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VOLUME 4, 2019

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A THEORETICAL AND LEGAL PERSPECTIVE OF NIGERIA'S CORPORATE GOVERNANCE FRAMEWORK

By

Anthonia Omosefe Ugowe*

Abstract

Nations primary company law steers the corporate governance approach in the country. To ascertain the effectiveness of regulations, regulations should be evaluated from time to time. This paper study of the effect of Nigeria's primary and ancillary companies laws, including the main theories that give effect to the ancillary regulation, found that the custodians of the Companies and Allied Matters Act 2020, the Code of Corporate Governance for Public Companies 2011 and the Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 do not provide sufficient information to enable an assessment of the effect of the laws in Nigeria. The paper also questions the adaptability of transplanted corporate governance theories to Nigeria's business environment. Nevertheless, the paper finds no dispute in the corporate governance approach in Nigeria's companies. Yet, in a bid to avoid disputes, it recommends that companies' memorandum and articles of association contain provisions that clearly state and describe companies' corporate governance approach. Another recommendation is for policymakers to produce a regulation that, in clear terms, supports company directors' management approach so long as the directors pay attention to regulatory prescribed care and skill; and the same can be proved using the reasonable man standard. The final recommendation is for policymakers to produce similar regulations for different governance approaches.

Keywords: Nigeria, Corporate Governance, Corporate Governance Regulation, Public Companies and Corporate Governance Theories

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1.0 INTRODUCTION

Companies are possibly the world's dominant institution, as some large companies have more income, logistical competencies, and global presence than some national governments.¹ Walmart, for instance, is the largest retailer in the world and has its presence in 24 countries. Walmart has approximately 10,500 stores in the countries it operates and eCommerce websites. The company employs more than 2.3 million associates worldwide, with the fiscal year 2021 revenue of \$559 United States Billion Dollars.²

Using Nigeria as its case study, this paper determines if the approach of company law should be to provide no more than a framework for the efficient functioning of a capitalist system, to maximize returns for financial investors mainly, or a broader spectrum of company's investors. For many years, there has been a debate regarding what the corporate governance of companies should be. Should a company be understood as purely private, or as a social institution in which there is a legitimate public interest? The growth of this debate can be attributed to the scandals and sometimes, collapses of "successful" indubitable companies and the 2007-09 global financial crisis. The scandals, collapses and crises had crippling effects on economies and the whole business world. Hence, the demand for a better legal framework through strong democratic institutions to sustain businesses and any economy in the wake of risky events.

Some scholars argue that for a company to function optimally, maximising its shareholders' wealth, should be the principal goal of company directors. Other scholars argue that for a company to function optimally, the interest of its various stakeholders, (financial and non-financial investors), are to be taken into consideration by the directors of the company. These competing claims for preference in the allocation of the company's overall interest while rendering social services has given rise to different points of view of what a company's governing overall interest should be.

¹David Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 American Political Science Review 139, 141; Jin Jing, 'Constructing the corporate governance system within the regime of corporate law from the perspective of a revised mechanism design theory: the shareholder primacy model versus the stakeholder theory model' (PhD thesis, University of Hong Kong 2014).

²Walmart 'About Us' <<https://corporate.walmart.com/our-story>> accessed 19 October 2021.

Regulatory institutions in every economy play a vital role in mapping out and coordinating the legal framework that guides the governance of every aspect within an economy. Nigeria's company law - Companies and Allied Matters Act 2020 provides for a fiduciary relationship between the directors and the companies the directors manage. It also provides that the directors at all times are to act in the best interest of the company by promoting its success.³ It is instructive to highlight that on the 7th of August, 2020, the President of Nigeria, Muhammadu Buhari, signed into law the Companies and Allied Matters Act 2020. The Act in operation before the new law is the Companies and Allied Matters Act 1990.

The Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 supplements the Companies and Allied Matters Act 2020. It applies as a flexible set of rules.⁴ Before the commencement of this regulation, the Code of Corporate Governance for Public Companies 2011 applied to all public companies, whether listed or not. This Code, like the Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018, applies flexibly but on a comply or explain basis.⁵ The reason the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 is not being examined is that it commenced in 2019; hence the effect of the regulation is yet to be evaluated. The examination of the provisions of the Companies and Allied Matters Act 2020 and the Code of Corporate Governance for Public Companies 2011, excludes other sectoral corporate governance regulations implemented in Nigeria. However, there are references to other sectoral governance regulations where necessary.

Despite the instruction given to directors to promote the success of the company at all times, shareholders, being the financial investors in a company expect returns on their investment, so too do other people who invest, albeit, non-financially, to the sustainability of a company expect returns on their contribution to the company. The non-financial investors in a company typically manage their relationship with the company through contracts and existing regulation(s). In contrast, shareholders' relationship with a company is usually regulated by the company's articles of association and existing regulation(s).

³ Companies and Allied Matters Act 2020, s 305 (1) (2) (a) (b) (3) and (8).

⁴ The Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018, s C.

⁵ Code of Corporate Governance for Public Companies in Nigeria 2011, s 1.3. (a).



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Companies and Allied Matters Act (CAMA), s. 163 (1)(2)(a)(b)(c) and (d).
Regulation in the Companies and Compliance with Nigerian Code of Corporate Governance 2018, 1 C.
Code of Corporate Governance for Public Companies in Nigeria 2011, 1.1.1 (a).

In analysing the effect of Nigeria's company law and her complementary corporate governance regulation in contributing to Nigeria's economy, this paper seeks to specifically assess both regulations as they guide public companies in Nigeria and the outcome so far. To understand the regulations, this paper evaluates two leading theories of corporate governance as both theories give credence to the two diverse opinions, on what the legal framework should be in regulating companies. The paper also evaluates national and international reports, including decisions from the judiciary and the expectations of society. The two theories of corporate governance discussed in this paper are the shareholder and the stakeholder theories.

The remainder of this paper is structured as follows: Part 2 analyses the shareholder theory. This theory argues that the corporate governance aim of a company should mainly be to maximise profits for its financial investors. In this part, the shareholder theory is analysed through the provisions of Nigeria Code of Corporate Governance, alongside its primary company law that gives authority to the advancement of the shareholder theory recommendations. Courts' judgments in corporate governance disputes are also examined.

Part 3 of this paper looks at the stakeholder theory. Here too, the paper analyses the provisions of Nigeria's Companies and Allied Matters Act 2020 that argues for the corporate governance of a company to be broader in its approach. The provisions of the nation's Code of Corporate Governance is also studied. In a bid to give effect to the reality of these provisions, some companies' statements are discussed.

Part 4 underscores lessons from Parts 2 and 3 literature and makes suggestions that are helpful to regulatory institutions in maintaining regulations and in building a strong economy for Nigeria. This part also concludes the paper.

2.0. THE SHAREHOLDER THEORY

The shareholder theory centres on the agency relationship, the agency problem, and the agency costs - the recommended solutions to the problem.⁶ An agency relationship arises when one party or more, also known as the principal(s) under a contract, delegate to another party or more, also known as the agent(s), the power to make decisions and create value on the job given to the agent(s).⁷ Following the contract, the agent is accountable to the principal on the management of the job for which the agent is under a contract to carry out. Agency problem occurs when the principal and the agent interests diverge or when the principal does not have complete information on the agent's actions.⁸ The principal bears the price to pay to solve the agency problem through effective control methods known as agency costs, to influence the agent's interests to align with the principal's and for the principal to have complete information on the agent's actions.⁹

The argument for the better governance approach of companies began in the United States of America (USA) in the debate between Professors Adolf Berle and E Merrick Dodd in the 1930s.¹⁰ Berle argued that a company should be run in the interest of its shareholders, because, the shareholders advance the funds used in managing the company. Accordingly, directors of a company should create value on behalf of shareholders by maximising the capital of shareholders ahead of any other interested party's interest in the company. To further bolster the theory, its supporters argue that there is empirical evidence to show that increasing shareholder value does not conflict with the long-term interest of other stakeholders in a company. Instead, it is only in growing shareholders value that the needs of other

⁶Douglas A Bosse and Robert A Phillips, 'Agency Theory and Bounded Self-Interest' (2016) 41 *Academy of Management Review* 276; Brahmadev Panda and N M Leepsa, 'Agency theory: Review of Theory and Evidence on Problems and Perspectives' (2017) 10 *Indian Journal of Corporate Governance* 74.

⁷Michael C Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305, 308; Bosse and Phillips (n 6) 278; Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, And the Lens of Theory' (2016) 39 *University of New South Wales Law Journal* 165, 168.

⁸Eugene F Fama and Michael C Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301, 304; Bosse and Phillips (n 6) 278.

⁹Eugene F Fama and Michael C Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301, 304; Bosse and Phillips (n 6) 278.

¹⁰Jennifer G Hill, 'Then and Now: Professor Berle and the Unpredictable Shareholder' (2010) 33 *Seattle University Law Review* 1005-006; Kevin V Tu, 'Socially Conscious Corporations and Shareholder Profit' (2016) 84 *The George Washington Law Review* 121, 128.

stakeholders, and even the need of the company to remain a going concern, can be met.¹¹

The primary argument put forward in support of the shareholder theory is that the shareholders own the company because they provide the capital needed to start and manage it. Thus, the responsibility of company managers is to increase shareholders' wealth.¹² In the USA case of *eBay Domestic Holdings Inc. v Newmark*,¹³ eBay Domestic Holdings Inc., a minority shareholder, kicked against the desire of the founding and majority shareholders in Craigslist to continue operating their online classified site as a free service to the community. In trying to protect the desires of its founding and majority shareholders, the board of directors of Craigslist adopted structures within the company which were detrimental to eBay. The board reduced eBay's ownership percentage; clogged eBay's right to sell its shares freely and hindered eBay from unilaterally electing a director to the board. eBay sued the board of directors for breach of fiduciary duties. The Delaware Court of Chancery held that a company incorporated for profit, pursuit of non-shareholders interest, must at some point align with the interest of its shareholders. The board of directors' duty under such an incorporated company was to increase the value of its shareholders. Company shareholders are the subscribers to the memorandum of the company and any person who in writing agrees to become a member of the company and whose name is in the company's register of members.¹⁴

Another argument in favour of operating a company principally for its shareholders is that the shareholders have the greatest stake in the outcome of the company. Shareholders benefit if the company's wealth increases, and bear a higher risk than fixed claimants such as creditors and employees when the company is liquidated. This is so because shareholders are the sole residual claimants in a company.¹⁵ The framework of this argument is in

¹¹Steven Wallman, 'The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties' (1991) 21 163, 177-78; Sajid Gul et al., 'The Relationship between Dividend Policy and Shareholder's Wealth' (2012) 552 *Economics and Finance Review* 55..

¹²Sajid Gul et al., (n 11); Jeehye You, *Legal Perspectives on Corporate Social Responsibility: Lessons from the United States and Korea* (Springer 2015) 37.

¹³16 A.3d 1 (2010).

¹⁴ Companies and Allied Matters Act 2020, s 105 (1)(2).

¹⁵Jonathan Macey, 'Corporate Social Responsibility: A Law & Economics Perspective' (2014) 17 *Chapman Law Review* 331, 333; Tu (n 10) 130.

Companies and Allied Matters Act 2020, ss117; 426 - 28; 431 - 32; 565 - 67; 588; 609 and 657. Also, supporters of the shareholder theory emphasise shareholders' return by company directors because shareholders appoint the directors. The agency relationship between directors and shareholders is a fiduciary type. The directors (also known as agents) are appointed by shareholders (also known as principals) to manage the company on behalf of the shareholders. Hence, without shareholders to monitor and discipline the directors, the directors may pursue selfish interests which may incur costs for the shareholders.¹⁶ The appointment argument is found in Nigeria Companies Act. The law states that at incorporation, the subscribers to the memorandum and articles of association of the company are to name the first directors and thereafter have a say in the appointment or rejection of subsequent directors in the company.¹⁷ The monitoring role of shareholders is found in the Companies and Allied Matters Act 2020, ss 107; 242 - 43; 267 - 68; 272 - 73; 278; 308 and 342.

By monitoring, the shareholders will be better informed in making decisions on their investments. The United Kingdom (UK) Times newspaper in 1866 blamed shareholders for their investment loss when the companies in which they had invested collapsed. The shareholders were blamed for being ignorant and knowingly paying no attention to their investments.¹⁸ Shareholders activism is one of the means to align shareholders and directors' interests thereby solving the challenges of the agency relationship between shareholders and directors. The accountability principle of corporate governance developed from agency theory.¹⁹

In Nigeria, however, the majority shareholders in companies are usually also the company's Chief Executive Officer (CEO) or his or her descendant or protégé.²⁰ Thus, ownership is concentrated and the interest of the

¹⁶Francois Brochet and Suraj Srinivasan, 'Accountability of Independent Directors: Evidence from Firms Subject to Securities Litigation' (2014) 111 Journal of Financial Economics 430, 433; Pattarin Adithipyangkul and Tak Yan Leung, 'Large Shareholders and Independent Director Equity Compensation' (2016) 26 Australian Accounting Review 208, 209.

¹⁷ Companies and Allied Matters Act 2020, ss 36(4) (c); s 272 - 73.

¹⁸Alice Belcher, *Directors' Decisions and the Law* (Routledge 2014) 6.

¹⁹Chinyere Uche, Emmanuel Adegbite, and Michael John Jones, 'Institutional shareholder activism in Nigeria' (2016) 16 Corporate Governance 680, 681; Amira Hawas and Chin-Bun Tse, 'How Corporate Governance Affects Investment Decisions of Major Shareholders in UK Listed Companies: Has the Recent Credit Crunch Changed the Game?' (2016) 31 Journal of Accounting, Auditing & Finance 100; Siala Bouaziz Souha and Jarboui Anis, 'Corporate governance and firm characteristics as explanatory factors of shareholder activism: Validation through the French context' (2016) 4 Cogent Economics & Finance 1, 2.

²⁰Emmanuel Adegbite, 'Good corporate governance in Nigeria: Antecedents, propositions and peculiarities' (2015) 24 International Business Review 319, 320.

majority shareholder and CEO are aligned. It is instructive to state that in the concentrated ownership structure, the corporate governance conflict is usually between the inside majority shareholder/CEO and outside minority shareholders on the mode of the governance or company's strategies or other reasons.²¹ To attend to the interest of all shareholders in Nigeria, Nigeria's company law contain provisions that aim at providing equal treatment among all shareholders. For instance, Companies and Allied Matters Act 2020, s 387 (1) (a) ensures that every member of a company regardless of whether he is entitled to receive notice of general meetings shall not less than 21 days before the date of the meeting be sent a copy of the company's financial statements for the year. S 392 (1) further provides that any member who demands a copy of the company's financial statements shall be provided with the company's last financial statements at no charge even if he is not entitled to the company's financial statements.²²

It is also argued that where maximising shareholders' wealth is the main focus of directors, the least cost will be spent, and the directors are more purposeful. The logic here is having additional interests may be tiring or impossible for the directors to balance all the divergent interests which may be conflicting.²³ Besides, non-financial investors are protected by regulation(s) and by the terms of the contracts entered into with the company.²⁴

In conclusion, supporters of the shareholder theory argue that investors' profit maximization should be considered above other company stakeholders' interests because shareholders are the only stakeholders in a company who are not able to exit companies without a significant sacrifice

²¹Ylber Bezo, Fran Brahimi and Rezart Dibra, 'Corporate Governance in Transition Countries' (2015) 6 Research Journal of Finance and Accounting 104, 105; Stephen R. Goldberg, Dori Danko and Lara L Kessler, 'Ownership Structure, Fraud, and Corporate Governance' (2016) 27 The Journal of Corporate Accounting & Finance 39, 40.

²² See further Companies and Allied Matters Act 2020, ss 341 and 343; Code of Corporate Governance for Public Companies 2011, ss 21-22; Goldberg et al. (n 21) 42; Ruth V Aguilera and Rafel Crespi-Cladera, 'Global corporate governance: On the relevance of firms' ownership structure' (2016) 51 Journal of World Business 50, 53.

²³See generally the conclusion in the empirical study of Martin Gelter, 'The Pension System and the Rise of Shareholder Primacy' (2013) 43 Seton Hall Law Review 968-70; N Craig Smith and David Rönnegard, 'Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools' (2016) 134 Journal of Business Ethics 464.

²⁴Lynn A Stout, 'The Toxic Side Effects of Shareholder Primacy' (2013) 161 University of Pennsylvania Law Review 2013; Diane Denis, 'Corporate Governance and the Goal of the Firm: In Defense of Shareholder Wealth Maximization' (2016) 51 The Financial Review 470.

on their part.²⁵ Even when shareholders sell their shares, the price paid for the shares takes into consideration any shareholders' exploitation. For instance, following Skye Bank solvency problem, the Central Bank of Nigeria (CBN) sacked the board and took over the management of the bank in 2016 to stabilise the bank.²⁶ By 2018, the CBN revoked the license of Syke Bank while the Nigerian Stock Exchange first suspended Skye Bank shares before delisting the bank some months after the suspension.²⁷ The shareholders recorded a cumulative loss of about N449 Billion shares or 13.64 percent of their investment.²⁸

Also in the UK's case of *Prudential Assurance Co. Ltd v Newman Industries Ltd*,²⁹ Newman, the first defendant shareholders in an extraordinary general meeting, approved the purchase of assets and certain liabilities in another company, relying on an issued company explanatory circular signed by its chairman (second defendant), who also sat as chairman in the company of interest. The plaintiff, a minority shareholder in Newman Industries, commenced an action against Newman's directors, claiming that the circular was misleading and tricky. The plaintiff action was at first brought as a derivative action wherein he also contended for personal damages against the second and third defendants (chairman and vice-chairman for conspiracy). Afterwards, the plaintiff claim for conspiracy was converted to a representative action seeking relief for all Newman's shareholders who had suffered a loss like the plaintiff. The court held, a plaintiff shareholder cannot recover personal loss against his investment company where the company has suffered damage, for his loss is through the company. A shareholder cannot receive relief on a sum equal to the diminution in the market value of his shares, or equivalent to the probable diminution in the

²⁵Smith and Rönnegard (n 23)472-73; Tu (n10) 179.

²⁶Proshare Markets, 'Tracking Skye Bank Share Price: 5 days After' (*Proshare*, 14 July 2016) <<https://www.proshareng.com/news/Investors%20NewsBeat/Tracking-Skye-bank-s-Share-Price--5days-After/31664>> accessed 9 October 2021; Yinka Ogunnubi, 'Skye Bank – The Rise, the fall and the bridge' (*Proshare*, 25 September 2018) <<https://www.proshareng.com/news/REGULATORS/SkyeBank---The-Rise--The-Fall-And-The-Bridge/41946>> accessed 9 October 2021.

²⁷Vanguard 'NSE suspends trading on Skye Bank shares' *Vanguard* (Lagos, 22 September 2018) <<https://www.vanguardngr.com/2018/09/nse-suspends-trading-on-skye-bank-shares/>> accessed 9 October 2021; Oladeinde Olawoyin, 'NSE Delists Skye Bank, Fortis' *Premium Times* (Abuja, 22 August 2019) <<https://www.premiumtimesng.com/business/business-news/347945-nse-delists-skye-bank-fortis.html>> accessed 9 October 2021.

²⁸Bamidele Ogunwusi, 'Banks Shareholders still Mourn Loss of Investment in Skye Bank' *Independent* (Lagos, 7 January 2019) <<https://www.independent.ng/banks-shareholders-still-mourn-loss-of-investment-in-skye-bank/>> accessed 9 October 2021.

²⁹[1982] 1 Ch 204. The principle in *Prudential's* case was used in the Australian case of *David Ballard v Multiplex Limited* [2008] NSWSC 1019 wherein the court rejected and dismissed the plaintiff's claim.

dividend. The acceptable procedure is to commence a derivative action on the company's behalf. Any recovery to the shareholders will be through the company.

Accordingly, shareholders bear the costs of wrongs or self-dealing by other stakeholders, even if they exit. An exception will be where the shareholder loss is personal and separate from the loss suffered by the company. Even though Nigeria publicly listed companies (like their counterparts in the UK) use the unitary board structure and implement the comply or explain approach in the adherence of their corporate governance codes, they differ in share ownership structure. As stated earlier in this paper, in Nigeria, ownership is usually substantially concentrated in a few shareholders.³⁰ The controlling shareholder is usually the company's founder and its CEO. Still, if the regulatory body of the company stipulates how long the founder is to occupy the post of CEO, he/she leaves the position at the expiration of the stipulated term to become the company's chairman. An example is CBN's directive, instructing CEOs of banks to serve a maximum tenure of ten years, notwithstanding the provisions of the memorandum and articles of association or any terms of any contract of engagement.³¹ The subsequent CEOs are usually members of his family or protégé. This structure is different from the UK, and other developed Anglo-Saxon environments where ownership is often dispersed and the shareholders are not traditionally involved in the management of the company.³²

The difference in share ownership structure between Nigeria and other developed Anglo-Saxon environments where the dominant corporate governance theories developed is the reason why the typical agency problems found in the Anglo-Saxon environments are not faced in Nigeria. Indeed, this paper finds no case in Nigeria where the shareholders have taken directors to court for losses caused by the separation of shareholders and directors. Even when discussions on the principle of reflective losses are discussed in Nigeria, no Nigerian case is cited.³³ This is not to posit that

³⁰ Adegbite (n 20) 320.

³¹ Central Bank of Nigeria, 'Brief on Guidelines for Tenure of Managing Directors of Deposit Money Banks and related matters' <www.cbn.gov.ng/out/2010/publications/pressrelease/gov/tenure_guideline19012010.pdf> accessed 21 June 2020.

³² Janet Dine and Marios Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar Publishing Ltd 2013) 189; Adegbite (n 20) 320.

³³ Wunmi Bewaji, *Insider Trading in Developing Jurisdictions: Achieving an effective Regulatory regime* (Abingdon and New York: Routledge, 2012), 223-24; Olaniwun Ajayi, 'Analysing the 'No-Reflective Loss'

there are no disputes when share ownership and management are substantially fused. What is usually found are disputes between controlling shareholders and minority shareholders as found in the case of *Agip (Nigeria) Limited v Agip Petroli International and others*.³⁴ Agip Petroleum International, an Amsterdam registered company, in a sale and purchase agreement sold off all its 60 percent shares in Agip Nigeria Ltd to Unipetrol Nigeria Plc. Nigerian shareholders held the remaining 40 per cent. Some minority shareholders alleged that their right of first refusal of shares was not sought before the sale to Unipetrol Nigeria Plc. Thus, by a Writ of Summons, the minority shareholders filed a suit against the respondents seeking a declaration that the said sale of shares is a fraud on the shareholders and other persons having an interest thereon, hence unlawful and illegal.

The minority shareholders also filed 2 Ex-parte motions seeking an injunction against the sale between Agip Petroleum International and Unipetrol Nigeria Plc, and a derivative action further to section 303 of the Companies and Allied Matters Act 1990. The trial judge granted the two Ex-parte applications. Some of the respondents appealed to the Court of Appeal against the orders of the trial judge. The Court of Appeal declared the issuance and service of the Writ of Summons null and void. The shareholders dissatisfied, appealed to the Supreme Court. The Supreme Court held that by the community reading of section 303 of the Companies and Allied Matters Act 1990 and Rules 2(1) and (2) of the Companies Proceedings Rules 1992, an application for leave to prosecute a derivative action is to be commenced by an Originating Summons with notice to the company.

A similarity between Nigeria's Code of Corporate Governance for Public Companies 2011 and the Code of Corporate Governance for Finance Companies in Nigeria 2018 is that both regulations are silent on what conditions should be met before a CEO can take up the position of chairmanship in the same company. The Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 however provide that where the board decides that the CEO or an Executive Director

Principle in the context of an SSPA' (9 February 2018) <<http://www.olaniwunajayi.net/blog/analysing-no-reflective-loss-principle-context-sspa/>> accessed 19 October 2021.

³⁴(2010) LPELR-SC 351/2002.

should become the company's chairman, the cool-off period should be three years.³⁵ The provision works to put a stop to a CEO having unbridled authority in a company if he becomes chairman immediately after functioning as company CEO.

Nevertheless, in the business world, the same individual sometimes holds the post of both CEO and chairman of the company if the board decides it is in the best business strategy for the company. An example is UK's Stuart Rose who held the position of CEO at Marks and Spencer from 2004 then, combined the role with chairman from 2008, exiting both posts in 2010 and 2011 respectively.³⁶ In the USA, Jamie Dimon occupies the position of chairman and CEO of JPMorgan Chase & Co, one of the four leading banks.³⁷ Be that as it may, existing studies are not in agreement on if combining the roles of CEO and chairman aids the company's performance or act as a clog to the prosperity of the company.³⁸ However, it is not news that, depending on several factors, some best practices of corporate governance may be harmful in certain circumstances but relevant to a company's survival in other circumstances. Thus companies and policymakers should consider the culture of the people, circumstances of the company, and other contexts before applying best practices of corporate governance. JPMorgan Chase & Co, for instance, outperform banks like Citigroup and Bank of America where the office of CEO and chairman are separate.³⁹

Nonetheless, the arguments presented above are not a conclusion that companies incorporated for profit do not consider the interest of their non-

³⁵ S 3.3.

³⁶Independent, 'He saved M&S. But Sir Stuart Rose will be a tough act to follow' *Independent* (London, 18 May 2008) <<https://www.independent.co.uk/news/business/analysis-and-features/he-saved-ms-but-sir-stuart-rose-will-be-a-tough-act-to-follow-830139.html>> accessed 2 October 2021; Julia Finch, 'Stuart Rose to leave M&S slowly after Bolland joins' *The Guardian* (London, 3 March 2010) <<https://www.theguardian.com/business/2010/mar/03/marks-spencer-executives-rose-bolland>> accessed 2 October 2021; Evening Standard, 'Sir Stuart Rose bows out at Marks & Spencer' *Evening Standard* (London, 4 January 2011) <<https://www.standard.co.uk/business/sir-stuart-rose-bows-out-at-marks-spencer-6551490.html>> accessed 2 October 2021.

³⁷JPMorgan Chase & Co, 'Who we are: Our Leadership' (2020) <<https://impact.jpmorganchase.com/about/our-leadership/jamie-dimon>> accessed 2 October 2021.

³⁸Anthony Goodman, 'Should banks keep combined the role of CEO and chairman?' *Financial Times* (London, 1 May 2013) <<https://www.ft.com/content/fb849930-b251-11e2-8540-00144feabdc0>> accessed 21 October 2021; Elisabeth Dedman, 'CEO succession in the UK: An analysis of the effect of censuring the CEO-to-chair move in the Combined Code on Corporate Governance 2003' (2016) 48 *The British Accounting Review* 376; Krista B Lewellyn and Stav Fainshmidt, 'Effectiveness of CEO Power Bundles and Discretion Context: Unpacking the 'Fuzziness' of the CEO Duality Puzzle' (2017) 38 *Organization Studies* 1604.

³⁹Goodman (n 38).

shareholders. Be Onsite, a London based, registered not-for-profit company, founded by Lend Lease, a multinational construction company, provides training, on-site experience and job opportunities to disadvantaged individuals seeking to earn a decent living in the property sector.⁴⁰ Disadvantaged persons include individuals with criminal records or not having academic qualifications or experience or disability.⁴¹ The job skill training provided by Be On site is combined with practical and emotional support until employees build sustainable careers.⁴² Another example is TOMS Shoes. The company gives shoes, water, safer births and sight to improve the lives of people and communities in need.⁴³ Beyond this, Toms funds start-up companies with a social mission and its coffee is resourced sustainably.⁴⁴

In Nigeria, United Bank for Africa Foundation is charged with the corporate social responsibility of the United Bank for Africa group. It contributes to the socio-economic improvement of the communities in which it operates.⁴⁵ For example, the Foundation sustains five leisure gardens across Nigeria; it sponsors empowerment and skills acquisition conferences, including entrepreneurship programmes. Across Africa, the Foundation provides recommended English literature to secondary schools to minimise the declining reading culture among secondary school students distracted by electronic social media and other vices.⁴⁶ Indeed, all public listed companies in Nigeria demonstrate their commitment to their stakeholders as the Companies and Allied Matters Act 2020⁴⁷ and the Code of Corporate Governance for Public Companies 2011⁴⁸ recommend that they do.

⁴⁰ Be Onsite, 'Who we are' (2012) <<https://www.beonsite.org.uk/who-we-are>> accessed 19 October 2021.

⁴¹ Be Onsite, 'What we do' (2012) <<https://www.beonsite.org.uk/what-we-do>> accessed 19 October 2021.

⁴² Be Onsite, 'What we do: how we do it' (2012) <<https://www.beonsite.org.uk/how-we-do-it>> accessed 19 October 2021.

⁴³ Toms, 'How we give: Improving lives' (2018) <<http://www.toms.co.uk/improving-lives>> accessed 19 October 2021.

⁴⁴ Toms, 'Beyond One for One' (2018) <<https://www.toms.co.uk/beyond-one-for-one>> accessed 19 October 2021.

⁴⁵ United Bank for Africa, 'Shared Values: UBA Foundation' (2018) <<https://ubagroup.com/uba-foundation>> accessed 19 October 2021.

⁴⁶ *ibid.*

⁴⁷ S 305 (3) and (4).

⁴⁸ S 28.

Despite the arguments; regulations, and judgments in favour of directors managing a company to maximise shareholder's interest, the shareholders value governance system is not without its gaps. These gaps undergird the theory's criticism and outright rejection in some spheres.

In relation to the ownership and management structure in Nigeria, shareholder theory is rejected as a foundation for governing Nigeria's companies because the theory's premise does not capture governance where ownership and management are fused. The theory cannot regulate the ownership-management structure in Nigeria. Its supporters' argument, based on the separation of management and shareholder ownership structure does not translate successfully to Nigeria's ownership concentration model.

Nevertheless, minority shareholders can benefit from the monitoring recommendation of the theory. Where all the non-management shareholders monitor the majority shareholder/CEO, the action would help the majority shareholder/CEO, and other shareholders understand the usefulness of making decisions after all the relevant facts are known and deliberated. The Financial Reporting Council of Nigeria can help in this regard by promoting awareness about corporate governance principles through workshops, seminars, and training. Already, the Financial Reporting Council of Nigeria Act 2011, directs the Council to ensure good corporate governance practices in Nigeria's private sector.⁴⁹

3.0 THE JUSTIFICATION WHY CORPORATE GOVERNANCE ENCOMPASSES MORE THAN SHAREHOLDERS MAXIMISATION

Scholars like Bebchuk⁵⁰ and Mansell⁵¹ argue that shareholder profit maximisation produces a short-term focus and that short-term earnings performance overshadows all else to the detriment of long-term earnings, and this fails to maximise social wealth. Some scholars have submitted that

⁴⁹Financial Reporting Council of Nigeria Act 2011, s 11 (c), s 50 (c) and 51 (b).

⁵⁰Lucian A Bebchuk, 'The Myth that Insulating Boards Serves Long-term Value' (2013) 113 Columbia Law Review 1637, 1638.

⁵¹Samuel Mansell, 'Shareholder Theory and Kant's 'Duty of Beneficence' (2013) 117 Journal of Business Ethics 583, 584.

short-term earnings contributed to the global financial crisis of 2008-09.⁵² This is because by focusing on shareholders' profit maximisation mainly, directors tend to invest in businesses with short term profit, without taking into consideration the effect of such decisions in the long run on the company and the economy. Still, it is good to note that a single objective of the company can have many interrelated variables that should be considered in managing a company. For instance, the role of government, creditors, employees, time frame and the climate in achieving the company's objective.

Also, depending on the circumstances of the company, the company may need to be sustained through the pressure of short term ventures/price competition. In Huawei early years of operation in Shenzhen; it operated as a private company in major competition with state-owned companies that dominated the market. Aware that Huawei's products were substandard than its competitors, Ren Zhengfei, Huawei's founder, attracted customers by providing outstanding customer service. Huawei products regularly broke down, but every time a breakdown was reported, its engineers went to the customer to fix the broken-down product at a time convenient for the customer.

Also, in rural and desert regions of China, rats affected telecom connections. Huawei, unlike the multinational companies, treated the rats' plague as a responsibility to solve. Its unlimited customer service was different from other companies even though Huawei's competition had standard products. Huawei's customer services delivery made the brand popular and reputable as its customers were assured that the company cared about their needs. With time, Huawei gained a competitive advantage.⁵³ Presently, Huawei is a notable international, infrastructure provider of information and communications technology, including smart devices. It operates in over 170 countries. The company remains a private company, fully owned by its China-based employees.⁵⁴

⁵²Jeffrey L. Callen and Xiaohua Fang 'Institutional investor stability and crash risk: Monitoring versus short-termism?' (2013) 37 *Journal of Banking & Finance* 3047.

⁵³David De Cremer and Tian Tao, 'Leading Huawei: Seven Leadership Lessons of Ren Zhengfei' *The European Business Review* (Online, 17 September 2015) <www.europeanbusinessreview.com/leading-huawei-seven-leadership-lessons-of-ren-zhengfei/> accessed 15 October 2021.

⁵⁴Huawei, 'Home: About Huawei – Corporate Information' <www.huawei.com/uk/about-huawei/corporate-information> accessed 15 October 2021; Juha Saarinen, 'Analysis: Who really owns Huawei' (*IT News*, 28 May 2010) <www.itnews.com.au/news/analysis-who-really-owns-huawei-175946> accessed 15 October 2021; Dan



The proponents against the shareholder theory argue that the emphasis on shareholders being the only residual claimants in a company is misplaced.⁵⁵ Shareholders are not the only individuals to make company-specific investments. Employees also may embark on specific skill training that is useful only in the company in which they are employed. In the event of long service in this company, the employee's employment prospects may be limited as they may be uninspired to move to another employer. When they do, they may not find useful the training undertaken in the previous employment in the new company. This may result in a stunted career progression or redundancy. In comparison, shareholders can diversify their risk more quickly than other stakeholders.

Finally, the idea that the shareholders own the company does not sit well with the concept of the company being a separate legal entity. Upon incorporation, cadxxdd companies operate as legal entities separate from their shareholders. Shares are the shareholders' property, but the company is not.⁵⁶ Shareholders are unable to lay claim to any property held by the company and assert ownership rights over it, except in cases of insolvency where company property can be distributed to shareholders.⁵⁷ *Salomon v Salomon*⁵⁸ is best-known for the effect of incorporation. Mr. Salomon boot manufacture business was firstly managed as a sole proprietorship before the business registration as a limited liability company. After the company's registration, the assets of the business were transferred to the company. The price of the transfer was paid to Salomon by way of debentures having a floating charge on the assets of the company and by shares.

When the company collapsed and went into liquidation, its primary debenture holder sued because Salomon's secured floating charge came first in time against the unsecured creditors of the company. The court held that the company is legally registered; thus, the company was separate in law from the person or persons directing the company. From the time of

Moskowitz, 'How to Invest in Huawei' (*Investopedia*) <www.investopedia.com/articles/investing/051215/how-invest-huawei.asp> accessed 15 October 2021.

⁵⁵Gelter (n 23) 919.

⁵⁶*Salomon v Salomon* [1896] UKHL 1, [1897] AC 22; Companies and Allied Matters Act 2020, s 42 and s 43.

⁵⁷Jean-Philippe Robé, 'The Legal Structure of the Firm' (2011) 1 Accounting, Economics and Law 1, 3.

⁵⁸[1896] UKHL 1, [1897] AC 22. See also Companies and Allied Matters Act 2020, s 42 and s 43; Robé (n 57) 3.

registration, the company became an independent person in law, with its duties and rights different from those of its shareholders.

Because of the shortcomings of the shareholder theory, some scholars like Dodd and Gooyert et al. advocate for an alternative purpose in governing a company. They argue that the role of any system of company law should principally be to provide a framework for the efficient functioning of a capitalist system to protect or balance the interest of various stakeholders, including shareholders. They believe this governance approach is a better means of building strong democratic institutions.⁵⁹

4.0 STAKEHOLDER THEORY

The early advocate for the stakeholder theory is Professor E Merrick Dodd.⁶⁰ The theory gained more prominence in the wake of corporate scandals in the business world.⁶¹ The stakeholder theory asserts that the managers of a company owe a duty to shareholders, as well as, other parties that contribute either voluntarily or not, to the creation of a company's wealth.⁶² For instance, employees of a company commit time and other resources in exchange for salaries and other benefits that come with performing excellently. Employees are beneficiaries and not risk bearers in the company.⁶³ Therefore, managers are to consider employees' interests and the interests of the shareholders when making decisions on behalf of the company. The stakeholders of a company have been identified to include creditors, employees, suppliers, customers and the communities in which the company operates.⁶⁴ These types of stakeholders are the non-financial investors.

⁵⁹Tu (n 10) 129; Vincent de Gooyert, Etienne Rouwette, Hans van Kranenburg and Edward Freeman, 'Reviewing the role of stakeholders in Operational Research: A stakeholder theory perspective' (2017) 262 *European Journal of Operational Research* 402, 408-09.

⁶⁰Hill (n 10) 1005 – 006; Tu (n 10) 128.

⁶¹Jill Solomon, *Corporate Governance and Accountability*, (3rd edn, John Wiley & Sons Ltd 2010) 21; Callen and Fang (n 52) 3047.

⁶²Leo E Strine, 'The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law' (2015) 50 *Wake Forest Law Review* 761, 763.

⁶³*Ibid*.

⁶⁴Solomon (n61) 15.

The arguments for the stakeholder theory are contained in the Companies and Allied Matters Act 2020, s 305 (3) and (4). The law direct directors to consider the impact of the company's operation on the environment in which it carries on business and also have regards to the interests of its members and employees in general in the performance of their duties.

The supporters of the stakeholder regime argue that balancing various stakeholders' interests will provide the company the long-term ability to remain a going concern. Thus, sustaining an institution beneficial to the wellbeing of individuals, society and a nation. Deng et al. studies focused on the years 1992 to 2007 to determine whether managers participate incorporate social responsibility (CSR) to meet non-shareholder stakeholders' interests to the disadvantage of shareholders' interest. The research examined 1,556 USA completed mergers by 801 companies to measure such companies rating, by their social performance in CSR. It made use of KLD Research & Analytics, Inc. (KLD) database in scoring the companies. In testing the robustness of its result, an out-of-sample analysis of USA companies in the FTSE4Good index, for the period 2001 to 2011, were analysed. Companies that had undergone mergers were chosen for this study because the process and outcome of mergers are unsure. Mergers not only threaten shareholders' wealth but also endanger the continued relationship between the company and its stakeholders. The result of the study reveals that mergers by acquiring companies with high CSR are unlikely to fail; the merger stake a shorter time to complete in comparison with acquiring companies with low CSR. After the mergers, high CSR participation companies announced higher stock returns for the acquiring companies and value-weighted portfolios of the acquiring and the target companies.⁶⁵ Furthermore, Deng et al. research found that during merger announcements, acquiring company's social performance significantly influences the wealth of other stakeholders, for example, acquirer's bondholders and target suppliers and customers.

Also, the job of the employees after the merger by high CSR acquiring companies, are less likely to be terminated compared with employees after a merger by low CSR acquirers⁶⁶ Again, the result of the research finds that

⁶⁵Xin Deng, Jun-koo Kang and Buen Sin Low, 'Corporate Social Responsibility and Stakeholder Value Maximization: Evidence from Mergers' (2013) 110 *Journal of Financial Economics* 87, 88-91 and 108 – KLD database is used because it is a renowned authority on companies CSR activities and performance ratings.
⁶⁶*Ibid* 89.

the companies that take into consideration the interest of its non-shareholder stakeholders enhance the company's efficiency and its long-term profitability, which eventually maximizes shareholders' wealth and company's value.⁶⁷ On the whole, a better approach in governing a company is to seek to balance various stakeholders' interests in the pursuit of the company's objectives.

Stakeholder theory seeks to focus on the fact that those involved in, and dealing with, companies are humans; thus, corporate law should not be de-personalised.⁶⁸ With the stakeholder theory, the usefulness of a company is measured by evaluating how it assists society gain a richer understanding of community by respecting human dignity and overall welfare.⁶⁹ Cases in point will be, 9mobile (previously trading as Etisalat Nigeria, a telecoms company that started trading in Nigeria in 2008). 9mobile gives merit awards scheme to undergraduate students of computer science, electrical electronics engineering and business management since 2009; the company also has in place a teacher training programme in English Language for teachers in primary and secondary schools in Rivers, Oyo and Kaduna States. It runs this programme in collaboration with the British Council.⁷⁰ Total Nigeria also is involved in various community schemes such as Malaria initiative, HIV/AIDS initiative.⁷¹ The company from 2016 has been incorporating the United Nations Sustainable Development Goals in its strategy to fulfil socio-economic and environmental development in Nigeria.⁷²

The stakeholder theory embraces a normative world view that emphasises the fact that people are part of a shared community who inherit the benefits, values and goals of the community.⁷³ Thus, the cultural environment in which people find themselves cannot be ignored, and the company is regarded as a community of interdependence, mutual trust and reciprocal

⁶⁷ *Ibid* 108; see also Thomas M Jones and Will Felps, 'Shareholder Wealth Maximization and Social Welfare: A Utilitarian Critique' (2013) 23 *Business Ethics Quarterly* 207, 218.

⁶⁸ Andrew Keay, 'Tackling the Issue of the Corporate Objective: An analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 *Sydney Law Review* 577, 586.

⁶⁹ *Ibid*.

⁷⁰ 9mobile, <<http://9mobile.com.ng/corporate-social-responsibility/>> accessed 29 September 2021.

⁷¹ Total Nigeria, <www.total.com.ng/pro/about-us/sustainable-development-amo.html> accessed 5 September 2021.

⁷² Total Nigeria, <<http://nigeria.total.com/en/commit-us/toward-responsible-energy>> accessed 5 September 2021.

⁷³ Solomon (n61)15.

benefit.⁷⁴ A consequence of this approach is that shareholders maximisation is not necessarily the main business driving force in carrying out company activities. Instead, company directors in managing a company, are to consciously consider other important interests for the benefit of the company in the long run.⁷⁵ Invoking a pure shareholder value approach in the governance of a company, according to stakeholders' apologists, will possibly damage the interest of non-shareholders in a company, as these groups of stakeholders will be aware that their interests are subordinate to shareholders' maximisation always.⁷⁶

Furthermore, even though investors are now more aware of their expectations, rights, powers and options, it does not seem wise for anyone in today's business world to invest in a company where a group of stakeholders' interests triumph over other stakeholders' interests. This is because the business world is embracing different interests to ascertain the sustainability of businesses, economies and the climate.

In addition, the scandals and sometimes, collapses of companies have highlighted the dangers of companies having an individual or a group of individuals wielding too much power within a company,⁷⁷ some of which failures were because the companies were directed for the benefit of its shareholders only.⁷⁸ Of popular knowledge are the scandals and collapses in Enron, Worldcom and Royal Bank of Scotland.

Opponents of the stakeholder theory raise questions such as if the company's managers are fiduciaries of the company and not its shareholders, which natural persons legitimately have the authority, and where is the authority to hold managers accountable derived? Who determines the interest of the company? From where is the right to determine the interest of the independent company gotten? Blair and Stout's team production model submits that because companies are fictional

⁷⁴*Ibid.*

⁷⁵ Companies and Allied Matters Act 2020, s 305(3) and (4).

⁷⁶Keay (n 68) 586.

⁷⁷See generally, Roger Barker and Iris H-Y Chiu, 'Protecting minority shareholders in block holder controlled companies: evaluating the UK's enhanced listing regime in comparison with investor protection regimes in New York and Hong Kong' (2014) 10 Capital Markets Law Journal 98 – 132.

⁷⁸*Ibid.*

persons that function only through human agents,⁷⁹ a company consists of its team members who contribute distinct investments in the company's provision of goods and services as a team. The company board's role is to mediate on the hierarchy within the company, by balancing team members' interests (which may be conflicting) in a manner that keeps every team member satisfied enough to remain a member of the team.⁸⁰

Having analysed the reasons proffered by the shareholder and stakeholder theories governance approach, both theories' recommendations contained in regulations, some empirical studies on regulation provisions and case laws, it is good to evaluate Nigeria's corporate governance acceptability rate. Including the adherence and the consequences of non-adherence of companies regulations from the reports of the institutions in place to produce and maintain the regulations.

Nigeria's Corporate Affairs Commission monitors the compliance of the Companies and Allied Matters Act 2020.⁸¹ The website has no report on compliance or otherwise of companies carrying out business in Nigeria.⁸² The public, however, can search for company names, addresses and dates of registration on the website.⁸³ The Department of Legal Division (Investment Management) under the office of the Operations Directorate of Nigeria's Securities and Exchange Commission, is responsible for compliance with the Code of Corporate Governance.⁸⁴ The Commission has no information or record on the rate of acceptance and compliance of this Code in Nigeria. The website, however, has information on companies that are facing disciplinary actions, including the names of companies that have faced disciplinary actions and have had the enforcement action taken against the companies lifted.⁸⁵ The website also has a list of the litigations in which the Commission is a party.⁸⁶

⁷⁹Margaret M Blair and Lynn A Stout, 'Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247, 249.

⁸⁰*Ibid* 282; Jan Kuly's, 'Controversies about Agency Theory as Theoretical Basis for Corporate Governance' (2016) 7 *Journal Oeconomia copernicana* 613, 627.

⁸¹Companies and Allied Matters Act 2020, s 8.

⁸²Corporate Affairs Commission, 'Home' <<http://new.cac.gov.ng/home>> accessed 17 October 2021.

⁸³Corporate Affairs Commission, 'Home: Public Search' <<https://search.cac.gov.ng/home>> accessed 17 October 2021.

⁸⁴Operations' <<http://sec.gov.ng/directories/operations/>> accessed 24 October 2021.

⁸⁵Securities and Exchange Commission Nigeria, 'Enforcement: Suspensions and Penalties: Companies facing enforcement action, 2016' <<http://sec.gov.ng/suspensions-and-penalties/>> accessed 24 October 2021.

⁸⁶Securities and Exchange Commission Nigeria, 'Enforcement: Litigation' <<http://sec.gov.ng/litigation/>> accessed 24 October 2021.

In the UK, the Department for Business, Energy and Industrial Strategy is responsible for companies. The department is supported by 42 agencies and public bodies,⁸⁷ among which is, Companies House (The equivalent of Nigeria's Corporate Affairs Commission), whose duties include incorporating and dissolving companies as well as inspecting and storing company's information. The detailed information displayed on the register of companies is accessible by everyone online free of charge. Thus the public can access comprehensive information of every company registered in the UK.⁸⁸ The UK Financial Reporting Council monitors the implementation and maintains the UK Corporate Governance Code.⁸⁹ It also reports yearly on the development of corporate governance in companies.⁹⁰ Through the reports, companies, institutions, and the public can monitor the governance approach of companies and make informed decisions on the companies. Indeed, accountability and transparency are at the heart of building a strong democratic institution and corporate governance. Where institutions and companies are not accountable and transparent, the result of regulations cannot adequately be evaluated. In the pursuit of companies' long-term success through viable regulations and institutions, this paper, makes recommendations in the next section.

⁸⁷Department for Business, Energy and Industrial Strategy, 'What we do' <<https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy>> accessed 24 October 2021.

⁸⁸Companies House, 'About us' <<https://www.gov.uk/government/organisations/companies-house/about#our-responsibilities>> accessed 24 October 2021.

⁸⁹Financial Reporting Council, 'FRC Roles and Responsibilities: Schedule of Functions and Powers' (June 2017) <www.frc.org.uk/getattachment/67835f0e-e4c2-4d2a-9aeb-e57fed885be/FRC-Roles-Responsibilities-Schedule-of-Functions-Powers-June-2017.pdf?5-6> accessed 25 October 2021 and Financial Reporting Council, 'The FRC and its Regulatory Approach' (Financial Reporting Council Limited 2014).

⁹⁰Financial Reporting Council, 'Developments in Corporate Governance and Stewardship 2011-20' <<https://www.frc.org.uk/directors/corporate-governance-and-stewardship/developments-in-corporate-governance-and-stewardship>> accessed 25 October 2021.

50 RECOMMENDATIONS AND CONCLUSION: GOVERNANCE FRAMEWORK TO AID STRONG DEMOCRATIC INSTITUTIONS

The question that arises is, which of the two models of governance should the company law and the corporate governance of a company protect? Professor Berle, after about twenty years of the debate between himself and Professor Dodd, admitted that the debate is settled in favour of Professor Dodd following the arguments that endured after their debate.⁹¹

Lawmakers and companies must acknowledge and do right by non-financial investors and, define the objectives of regulations, by embracing standards wider than investors profit maximisation. As evidenced in the preceding paragraphs in this paper, Nigeria's primary and ancillary company laws, have already made provisions for this broader governance - by directing the directors of a company to consider the interest of the environment, shareholders as well as the company's employees.

Yet, because the argument still abounds, especially in Nigeria where ownership and management usually rest on the same people, on the governance approach a company should imbibe, this paper makes the following recommendations to directors – as they are the ones who decide on the governance approach in companies. The approach the directors take may put them in risky situations where the shareholders may challenge directors' decisions as failing to maximize shareholders' profit. Company directors may be sued for violating the "fiduciary duties" owed shareholders should directors' decisions seem to take into consideration other aims, other than shareholders' profit maximisation. Be that as it may, directors are usually insured to cover claims or compensation.

Even though this paper finds no case and literature where shareholders in Nigeria have taken directors to court, for losses caused by the separation of shareholders and directors in corporate governance, it is recommended that in Nigeria, where all incorporated companies are required to have a Memorandum and Articles of Association before incorporation,⁹² prospective companies' Memorandum of Association should clearly state

⁹¹Tu (n 10) 129.

⁹²Companies and Allied Matters Act 2020, s 27, 36 (1), (4)(c).

that the company will create benefits for the public. At the same time, the Articles of Association should contain a detailed description of this provision.⁹³ The Memorandum and Articles of Association are the rules by which companies are governed. These documents can be altered, subject to the provisions of the Companies and Allied Matters Act 2020, ss49 - 54. This means that already incorporated companies can make necessary changes in accordance with the Act.

Another recommendation is for Nigeria policymakers to produce a regulation that, in clear terms, support company directors making profits for its shareholders, yet direct that non-financial investors' resources are not depleted. This will protect directors from frivolous litigations for putting into consideration the interests of non-financial investors. The regulation to be produced should protect directors, so long as the directors believe that their actions or inactions are in the best interest of the company and same can be proved, using a reasonable standard of care and skill.

Furthermore, Nigeria policymakers should consider producing parallel regulations that support the different governance regimes. In this way, all stakeholders have a good knowledge of the governance approach adopted in any company. In the UK, some companies are classified as B corporations. These companies are incorporated for-profit, yet the companies' mission includes standards in environmental and social outcome, accountability and transparency.⁹⁴ The USA has the Benefit Corporations Legislation. Companies passed under this state to state legislation, must have the following features: the company must consider non-shareholders' interests; have a corporate objective of creating benefits for the public; its annual report, which must be made public, must contain information on the company's efforts to pursue a public interest. The company must also make public the evaluation of the company's overall environmental and social performance as judged by a third-party standard.⁹⁵ The legislation is operational in states that have passed the legislation.⁹⁶

⁹³ Companies and Allied Matters Act 2020, s 32(1), 46(1).

⁹⁴ B lab, 'Home: What are B Corps?' <<http://bcorporation.uk/what-are-b-corps-uk>> accessed 15 October 2021.

⁹⁵ Felicia R Resor, 'Benefit Corporation Legislation' (2012) 12 Wyoming Law Review 91– 92 and 101; Tu (a 10) 42.

⁹⁶ Benefit Corporation, 'How to become a Benefit Corporation' <<http://benefitcorp.net/businesses/how-become-benefit-corporation>> accessed 15 October 2021.

In response to the question of the governance approach that ensures a company flourishes, develops and supports any economy to grow and develop, this paper is not taking a position with any of the competing camps. Instead, it sought to provide information and recommendations, which may aid all stakeholders and prospective stakeholders' decisions in relating to a company. For institutions, the tools needed to build a strong democratic government. Furthermore, the paper brings to the fore Nigeria's court inexperience in the no-reflective loss aspect of company law.

All the same, the reality is that whatever type of governance approach a company leans towards, without functional institutions to uphold regulations, be they hard or soft law, the objective of the company, the development of a nation and the sustenance of the environment may be unattainable. Hence the call for Nigeria's institutions to effectively carry out institutions purpose and be accountable and transparent to the public on their responsibilities. Accountability and transparency are some of the ways to build strong democratic nations.