduciary duties to the company and

93. G.J. Rossouw, *Business Ethics and Corporate Governance*, 44 Afr. Bus. & Soc'y 94-106 (2005).

94. Oso & Semiu, *supra* note 57.

95. The Combined Code on Corporate Governance, 2003 (U.K.).

will act as an agent of the company.[96] Also, by virtue of section 283 of CAMA, directors are trustees of the company's monies, properties and powers and as such must account for all the monies over which they exercise control.[97] A combination of the role of CEO and the board chairman will invariably defeat the purpose of the above statutory provisions. The separation of the roles, therefore, will provide the needed advantages inherent in the principles of checks and balances in any organization. The combination of the roles will also defeat the provision of section 279(3) of CAMA which provides that a director shall act at all times in what he believes to be the best interests of the company as a whole.[98] A lack of checks and balances no doubt will not be in the interest of the company as a whole.

B. Prescription of Executive and Non-Executive Directors on the Board

The prescription of executive and non-executive directors on the board is necessitated by the responsibilities attached to each. An executive director is a director who has separate responsibilities within the company as an executive. At the same time, the role of a non-executive director has a positive contribution to making and ensuring that the board fulfills its main objectives. A non-executive director can exercise an impartial influence and bring to bear experience gained from other fields in order to appropriately advise the board of directors. This is because directors must exercise their powers collectively. In applying some particular standards no distinction is drawn between executive and non-executive directors. For example, whether executive or non-executive, all directors have the same responsibilities in law and all owe their duties to the company as a whole, a breach of those duties may result in their being judged unfit to be concerned in the management of a company. In the performance of their duties, directors are expected to exhibit such a degree of skill as may reasonably be expected from a person with their knowledge and experience and to take such care as an ordinary person might be expected to take in their own behalf. However, the distinction between executive and non-executive directors in applying other standards is as stated below:

96. Judge Dixon noted that "directors of a company are fiduciary agents, and power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power." Mills v Mills (l938) 60 CLR 150, 186 (Austl.).

97. Companies and Allied Matters Act § 283.

98. *Id.* § 279(3).

i. Executive directors are expected to devote their time and energy to company matters in accordance with the terms of their contract. In most cases, this will require them to devote all their working time.

ii. Non-executive directors are not required to give continuous attention to company affairs. However, they are expected to familiarize themselves with the company's affairs, including its financial position, and should attend meetings of the board whenever they are reasonably able to do so.

iii. Where a director, executive or non-executive, possesses a particular professional skill, for example, as an accountant or a lawyer, they are required to exhibit that skill or ability as reasonably expected from a person in that profession.[99]

Both executive and non-executive directors are expected to exhibit equal standards of care and as such, a board of directors, acts as a whole. Although some of its members may be given additional powers by the articles or by resolution, the general duties and responsibilities are the same for each director. If a breach of duty is to be attributed to a board on the basis that all of its members were present at a meeting which had approved a wrongful act, then the liability of each director is joint and several and no allowance is made for the fact that some work part-time and may have acquiesced in a situation which they did not fully understand, as was in the case of *Re Lands Allotment Co.*[100] For the same purposes, the directors are in the same position as trustees of a fund and may be held liable for knowledge of wrongdoings in relation to dealings with its property, such as in *El Ajou v. Dollar Land Holdings*.[101] It follows, therefore, that higher duties are owed by those who are employed under service contracts or because of their professional skill. As far as corporate governance is concerned, non-executives are usually associated with independence and may be self-employed.

Premised on the above, recommendations that directors or senior executives of a listed entity should have a clear understanding of their roles and responsibilities and of the entity's expectation of them should be reduced to a written agreement becomes apt. Usually, this agreement will take the form of a letter of appointment in the case of non-executive

99. K. Aina, *Board of Directors and Corporate Governance in Nigeria*, INT'L J. BUS. & FIN. MGMT. RES., 21-24 (2013).

100. Re Lands Allotment Co., [1894] 1 Ch. 616, 63 L.J. Ch. 291 (C.A.) (Eng.).

101. El Ajou v. Dollar Land Holdings, (1994) 2 All E.R. 685, 1 B.C.L.C. 464 (C.A.) (Eng.).

directors and a service contract in the case of an executive director or other senior executive.[102]

C. Improving the Quality and Performance of Board Membership

Improving the quality and performance of board membership is a factor of the quality and caliber of directors as the nature of directorship is central to company law. This brings to fore issues of full-time executive and part-time non-executive directorship. In large public companies, good corporate practice generally requires that executive directors may not control all aspect of management, especially in relation to their own remunerations. Consequently, non-executive directors, generally drawn from backgrounds which give the board useful perspectives on the company business, are used to decide issues which executive directors ought not to decide alone and are used to advise the executive directors on the most appropriate way for the company to act in a number of circumstances. The more complex the company or group of companies, the more likely it is that different directors will have very different responsibilities, all bringing in professionalism from their various fields of endeavors into the quality performance of the board.

D. Introduction of Merit as Criteria to Hold Top Management Positions

The principle of introducing merit as criterion to hold management positions is in line with the directors' duties as fiduciaries and agents. This is buttressed once more by Lord Cranworth's statement in *Aberdeen Railways Co v. Blaikie Brothers* to wit:

> The Directors are a body to whom is delegated the duty of managing the general affairs of the Company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties universal to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which

102. Australian Securities Exchange (ASX) Corporate Governance Council, Corporate Governance Principles and Recommendations (2014), http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf.

possibly may conflict with the interest of whom he is bound to protect.[103]

The introduction of other criteria other than merit is obviously a negation of the duties owed by directors to the company because in their dealings with the company's assets, tangible or intangible, the directors would be liable for breach of trust if they misapply them. This would give rise to a constructive trust in many circumstances[104] or to an action against them for damages or equitable compensation for any loss caused to the company through the application of anything but the introduction of merit as criterion to hold top management positions. This will also be in line with section 172 of the U.K. CA 2006, which provides that a director is expected to act, in good faith, in the way he considers would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) for the likely consequences of any decision in the long term.[105] Also, by section 282(1) of CAMA and section 174 of the U.K. CA, a director is expected to exercise reasonable care, skill and diligence; these same duties apply to holders of top management positions in a company. It follows that a departure from merit in the criteria of top management recruitment would also permeate downstream the organizational structure with adverse consequences on the company both in the short and long run.[106]

E. Introduction of Transparency, Due Process and Disclosure Requirements

The principle of having transparency, due process and disclosure requirements embraces the philosophy of "encapsulated trust" and is a basis for the fiduciary duty of disclosure for the improvement of the integrity and effectiveness of corporate governance. The tragedy of a lack of transparency, due process and disclosure will invariably threaten the viability of the burgeoning corporate citizenship which good corporate governance is meant to promote.

This principle is also in accordance with the principle of separation of ownership from management. In a modern corporation, professional

103. Aberdeen Railways Co v. Blaikie Brothers, (1854) 1 Macq. 461, 471 (U.K.).
104. Regal v. Gulliver, (l942) 1 All E.R. 378 (Eng.); Boardman v. Phipps, [l967] 2 A.C. 47 (Eng.).
105. Companies Act, 2006, c. 46 (U.K.).
106. H. Adamu, A Comparative Analysis of Directors' Duties of Care and Skill and Fiduciary Duties of Loyalty and Good Faith under the Companies' Acts of Nigeria and the United Kingdom (2013) (unpublished LL.M. dissertation, Ahmadu Bello Univ., Zaria).

managers are appointed to run the affairs of the corporation and such professional managers constitute a distinct group from the owners, who are under the supervision of the board of directors. The separation of ownership from management creates the justification for defining an appropriate framework that will ensure transparency, accountability, probity, integrity and fairness in the management of a corporation.[107]

VII. MECHANISMS OF CORPORATE GOVERNANCE

Corporate governance mechanisms are the inherent policies, guidelines and control for the management of an organization to minimize conflicts and reduce inefficiencies. Owners and management use these mechanisms to help managers and employees understand the acceptable behavior in their organization. Corporate governance mechanisms can also provide motivation factors, goals and objectives that may include incentives to reward everyone in the chain of production for adhering to the company's internal operating standards. Common corporate governance mechanisms include a board of directors, internal controls, balancing powers, compensation, takeovers, disclosure of information by companies, shareholdings by managers/directors and so on. These mechanisms will be discussed further below.

A. Board of Directors

Large business organizations and publicly quoted companies use a board of directors as a platform to ensure that the interests of shareholders or outside investors are earning sufficient financial returns. This is in line with the legal position of directors as stipulated in section 281 of CAMA, which holds that directors are trustees of the company and as such shall exercise their powers honestly in the interest of the company and all the shareholders.[108] Board members are typically voted in by shareholders at annual meetings.[109] Each member serves a set number of years and has the responsibility to oversee directors and executive managers, create a mission or vision for the company, set compensation levels for officers, and deal with any significant internal or external conflicts.[110] The board of directors is typically comprised of some individuals who do not work

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107. B.J. Inyang, *Nurturing Corporate Governance System: The Emerging Trends in Nigeria*, 4 J. Bus. Systems Governance & Ethics 2 (2009).

108. Companies and Allied Matters Act § 281.

109. D. Yermack, *Shareholder Voting and Corporate Governance*, Ann. Rev. Fin. Econ. (2010).

110. Companies and Allied Matters Act § 278.

directly for the company. This provides an objective opinion for governing the organization.

B. Internal Controls

Internal controls represent corporate governance mechanisms that are standard policies and procedures each individual follows within an organization. These controls help protect and safeguard a company's business or financial information. Controls are often at the corporate level because executive managers are responsible for all business operations and financial reporting. Internal and external audits help to ensure that these controls are sufficient and do not create an overly restrictive working environment. Internal controls may also be driven by laws and regulations from government agencies. Companies may need to implement internal controls to avoid penalties or fines.

C. Balancing Power in an Organization

This is synonymous with the separation of the role of the CEO and the Board Chairman already discussed above and it is a common set of corporate governance mechanisms. The need to separate the roles of Chairman and CEO, is internationally applicable. As the U.K. Combined Code 2003 stipulates, "There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for running the company's business. No one individual should have unfettered powers of decision."[111]

Also, organizations often set up multiple departments, divisions, and managers to divide responsibilities and limit the number of tasks one individual completes. This ensures that no one individual can overextend the organization's resources. Creating this checks and balances system can also create a certain amount of flexibility for companies to add additional corporate governance mechanisms. This also helps companies merge subsidiaries into their operations with as few issues as possible.

D. Compensation

Compensation is a performance-based type of management structure. This corporate governance mechanism offers benefits, such as individual bonuses, company shares, compensation increases and additional time off. This helps companies improve performance by offering managers and individuals the opportunity to personally benefit by working hard in

111. The Combined Code on Corporate Governance, 2003, § 1(A) (U.K.).

the organization.[112] Organizations often use this mechanism to tap into the creative traits of their employees who can help find new ways to accomplish tasks and objectives.

E. Takeover

This comes as a form of discipline upon a manager through a replacement with a perceived more efficient one in the management of the company. It makes managers sit up constantly. This mechanism is, however, predicated upon the effectiveness of the market for corporate control and this can be frustrated by defensive tactics by the managers of specific companies or through governmental intervention.

F. Disclosure of Information

Corporate Governance disclosure is a fundamental theme of the modern corporate regulatory system, which encompasses providing information by a company to the public in a variety of ways. This helps to properly monitor directors and managers, some of which may be mandatory or voluntary. For example, rule 4.10.3 in the Australian Stock Exchange Listing requires listed companies to disclose their corporate governance practices.[113]

G. Shareholdings by Directors/Managers

This mechanism recommends increased shareholdings by directors/managers as possible incentives to enhance their commitments towards improved corporate performance and properly position them to meet their social responsibilities as good corporate citizens.[114] The reverse is bad corporate governance with its attendant consequences.

VIII. CONSEQUENCES OF BAD CORPORATE GOVERNANCE

Arising from the analysis of the code of corporate governance above and the obvious benefits derivable from good corporate governance, it is also to be drawn from the analysis of the consequences of bad corporate governance not only from the company level but also at macro/systematic levels. According to Prasad, poor corporate governance is reflected at

112. Elewechi N. M. Okeke, *Corporate Governance in Nigeria: the Status Quo*, 15 Corp. Governance: An Int'l Rev. 179 (2007).

113. Australian Stock Exchange, Listing Rule at Guidance Note 8, *available at* https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf.

114. B. Ackers, *CSR Reporting: What Board of Directors Need to Know*, 10 Corp. Bd.: Role, Duties & Composition 18 (2014).

three levels, namely at the company level, macro level and general level.[115] At the company level, poor corporate governance causes an undervaluation of the company's shares, low confidence in stakeholders and financiers to bear risk and invest capital and poor quality of management which is reflected in overall poor results.[116] At the macro level, poor corporate governance leads to the following consequences: stagnation and slow growth of capital market due to the public's reluctance to risk their money; stagnant, stunted individual growth; poor employment generation; low gross domestic product (GDP) growth; low efforts for alleviation of poverty; and low human development indicators.[117] On a general level, poor corporate governance normally coexists with a loss of integrity and incidences of high corruption.[118] Thus, corporate governance is a part of the macroeconomic system of a country and as such, by and large, corporate governance cannot succeed in the absence of corresponding macroeconomic and public reforms. Good business needs a hassle free environment, strong legal system and, at macro level, the right structure where business can flourish.

Based on the above analysis, the failures in corporate governance are a real threat to the future of every corporation and by extension negatively influence the concept of corporate citizenship and responsibility. This is because with effective corporate governance based on core values of integrity and trust (reputational values)[119] companies will have a competitive advantage in attracting and retaining talent and generating positive reactions in the marketplace. With a reputation for ethical behavior, it engenders both customer and employee loyalty. With the adoption of a set of principles and best practices, effective corporate governance can be achieved. This is also predicated upon fairness, honesty, integrity and the manner in which companies conduct their affairs. Companies must make a profit in order to survive and grow; however, the pursuit of profit must be done within ethical bounds. Companies should adopt policies that include environmental protection whistle blowing, ethical training programs and so on. Such compliance mechanisms help develop and build corporate image and reputation, gain loyalty and trust from consumers and heighten commitment to employees.

115. K. PRASAD, CORPORATE GOVERNANCE 189 (Princtice-Hall of India Private Ltd. 2006).

116. James N. Obi & I. A. Uwandu, *Effect of Poor Corporate Governance on the Performance of Nigerian Banks*, 3 AFR. J. INNOVATIVE RES. & ADVANCED STUD. 1 (2015).

117. M. R. Salam, *Corporate Governance in Malaysia: The Macro and Micro Issues*, HANDBOOK INT'L CORP. GOVERNANCE COUNTRY ANALYSES, 24 (2011).

118. E.H. Rasheed & R. Yazdamifard, *Corporate Governance As a Solution for Corruption in Private Sector*, 2 GLOBAL J. COM. & MGMT. PERSP. 117 (2013).

119. *Easy to Lose*, THE ECONOMIST, Jan. 24, 2004, at 14.

IX. CONCLUSION

Corporate governance ensures that an organization is run in a responsible manner by ensuring accountability, transparency and compliance with due regard to its key stakeholders. It is the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated.[120]

Corporate citizenship, which in this context is synonymous with corporate social responsibility, is the corporate form of self-regulation integrated into the business model to create a positive impact on the stakeholders and the environment. Corporate citizenship is a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis.[121]

A traditional view suggested a contradiction between corporate citizenship and corporate governance.[122] Corporate governance was related to profit maximization and provided protection to shareholders who have provided capital to firm, while corporate citizenship apparently was against profit maximization because it suggested a set of actions beneficial to external stakeholders that may not be good for a shareholder. However, this is no longer the case, as argued above. Corporate governance is an umbrella term and corporate citizenship is gradually getting fused into the company's corporate governance practices. Their relationship can be interpreted by abandoning the standard view of the firm as a shareholder value maximizer and embracing the view of a firm as a stakeholder value maximizer. This convergence paves the way for corporate governance to be driven by ethical norms and the need for accountability, and it enables corporate citizenship to adapt prevailing business practices. Today, both corporate governance and corporate citizenship focus on ethical practices in business and the responsiveness of an organization to its stakeholders and the environment in which it operates.

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120. W. SUN, J. STEWART & D. POLLARD, CORPORATE GOVERNANCE & GLOBAL FINANCE CRISIS: INTERNATIONAL PERSPECTIVES, 8 (Cambridge Univ. Press 2005).

121. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *supra* note 91.

122. Andrea Beltratti, *The Complementarity between Corporate Governance and Corporate Social Responsibility*, 30 GENEVA PAPERS ON RISK & INS. - ISSUES & PRACTICE, 373-86, 2005.

Based on the above, it is apt to state that lack of effective corporate governance at the executive and management level can lead to bad business decisions, which can lower the overall value of the company and make it more difficult for the business to meet its financial obligations expected of a corporate citizen.