

PRINCIPLE OF 'COMPLY AND EXPLAIN' AS AN ENFORCEMENT MECHANISM TO CORPORATE GOVERNANCE CODES FOR PUBLIC COMPANIES IN NIGERIA*

Abstract

This work examined how a mandatory application of codes of corporate governance in Public Companies can be enforced using the principle of comply and explain. The extent and worth of decision making in a firm determines the forward movement of the company, its movement backward or whether it would be stagnant in relation to its corporate interest. In every corporate entity, the gulf between the interest of those who provide external capital and those who have control over the firm often creates a 'principal-agent problem, this can be resolved through the application of corporate governance. More importantly is the application and enforcement of corporate governance codes. It is observed that the several cases of financial scandal and collapse of companies in Nigeria are characterized by poor regime of corporate governance practices. These failures which gave rise to bank consolidation and recapitalization would have been averted if there were mandatory compliance with the code of corporate governance. The core principle of comply and explain is in response to the need to have a strict compliance financial governance laws particularly with respect to the practices in public companies where members of the public sometimes stake their life savings in investment. This necessity for a regulatory regime brought about the National Code of Corporate Governance which was envisaged by the Financial Reporting Council Act 2011. This work downplayed the need for a self-regulatory system of compliance with the codes of corporate governance. It argued that this self-regulatory regime which underscores flexibility will not strengthen the Nigeria corporate governance structure and values. Attendant challenges of enforcement were examined and recommendations suggested.

Keywords: *Comply, Explain, Compliance, Corporate, Code*

1. Introduction

Corporate governance is a concept that can be defined from various perspectives. It may be viewed as the way and manner corporations are directed, controlled and made accountable. It involves having effective leadership of corporations to ensure that promises are kept particularly as it concerns wealth creating organ of the society.¹ Corporate governance is a mechanism adopted by companies in regulating the exercise of powers within the company with the aim of ensuring that the ultimate aim of establishing a company which is the creation, control and management of sustainable value (which is the *raison d'etre* of companies that are profit-oriented) is achieved.² Furthermore, it can be viewed as a system of regulation and overseeing of corporate conduct and balancing of interest of all internal stakeholders and other parties who are directly or indirectly affected by the corporation's conduct, with the view to ensuring responsible behavior by corporations and to achieve the maximum level of efficiency and profitability.³ Every corporate existence rests on the underlying principle of corporate governance. With the 21st century, many public companies had experienced transformation in the area of Corporate Governance. the development during this era was slow due to legal and entrenchment of social norms in the society.⁴ While corporate governance is subject to various definitions, some of its canon of universal application is that shareholders, whether majority or minority must have equal treatment⁵. The board of directors have corporate task of acting on behalf of the company as flagship and are answerable to the various shareholders for their deeds.⁶ To ensure transparency, the

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¹ Inam Wilson 'Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation'(2006)(12)(2) *Nigerian Economic Summit Group and Economic Indicators*

² Ramani Naidoo *Corporate Governance: An Essential Guide to South African Companies* 2ed. (2009) 11.Lexis Nexis South Africa.

³ Jean Du Plessis et al *Principles of Contemporary Corporate Governance* (2011) 3. Cambridge University Press

⁴ Bob Garrat *Thin on Top: Why Corporate governance matters and how to measure, manage and improve board performance* (2003) 12, PHI Learning Private Limited New Delhi India

⁵ Andrew Chikanika 'Corporate Governance in South Africa: Progress and Challenges' Unpublished LLM thesis 2013, School of Advanced Legal Studies, Faculty of Law, University of Cape Town, South Africa 5

⁶ Brian Coyle *Corporate Governance* (ed.) (2010). Institute of Chartered Secretaries and Administrators Publishing Limited.

corporate responsibilities of the board must be carried out in the open public. This is also done through the dissemination of information publicly to the various shareholders.⁷ Generally, the entrenchment of corporate governance principles requires the board of directors to act fairly and accountably to the stakeholders and their actions are transparently performed without fear or favour.⁸

2. Need for Regulation

Corporate governance is an aspect of commercial law which provides a lens which can be used to access the various legal and regulatory structures within the corporate environment where business is carried out. This legal regulatory regime varies from jurisdiction to jurisdiction. Consequently, its efficacy depends largely on the legislation that is in place. This position influenced the thoughts of John Folsom who observed that:

Over the past twenty years, corporate governance has seen a surge in interest with regard to corporate responsibilities to society. Often these interests have not been embedded in statutes but instead have been implemented through guidelines and codes. The companies Act directly provides clear framework for the empowerment of stakeholder and includes a directive that companies operate to enhance not only shareholder profits but also social welfare...⁹

In most economies of the world, the growth of corporate governance has met with the establishment of diverse legal and regulatory frameworks with the objectives of controlling, supervising, and managing how corporate firms are governed. The effectiveness of these framework depends on the potency of the operations of the laid down structure.¹⁰ The necessity of having a regulatory regime is to provide a conducive environment that is predictable and productive to the company's needs. The need to regulate is for the purpose of rectifying imperfections that may exist within the enabling legislation or the operating environment.¹¹ While the Act authorizes the creation of companies, a regulatory framework is drawn up to assist the enabling Act.¹² This mechanism is needed to reduce inefficiencies that may arise from moral hazards and adverse selection. It seeks to provide incentive alignment towards corporate goals and objectives.¹³

3. Corporate Governance Mechanisms in Nigeria

Globally governance of corporation has been a subject of immense concerns. International bodies like the Organisation for Economic Co-operation and Development (OECD) and the Bank for International Settlement (BIS) have established the core principles of corporate governance which is considered as the moral consensus for the international community. The corporate scandals in Enron, Parmalat, Worldcom and Barings Bank taught the corporate world that no corporate entity is too big to experience financial failure. The common factor that ran through all these corporate failures was poor corporate governance practices such as poor management, fraud, insider abuse, poor asset and liability management, poor regulation and supervision.¹⁴ From a banking perspective, the requirement of good corporate governance is for banks to carry out their businesses in a safe and sound manner in compliance with applicable laws and regulations with the interest of depositors as very paramount. It is however worthy of note that not all banks in Nigeria observe these strict rules of corporate governance, best practices and high ethical

⁷ Ibid 5

⁸ Ibid 5.

⁹ John Folsom 'South Africa moves to a global model of corporate governance but with important national variations' in Mongalo H Tshepo (ed) *Modern Company Law for a Competitive South African Economy* (2010) 219-247.

¹⁰ Ramani Naidoo Op cit 28.

¹¹ Jane Dine *The Governance of Corporate Groups* (ed.) (2000) 11 Cambridge University Press

¹² Ramani Naidoo Op cit 28.

¹³ Leonard C.Opara 'The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis' (2014)(26) *Journal of Law, Policy and Globalization* 39

¹⁴ S.O Alashi and M.K Ahmad 'Nigeria Deposit Insurance Corporation Lagos' AERC Research Paper 145, African Economic Research Consortium (AERC), Nairobi, Kenya, November 2004. See also Inam Wilson 'Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation'(2006)(12)(2) *Nigerian Economic Summit Group and Economic Indicators*

standards in their dealings.¹⁵ In Nigeria, the mechanism of corporate governance was advanced through a combination of voluntary and mandatory mechanism. The Atedo Peterside committee was set up by the Securities and Exchange Commission to develop a Code of Best Practices for Public Companies in Nigeria. The voluntary code was designed to entrench good business standards for boards and directors, CEOs, auditors of listed companies and banks.¹⁶ The mandatory provision which applies to banks are contained in the Companies and Allied Matters Act (CAMA).¹⁷

The Banks and Other Financial Institutions Act (BOFIA),¹⁸ the Investments and Securities Act 2007. While it may be suggested that these extant laws and codes regulating the governance of corporate reflects the moral consensus and international best practices in this field,¹⁹ enforcement of these codes do not reflect ethical standards. Efforts have been made at improving the standards from voluntary enforcement to total mandatory compliance. The Financial Reporting Council of Nigeria (FRC) proposed a National Code of Corporate Governance. The objectives was to unify all Codes of Corporate Governance for Private Sector, Code of Corporate Governance for the Public Sector and the Not for Profit Organizations Governance Code. Compliance to the codes would be mandatory for both Private and Public firms, but for corporate entities which are Not for Profit Organizations, it would operate on the basis of comply or explain basis which is in line with the United Kingdom approach.²⁰ The operation of this code has however been suspended. It has been argued that this proposed code adopts rule-based approach rather than a principle-based format. It is further argued that the code rather than providing a guide and complement has a subverting and overriding approach.²¹ It is suggested that implementing a total mandatory approach of comply and explain which is contained in the proposed report is a welcome development in view of the challenges that exists in enforcing codes of corporate governance. The proposed code is forward-looking. The initiative should be upheld particularly aspects that seeks to enhance good corporate standards and values.

4. Enforcement of Corporate Governance Codes in Nigeria

Internationally, efforts have been made in many jurisdictions at increasing the measure of enforcing codes of Corporate Governance. In the U.S for instance, the Sarbanes Oxley Act has made efforts to strengthen private supervisory mechanisms ranging from company’s external auditors, audit committees, external counsel, and whistle blowing. By strengthening the monitoring capacities of the various instruments, the Act is pursuing the possibility of detecting illegal and inappropriate activities.²² The Sarbanes-Oxley Act imposes stiff criminal sanctions on directors of a company for any fraud or suspicious transaction. It increased criminal penalties imposed on the Chief Executive Officer and Financial Officer for any inaccuracies in financial statement.²³ Enforcement of corporate governance requires strict compliance with these codes. During the colonial era in Nigeria, indigenous customary commercial norms were the common practice and the concept of corporate governance was largely unknown until the post-colonial times.²⁴ After the grant of self-rule in 1960, the prevailing ideological conviction which underscored economic self-dependence in terms of indigenous ownership influenced the direction of corporate governance in Nigeria.²⁵ There was a need for local control of resources which before then was under the management of foreign

¹⁵ Uche Aniemena ‘Good Corporate Governance in the Banking System’ being a paper delivered at the 3rd Pan African Forum on Corporate Governance, 8-10 November 2005 at Dakar, Senegal.

¹⁶ Inam Wilson Op cit 2

¹⁷ CAP C20 LFN 2004

¹⁸ CAP B3 LFN 2004

¹⁹ Uche Aniemena Op cit 3

²⁰ George Etomi ‘The Financial Reporting Council of Nigeria- National Code of Corporate Governance’ available at www.mondaq.com/Nigeria/x/589962/Corporate+Governance/The+Financial+Reporting+Council+of+Corporate+Nigeria accessed on 27 November 2018.

²¹ Uche Aniemena Op cit

²² Enron’s Legislative aftermaths ‘Some Reflections on the deterrence aspects of the Sarbanes-Oxley of 2002’ available at <https://www.law.columbia.edu/Law-economicstudies> accessed on the 27 November 2018.

²³ The Wall Street Journal, Thursday 24th June 2010 available at <https://www.online.wsj.com/article/SB10001424HTML> accessed on 27 November 2018.

²⁴ Ukpabi, S.C *Mercantile Soldiers in Nigerian History (History of the Royal Niger Company Army 1886-1900) (1987)* Gaskiya Corp. Zaria. See also Orojo, J.O *Company Law and Practice in Nigeria (1992)* Mbeyi and Associate, Lagos.

²⁵ Boniface Ahunwan ‘Corporate Governance in Nigeria’ (2002) 37 *Journal of Business Ethics* at 270.

owners.²⁶ History reveals that there was a nexus between abuse of shareholders right and corporate governance. While this problem was initially a principal-agent issue, it has also been suggested that such problem also existed between majority and minority owners where the interest of minorities are ignored by the majorities.²⁷ The principal-agent problem has been further worsened in Nigeria through all forms of political vices like corruption, ethnic rivalries and poor market structure. This has provided avenues for managers and directors to exploit corporate opportunities for their own personal benefits.²⁸ The applicable codes of corporate governance in Nigeria includes Code of Best Practices on Corporate Governance in Nigeria 2011, the Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006,²⁹ the Code of Corporate Governance for Insurance Industry in Nigeria 2009,³⁰ the Licensed Pension Operators 2008.³¹ The multiplicity of these codes have been queried, however, to reduce the load of work on federal high courts which has jurisdiction to entertain suits bordering on these codes, they are equally assisted by a special court³² established for the purpose, which is a novel idea.

These codes have become very noticeable as a self-regulatory mechanism by which companies are to carry out their responsibilities within the corporate environment. These codes which are company-specific and supplemented by soft law and hard law, defines conduct. They contain important rules, values, norms and practices that regulates the ways employees, managers and directors carry out their duties towards the corporate entities.³³ These salient documents which also depict the identity of the company is a requirement for the management of the institution, a legitimacy from the society and a social license to operate.³⁴ Self-regulation or self-enforcing mechanism introduced

²⁶ Yerokun, O. 'The Changing Investment Climate through Law and Policy in Nigeria' in C.O. Okonkwo (ed.) (1992) *Contemporary Issues in Nigerian Law* Taiwo Fakoyede, Lagos, at 219.

²⁷ Boniface Ahunwan Op cit at 274.

²⁸ Jensen, M and W. Meckling 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* at 305. This agency problem is reflected in the case of Lever Brothers Nigeria Plc (LBN). LBN was listed as a public company in Nigeria. The Unilever Group U.K had about 52% interest in the company. Between the periods of 1996 and 1998, there were allegations of abuses like insider dealings, shares racketeering by senior management. It was revealed that one of the senior officers of the company had about 18 official cars to himself and most of the company's contract were registered in the wife's name. Employment in the company was based largely on ethnic solidarity than efficiency. In 1998 the Nigerian Stock Exchange put on hold the activities of the company for the offense of submitting annual return with irregularities. See Ogbu, C. 'LBN's Account Set to Open a Can of Worms' *The Post Express (Nigeria)* February 11, 1998.

²⁹ Issued by the Central Bank of Nigeria. See Leonard C. Opara and Ayodele John Alade 'The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis' (2014) 26 *Journal of Law Policy and Globalization* at 40.

³⁰ Issued by the National Insurance Commission.

³¹ Issued by the Pension Commission.

³² Investment Security Tribunal (IST).

³³ Jan Eijssbouts., 'Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and their Enforcement' (2017) 24 *Indiana Journal of Global Legal Studies* 1 at 183. For a comprehensive overview of corporate codes, see KPMG, Business Codes of the Globe 200: Their Prevalence, Content and Embedding 2008 available at www.ethicsmanagement.info/content/Business%20codes%20Fortune%202000.pdf accessed on 23 April 2018. See also Corporate Responsibility: Private Initiative and Public Goals, available at www.oecd.org/corporate/mne/corporateresponsibilityprivateinitiativeandpublicgoals.htm accessed on 23 April 2018. In that study the OECD defines a Code of Conduct as "commitments voluntarily made by companies, associations or other entities, which put forward standard and principles for the conduct of business activities in the market place." This definition so drafted, which includes self-imposed obligations and negotiated instruments comparable with the OECD's definition of corporate governance, raises two observations. First, the voluntary aspects is emphasized just like the EU Commission's 2001 CSR definition, but this qualification meets the same criticism as the said EU CSR definition. Moreover it is only outward oriented by its focus on business activities in the market place, but does not refer to rules and principles covering the internal dimension of corporate governance and responsibility. See Anna Becker *Enforcing Corporate Social Responsibility Codes on Global Self-Regulation and National Private Law* (2015) Hart Publishing at 318.

³⁴ On the concept of the license to operate, consisting of a social and a legal license and their interaction, see Neil Gunningham, 'Corporate Environment Responsibility: Law and the Limits of Voluntarism in the New Corporate Accountability' in D McBarnet, A Voiculescu, and T Cambell (ed.) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, Cambridge, United Kingdom, 476-500

by Black and Kraakman³⁵ presupposes a non-adjudicatory mechanism where rules which regulate the activities of corporate entities must be obeyed. The rules are framed to accommodate and encourage compliance.³⁶ Legally they are non-binding standards bordering on the internal administration of the firm issued collectively by a body relating to the corporation³⁷ and reflects the corporate regime of comply or explain.³⁸ The emphasis here is a combination of cultural and market constraints where rules do not have overt state involvement and so not legally binding as these entities can chose not to be bound by these rules. It is suggested that this self regulatory approach which is a comply or explain mode of governance will not provide the required remedy for challenge in Nigeria’s corporate environment. This is in contradistinction with the mandatory system which emphasizes a rigid regulatory system with the state as the regulator.³⁹ Self-enforcing models are commonly used in developing economies with relatively weak legal market and cultural systems but there is always a voluntary compliance by managers, shareholders and major stakeholders to procedural requirements.⁴⁰

In Nigeria, for instance, cases of financial scandal in the banks and publicly quoted companies⁴¹ provoked the Nigerian Government at the Federal Level to develop an organizational structure to ensure investors interests are protected from fraudulent directors,⁴² hence in 2001 a Code of Best Practices for Public Companies in Nigeria which was introduced by the Securities and Exchange Commission became effective in 2003 and subsequently reviewed in 2011.⁴³ The apparent failure of banks to comply with these codes impacted negatively on the banking sector.⁴⁴ In a 2004 report on Observance of Standards and Codes produced by a World Bank Group, it was reported that in Nigeria, when it comes to auditing and accounting practices there are organizational gulfs particularly in the field of enforcement of rules and standards, regulation and compliance.⁴⁵ It is not surprising that the incidences of banking institutions becoming insolvent have been common place in Nigeria.⁴⁶ For instance, in 1998 about twenty-seven

³⁵ Black, Bernard S. & Kraakman, Reinier H., ‘A Self Enforcing Model of Corporate Law’ (1996) 109 *Harvard Law Review* pp. 1911-82

³⁶ Shanthi Rachagan ‘Controlling Shareholders and Corporate Governance in Malaysia: Would the Self-Enforcing Model Protect Minority Shareholders?’ (2007) 3 *Corporate Governance Law Review* 1 p. 3

³⁷ Weil, Gotshal and Manges LLP ‘International Comparison of Selected Corporate Governance Guidelines and Codes of Best Practices (New York, 2003) available at https://www.weil.com/media/files/pdfs/us_active_international_matrix_june_2014_44503343_pdf accessed on 7 July 2018

³⁸ This concept originated in the United Kingdom through the Report of the Committee on Financial Aspects of Corporate Governance (Cadbury Report) on 1 December 1992 under the chairmanship of Sir Adrian Cadbury.

See also D Seidl ‘Standard setting and following in corporate governance: an observation-theoretical study of the effectiveness of governance codes’ (2007) 14 *Organizational Study* 705 at 708. See also R Aguilera and A Cuervo-Cazurra ‘Codes of good governance’ (2009) 17 *Corporate Governance International Review* 376.

³⁹ David Kershaw ‘Corporate Law and Self-Regulation’ (2015) *Law, Society and Economy Working Papers*, London School of Economics and Political Science

⁴⁰ *Ibid* p.4

⁴¹ Like Cadbury Nigeria, Unilever Brothers, African petroleum and the Nigerian Stock Exchange. See Ogbechie & D Koufopoulos ‘Corporate Governance Practices in Nigeria in S O Idowu & R Schmidpeter (ed.) (2014) *Corporate Governance in Emerging Markets* Springer Berlin Heidelberg, 373-374.

⁴² O M Uadiale ‘Earning Management and Corporate Governance in Nigeria’ (2012) 3 *Research journal of Finance and Accounting* at 1

⁴³ Securities and Exchange Commission, *Code of Corporate Governance for Public Companies in Nigeria* 2011 available at sec.gov.ng/code-of-corporate-governance-for-public-companies_may-12-2014 accessed on 13 April 2018. See also Anthonia Omosefe Ugowe, ‘Monitoring Good Corporate Governance in Developing Countries: Evidence from Nigeria’ (2016) 7 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 125, at 3.

⁴⁴ Kunle Aina and Bolanle Adejugbe ‘A Review of Corporate Governance Codes and Best Practices in Nigeria’ (2015) 38 *Journal of Law, Policy and Globalization* 78, at 6.

⁴⁵ The World Bank Group reports on the Observance of Standards and Codes. ‘Report on the Observance of Standards and Codes (RosC) Nigeria’ (Accounting and Auditing, 17 June 2004) available at http://www.worldbank.org/ifa/rosc_aa_nga.pdf accessed on 13 April 2018.

⁴⁶ Okpanachi Joshua ‘Comparative analysis of the impact of mergers and acquisitions on financial efficiency of banks in Nigeria’ (2011) 3 *Journal of Accounting and Taxation* 1at.2.

banks⁴⁷ went into liquidation aside the five banks which had earlier been closed down in 1994.⁴⁸ Also in 2009, due to inadequate capital ratio, resulting from reckless lending, five Nigerian banks were declared illiquid. Due to these imbalances in the banking system, the then Governor of Central bank, Charles Soludo, introduced the consolidation and recapitalization policy⁴⁹ through mergers and acquisitions. Out of the 89 banks in existence as at 31st December 2005, only 25 banks met the consolidation requirements.⁵⁰ Furthermore, in 2009, from a report, the Nigerian Capital Market was ranked the worst in 2008 due to poor corporate governance⁵¹ From this liquidity problem, in Africa, while a country like Egypt lost about 56.43%, Nigeria was ranked below South Africa which lost 25.72%.⁵² In the same vein, many companies have a culture of polishing and window dressing their financial reports to please shareholders and other stakeholders. It is these reports that are often submitted to regulators who due to laxity do not often detect these fraudulent reports. This culture of fraudulently manipulating reports caused many world corporate organizations like Enron in the United States, Intercontinental Bank of Nigeria, Alpha Bank and Cape Investment Bank of South Africa to collapse.⁵³

In Nigeria, aside the fact that there is multiplicity of codes, corporate governance codes makes provision for independent director. This provision raises doubt as to the extent of understanding of the drafters of the codes on directors because there is no uniform definition of who an independent director should be.⁵⁴ Some codes left out the angle of the definition of independent directors but only stipulated that organizations are to appoint independent directors within the purview of the code.⁵⁵ For the banking sector,⁵⁶ pension operators⁵⁷ and insurance companies,⁵⁸ there are about three applicable corporate governance codes. These codes contain different and inconsistent provisions on issues relating to corporate governance thereby subjecting companies to grave hardship in the area of compliance.⁵⁹ As regard the mode of enforcement, the 2011 code is quite ambiguous, providing no exact method of compliance.⁶⁰ The enforcement mechanism is unascertainable for while on the one hand it prescribes a voluntary compliant approach which is self-regulatory and situated in the “comply or explain” option, on the other hand, it provides the obligatory approach which is a “rule based” approach traceable to the Sarbanes Public Company Accounting Reform and Investment Protection Act 2002.⁶¹

⁴⁷ Abacus Merchant Bank Ltd; ABC Merchant Bank Ltd; Allied Bank of Nig. Plc; Allstates Trust Bank Plc; Amicable Bank of Nig. Plc; Century Merchant Bank Plc; Commerce Bank Plc; Commercial Trust Bank Plc; Continental Merchant Bank Plc; Coop. & Commercial Bank Plc; Credite Bank Nig. Ltd; Crown Merchant Bank Ltd; Great Merchant Bank Ltd; Group Merchant Bank Ltd; Highland Bank of Nig. Plc; ICON Ltd (Merchant Bankers); Lobi Bank of Nig; Mercantile Bank of Nig. Plc; Merchant Bank of Africa Ltd; Nigeria Merchant Bank Ltd; North-South Bank Nig. Plc; Pan African Bank Ltd; Pinnacle Commercial Bank Ltd; Prime Merchant Bank Ltd; Progress Bank Ltd; Royal Merchant Bank Ltd; Victory Merchant Bank Ltd. Available at ndic.gov.ng/closed-financial-institutions/ accessed on 31 March 2018.

⁴⁸ Alpha Merchant Bank Plc; Financial Merchant Bank Plc; Kapital Merchant Bank Ltd; United Commercial Bank Ltd. Available at ndic.gov.ng/closed-financial-institutions/ accessed on 31 March 2018.

⁴⁹ C. Soludo, ‘Consolidating the Banking Industry to Meet Development Challenges’ Discussion Paper, available at <http://www.thisdayonline.com/business> accessed on 31 March 2018.

⁵⁰ P. N. Umoh, ‘Capital Restructuring of Banks: Conceptual Framework’ Conference Proceedings on Consolidation of Nigeria’s Banking Industry, Central Bank of Nigeria, Abuja.

⁵¹ Nigerian Capital Market Report 2009 available at <http://www.proshareng.com> accessed on 31 March 2018.

⁵² Aina & Adejugbe Op cit at 82.

⁵³ Ibid. at 83.

⁵⁴ Section 5.5 (a) and (b) and Section 4.3 and 34.4(a).

⁵⁵ Ibid. at 83.

⁵⁶ Code of Corporate Governance of Banks in Nigeria Post-Consolidation 2006 (Bank Code).

⁵⁷ Code of Corporate Governance for Licensed Pension Operators 2008 (Pension Code).

⁵⁸ Code of Corporate Governance for Insurance Industry in Nigeria 2009 (Insurance Code).

⁵⁹ Nat Ofo ‘Securities and Exchange Commission of Nigeria’s Draft Revised Code of Corporate Governance: An Appraisal’ (2011) 55 *Journal of African La*, 2 at 290.

⁶⁰ E Wymeersch ‘Enforcement of Corporate Governance Codes’ (2005) 46/2005 ECGI Working Paper Series in Law 1 at 4.

⁶¹ Section 404. See also Nat Ofo Op cit at 284. See Sections 1.3(a) and (b) of the Nigerian Code of Corporate Governance. Section 1.3 (b) provides that shareholders should “encourage” compliance with the Code by their companies. See also Section 34.7 and 34.14.

5. Challenges of Compliance with Corporate Governance Codes in Nigeria

It has been observed that the abuse of corporate powers cannot be adequately constrained by leaving it to the company's members to ensure compliance. Agencies like SEC, CAC and CBN though exercise supervisory role, they also have the power to suspend and revoke licenses. However, the penalties often meted out to listed companies who are liable can best be described as a tap on the wrist, and as a result companies can afford to risk non-compliance with relevant laws. This is unlike developed institutions like the SEC in the US which has a high profile enforcement action and zero-tolerance policy in the punishment of unethical behaviours. The UK also has agencies empowered to launch inquisitorial raids on corporate bodies.⁶² Some of the challenges in enforcing these codes include:

- 1 **Institutional challenges:** These challenges include corruption, poverty, unemployment and weak regulatory framework. In Nigeria there is an interwoven relationship between public and private regulators, this gives public office holders the opportunities of to use private companies as a cover up for money stolen from public sector, thus influencing their independence in the enforcement of a strong regulatory framework.⁶³
- 2 **Weak Regulatory system:** The practice of window dressing reports, showing a company is making profit and concealing outrageous malpractices is very common among companies. Financial accounts are polished to deceive investors and shareholders. There is also laxity on the part of regulators to detect these vices
- 3 **The role of Cronies:** Officers of these regulatory agencies sometimes encourage the vices among corporate entities. Auditors sometimes collude to conceal facts and details which could have exposed these companies
- 4 **Conflict in the Nigerian Codes:** The inability to harmonize the various codes of corporate governance has brought about lots of conflicts in the area of enforcement and compliance. While the SEC code seeks to provide a guide the CBN code is mandatory in disposition. With the proliferation of several codes, there are lots of conflicting provisions and sections which needs to be harmonized if truly enforcement is to be achieved.⁶⁴
- 5 **Protecting Whistle Blowers:** The failure to provide adequate protect to whistle blowers may affect the will by members of the society to expose corrupt and fraudulent corporate practices. Irrespective of the fact that the law may provide for this protection, enforcement of the provision is lacking and this may amount to victimization of potential whistle blowers.

6. Conclusion And Recommendations

This work has examined the need for the enforcement of corporate governance codes and in Nigeria drawing lessons from other jurisdictions. The various challenges have also been highlighted. It advocates for a mandatory code system as against the voluntary system is. It observed that the failure of many Public Companies in operating the core principles of corporate governance is tied to the failure of regulatory agencies to insist on the strict observance of the codes which underlies the basic attributes of corporate governance. It is recommended that this mandatory code be enforced by various regulatory bodies in Nigeria rather than a self-regulatory and non-binding mechanism.

⁶² Gower and Davies' *Principles of Modern Company Law*, 7th Ed. Sweet and Maxwell 2003, 467.

⁶³ Kunle Aina and Bolanle Adejugbe Op cit 83

⁶⁴ Ibid 83 see also Demak G.O 2011. Proliferation of codes of corporate governance in Nigeria and Economic Development *Business and Management Review* available at <http://www.businessjournalz.org/bmr1.6:1-7>