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The Search for an Effective Corporate Governance Model and Management Principles in Nigeria: A Merry-Go-Round or an Economic Imperative

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Abstract

Colossal loss of jobs and revenues in Nigeria as a result of failures of hitherto productive companies including banks showed that Nigeria as an economy was not immune or isolated from the global financial meltdown that sent even some European countries on the path of economic recovery. Thus events worldwide concerning high profile corporate failures necessitated the need to search for efficient corporate governance and management oversight devices. Using both primary and secondary source materials, the paper critically analyses and evaluates the conceptual foundation of corporate governance and management in Nigeria as well as the global trend on the development of modern corporate government and management principles. The paper finds that corporate bureaucrats charged with the onerous task of effective governance and management of companies in Nigeria as well as the various inbuilt monitoring devices have failed to perform their assigned roles thus raising a critical question of the necessity for reforms and a concomitant change of attitude amongst stakeholders. The paper recommends among other things that the legal regime regulating directorial conducts needs to be revisited in the form of amendments to make the obligations more defined, focused and deterrent and a uniform corporate governance code for Nigerian companies enacted.

Keywords: Corporate Governance, Management Principle, Nigeria, Convergence

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1. Introduction

Corporate governance refers to the processes and structures by which the business and affairs of an institution are directed and managed in order to improve long-term shareholder value by enhancing corporate performance and accountability, while taking into account the interest of other stakeholders. Corporate governance is about building credibility, ensuring transparency and accountability as well as maintaining an effective channel of information disclosure that would foster good corporate performance. Corporate Governance therefore is the processes and systems by which a company is governed which ensure appropriate checks and balances as well as the manner companies and enterprises are managed efficiently.

For example, following the dawn of privatisation in Nigeria there was an upsurge in the number of shareholders and a change in the nature of shareholding from concentrated to dispersed ownership. The implication of this is that shareholders of the privatised companies are not only scattered all over Nigeria but held insignificant shares each to be able to monitor the performance of their directors. Consequently, the gap between ownership and control is widened beyond expectation. Corporate law is therefore not adequate to meet the challenges by dispersed ownership leading to renewed interest of stakeholders, investors, creditors and governments all over the world to search for effective corporate governance and management. Share ownership is now dispersed in Nigeria and the gap between shareholders and directors is getting wider. Shareholders are passive and have been reduced to mere supplier of capital.

Thus, the governance of corporation is now as important in the world economy as the governance of countries.[2] Developments at the global level have necessitated the need for corporations and their stakeholders to imbibe the full complements of corporate accountability and efficiency. Similarly, globalisation of economics on the world scale has brought with it the need to develop international standards of best practices for the benefit of investors, and all the stakeholders, a development necessitated by corporate failures which affected America, Asia, Europe and Africa and creating in the process economic instability. In the case of Nigeria, the commercial and banking terrain has been groping and grasping for breath and survival since the 80s and 90s.

[2] See James Wolfesohn, 'The World Bank', available at <http://www.worldbank.org/html/fpd/private/sector/eg/aboutus.htm.> accessed 20 February 2014.

Even in this millennium, the ghost of financial distress is still seen haunting the financial service sector leading to the great Soludo[3] and Sanusi[4] era of banking reforms.[5]

There is an inseparable link between corporate governance and management and investor confidence. No investor will consider investing in an enterprise devoid of transparency and accountability. While it is true that in the past few years, the Nigerian commercial terrain has witnessed vigorous legislative activities, particularly in the area of Company Law to facilitate business activities in the country and ensure that the tripartite interests of the investing public, the general public itself as well as that of the nation were protected, recent experiences have shown that deep rooted lack of corporate governance and management efficiency have continue to bug down the growth of corporations in Nigeria[6]

In Part 2, the paper examines the meaning and the distinction between corporate governance and management. It also considers the need for effective corporate governance and management of corporations by stakeholders charged with such responsibility especially as it relates to taking the overriding interest of all stakeholders and their corporations. Part 3 of the paper examines Corporate Governance in Nigeria on a comparative perspective in the face of current global initiatives and developments in the area of corporate governance and management.

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[3] Anthony O. Egbase & Associates, 'Corporate Lawyer's Solution amidst Soludo Solution (ss): The Solution as Part of the Corporate Lawyer's Job'. http://www.nigerianlawguru.com/articles/company%20law/MERGERS%20&%20ACQUISITIONS.htm accessed 30 January 2014.

[4] D. Alford, 'Nigerian Banking Reform: Recent Actions and Future Prospects', 25 *Journal of Int. Banking & L. Reg*. 337 (2010). L. Sanusi, 'Growth Prospects for the Nigerian Economy', 13, November 26, 2010. Available at http://www.cbn.gov.ng/out/speeches/2010/gov_convocation_lectureigbinedionuniverity- accessed 03 March 2014.

[5] *Ibid* at n 3. See also Mamman H., 'Banks Management Issue and Restoring the Health of Nigerian Banks through Improving the Quality of Management/Employees', *N.D.I.C. Quarterly Vol.* 4 No. 4 at p. 57. 3 Nigerian Deposit Insurance Corporation *(N.D.I.C.) Yearly Report* 1999; Chigbo, Ejiofor, 'Liquidation Banks in Nigeria', in *Body and Soul Weekend Paper* Vol. 1 No. 9 dated 31st October 1999 at p. 12 and 13. 4 Nigerian Deposit Insurance Corporation *(N.D.I.C) Yearly Reports* 1998, at p. 3. 3.

[6] J. Ekeng, 'The Paradox of Bank Ratings'. Available at www.m2weekly.com/feature/the-paradoxof-bankratings/> accessed 30 March 2014. Shortly after the 2004 consolidation exercise, there was an unusual rush by Nigerian banks for awards and other forms of international recognition. No bank wanted to be outdone in the mad rush. Then the rating agencies got involved. Every bank was adjudged to be in great condition. But the ongoing shake-up in the industry has proved that the whole exercise was not a true reflection of reality. Even with recent developments in the banking industry, the rating agencies are busy turning out what appear to be curious reports**.** See also Financial Nigeria.com 'Oceanic Wins 2007 Bank of The Year Award, Daily Independence (November 30, 2007). The banks rescued in the fall of 2009 are Afribank, Bank PHB, Oceanic Bank, Union Bank, Intercontinental Bank, Finbank, Equatorial Trust Bank and Spring Bank.

In doing this, the paper did a synthesis of the some corporate governance codes of best practices applicable to various jurisdictions including Nigeria. The paper explored the corporate governance models in the USA, British, Japanese, German etc, with a view to finding the ideal corporate governance model for dispersed ownership that is able to make the management of public companies more efficient and also attract investors for the economic development of Nigeria.

The academic debate surrounding the convergence of the various corporate governance regimes is also replayed in this part of the paper. In Part 4, the paper is concluded by considering whether actual convergence is realistic for now or futuristic, considering the social, political, cultural and legal differences in every jurisdiction. Measures to make shareholders more active in corporate governance are recommended. These measures include the re-enforcement of unitary boards system through independent directors, the development of institutional investors, proxy reform, informal measures by shareholders to increase their voice in corporate governance, reinventing the Securities and Exchange Commission and expanding its mandate on investors' enlightenment, a more effective machinery for the enforcement of contractual obligations in Nigeria, the appropriate use of leverage buy out and the Nigerian Bar Association getting more involved in corporate governance.

2. Corporate Governance as Distinct from Management: The Necessary Connect and Historical Foundation

The term 'Corporate Governance' is a uniquely complex and multi-faceted subject. Devoid of a unified or systematic theory, its paradigm, diagnosis and solutions lie in multidisciplinary fields i.e. law, economics, accountancy, finance among others.[7] As such it is essential that a comprehensive framework be codified in the accounting and legal framework of any organization. In any organization, corporate governance is one of the key factors that determine the health of the system and its ability to survive economic shocks. The health of the organization depends on the underlying soundness of its individual components and the connections between them.

According to Morck, etcetera,[8] among the main factors that support the stability of any country's financial system are good corporate governance, effective marketing discipline, strong prudential regulation and supervision, accurate and reliable accounting financial reporting systems, a sound disclosure regimes and an appropriate savings deposit protection system.

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[7] Cadbury A., 'Overview of Corporate Governance: A Framework for Implementation', (2002) *The World Bank Group; Washington. D.C: V-VI.*

[8] Morck R.; Shleifer A. and Vishny R., 'Alternative Mechanism for Corporate Control'. *American Economic Review.* (1989) Vol. 79, pp.41- 56.

Corporate Governance as a subject matter has attracted a lot of attention of recent because of its undeniable importance to the economic well being of corporations and the society in general. It is a subject matter that has no generally accepted definition, as most scholars and stakeholders in the field tends to examine the concept from their own perspectives.

Coleman and Nicholas-Biekpe[9] defined corporate governance as the relationship of the enterprise to shareholders or in the wider sense as the relationship of the enterprise to society as a whole.

However, Mayer[10] offers a definition with a wider outlook and contends that it means the sum of the processes, structures and information used for directing and overseeing the management of an organization. The Organization for Economic Corporation and Development[11] has also defined corporate governance as a system on the basis of which companies are directed and managed. It is upon this system that specifications are given for the division of competencies and responsibilities between the parties included (board of directors, the supervisory board, the management and shareholders) and formulate rules and procedures for adopting decisions on corporate matters.

In another perspective, Arun and Turner[12] contend that there exists a narrow approach to corporate governance, which views the subject as the mechanism through which shareholders are assured that managers will act in their interests.

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[9] Coleman A. and Nicholas- Biekpe N., 'Does Board and CEO Matter for Bank Performance? A Comparative Analysis of Banks in Ghana', *Journal of Business Management, University of Stellenbosch Business School (USB), Cape Town, South Africa* (2006) Vol.13, Pp.46- 59.

[10] Mayer C., 'Corporate Governance in the UK', A Paper Presented at The Conference on Corporate Governance: A Comparative Perspective, held in University of Oxford on 16 October 1999.

[11] OECD Principles of Corporate Governance, Ad-Hoc Task Force on Corporate Governance, (91999) OECD, Paris.

[12] Arun T.G., and Turner J. D., 'Corporate Governance of Banking Institutions in Developing Economies: The Indian Experience', *Paper presented in the conference on 'Finance and Development' organized by IDPM, The University of Manchester, 23 July 2002.*

Shleifer and Vishny,[13] Vives[14] and Oman[15] observed that there is a broader approach which views the subject as the methods by which suppliers of finance control managers in order to ensure that their capital cannot be expropriated and that they can earn a return on their investment. According to Wolfensohn, 'Corporate Governance is about promoting corporate fairness, transparency and accountability.'[16] The Organization for Economic Cooperation and Development (OECD) sees it as the system by which business corporations are directed and controlled.

The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the Board members, shareholders and other stakeholders and spells out the rules and procedures for making decisions on corporate affairs. By this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.[17] At the Nigerian scene, Sanusi views corporate governance from the perspective of building credibility, ensuring transparency and accountability as well as maintaining an effective channel of information disclosure that would foster good corporate governance performance, trust as well as sustaining confidence among the various interest groups that make up an organization.[18]

The definitions offered so far explain the concept of corporate governance, which is quite different from corporate management. The term 'management' is a concept that has many facets.[19] Just as governance is a process, management is also a process.

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13 Shleifer A. and R. Vishny, 'A Survey of Corporate Governance', *Journal of Finance,* (1997) Vol. 52, pp 246- 253.

14 Vives X., *Corporate Governance: Does it Matter,* in Xavier Vives (ed.) *Corporate Governance: Theoretical and Empirical Perspectives*, Cambridge: Cambridge University Press (2000).

15 Oman C. P., 'Corporate Governance and National Development', (2001) *OECD Development Centre Technical Papers, Number 180 pp. 362-388.*

16 Wolfensohn, *ibid* at n 1.

17 See the OECD (Organization for Economic Co-operation and Development), Principles of Corporate Governance 1999. Available at http://www.oecd.org/ab.utgeneralindex.html accessed 01 March 2014. The principles are presently undergoing review. The OECD is multilateral institution established in 1961 with a Secretariat in Paris, France.

18 Sanusi S.O., 'Enhancing Good Corporate Governance: A Strategy for Financial Sector Soundness', A Keynote Address Presented at the Dinner Nite of the Chattered Institute of Bankers Nigeria, November 8, 2002. Available at http://www.expisc.com/governance.htm accessed 12 March 2014.

19 Other facets concerns management as a discipline, as a people and as a carrier.

In defining the word management, it has been said that it is the process undertaken by one or more persons to co-ordinate the work activities of other persons, capital, materials, and technologies to achieve high quality results not attainable by anyone person alone.[20] Co-ordination is thus an essential feature of the work schedule of those occupying management position and whose umbrella the various departmental heads and other employees operate. At the local scene, management is also defined elaborately as the process of 'getting things done' or co-ordinating all resources of an organization through the process of planning, organizing, directing and controlling in other to attain organizational objectives, the guidance or direction of people towards organizational goals or objectives, the supervision, controlling and co-ordinating of activity to attain optimum results with organizational resources.[21]

The essential characteristic features that can be gleaned from these definitions are that those involved in the process of management as opposed to governance focus on corporate objectives, plan and set policies, organize staff, communicate with subordinates, colleagues, direct and supervise by securing actual performance from subordinates and control organizational activities corporate management may be defined as the corporate management process involving certain responsibilities that those in executive positions such as directors and managers must carry out in the interest of the company to attain the set goals of a corporate entity. It would seem however, that the definition of corporate governance viewed from those provided above encompasses the essential features of corporate management as the tendency and approach of most scholars is to blur any distinction between governance and management. This approach understandably is informed by the fact that some of the features of management as a process are imbedded in the definition of governance. Thus, the concept of governance according to latter day scholars is all encompassing. This approach, it is submitted, is unrealistic.

Despite the affinity between the two interrelated concepts, it is obvious that a dividing line separates them. There is a consensus, however that the broader view of corporate governance should be adopted in the case of banking institutions because of the peculiar contractual form of banking which demands that corporate governance mechanisms for banks should encapsulate depositors as well as shareholders.[22]

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[20] See Ivancevich J.M., Corenzi, P; Skinner, S.J; Crosby, P.B., *Management: Quality and Competitiveness*, 2nd ed. (USA: Irwin McGraw-Hill, 1997).
[21] See Nwachukwu C.C., *Management Theory and Practice* (Onitsa: Africana First Publishers Ltd., 1992). 189.
[22] Macey J. R., and O'Hara M., 'The Corporate Governance of Banks', *Economic Policy Review,* (2001) Vol. 16 No.2 pp 89- 102.

Arun and Turner[23] supported the consensus by arguing that the special nature of banking requires not only a broader view of corporate governance, but also government intervention in order to restrain the behaviour of bank management. They further argued that, the unique nature of the banking firm, whether in the developed or developing world, requires that a broad view of corporate governance, which encapsulates both shareholders and depositors, be adopted for banks. They posit that, in particular, the nature of the banking firm is such that regulation is necessary to protect depositors as well as the overall financial system.

This paper therefore adopts the broader view and defines corporate governance in the context of banking as the manner in which systems, procedures, processes and practices of a bank are managed so as to allow positive relationships and the exercise of power in the management of assets and resources with the aim of advancing shareholders' value and shareholders' satisfaction together with improved accountability, resource use and transparent administration.

In summary, while corporate governance has an external focus, corporate management has an internal focus. Corporate governance is strategy-oriented while corporate management is task-oriented. Again, corporate governance is the responsibility of directors, while corporate management is the duty of the company executives.[24] Trickler puts the definition in its real perspective when he said that Corporate Governance also entails giving overall direction to the enterprise, while overseeing and controlling the executive actions of management and with satisfying legitimate expectations for accountability and regulation of interest beyond the corporate boundaries. He concluded that if management is about running business, governance is about seeing that it is run properly.[25] Evidently, governance revolves around the intrinsic nature, purpose, integrity and identity of the institution; monitoring and overseeing strategic direction of an institution within a particular socio-economic context. It deals with the institution externalities. Management on the other hand is built around focusing on specific aims and objectives over a certain time frame by the judicious use of means directed towards their actualisation.

Two theories regulate the concept of corporate governance, namely, the stewardship theory and the agency theory.

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[23]Arun T.G., and Turner J.D., *supra* n 11.

[24]See Ohuabunwa S. M., 'Corporate Governance in Nigeria'. Being text of a paper delivered by the Chairman/Chief Executive Nermeth International Pharmaceutical Plc. at the Annual Dinner/Merit Award Night of the Government Secondary School, Owerri, Imo State, 1999.

[25]See Tricker R. I. Corporate Governance (Gower Publishing Company, Hart, 1994) at p.6 11.

The former hinges the philosophy on the premise that a man, as a creature, is trustworthy, honest, and capable of acting bona fide (i.e. in good faith) in other peoples' interest; while the latter premises its philosophy on the platform that human beings cannot really be trusted to act in good faith.[26] A necessary consequence of the distinction between Corporate Governance and corporate management is that hierarchically, power resides at the top of the structural pyramid of the organization called the Board of Directors while at the base, the shareholders and employees have some modicum of relative powers of importance, one acting as pressure groups and a monitoring devise to management, the other acting as the transformers of corporate objectives into corporate realities. The management on the other hand, is the recipient of the decision-making apparatus of the company within the centralised structure. Sometimes, however, the distinction between Corporate Governance and Corporate Management may overlap and intertwine where Board of Directors contain executive directors who are both managers and directors.[27] This apart, the ownership structure of a company may blur the distinction between Corporate Governance and Management.

In private companies, ownership resides in few persons who are in most cases involved in the day to day running of the company affairs. The highest shareholder would usually perform the dual role of Company Chairman and Chief Executive. Thus, the same person ends up owing, governing and managing the company.

The various roles assigned to the Board of Directors and Management by law is a reflection of the distinction between Governance and Management. It is in this light that the Board of Directors, as of necessity, acts as arbitrator between competing interests; acts as crises manager; establish and define corporate policies and objectives; perform legal duties; promote the company; lend credibility to the organization; select chief executives; assist management to reach appropriate decisions through advice; protect and report to shareholders, etc;[28] while management vested with formal authority over the organization, perform duties of a ceremonial nature,[29] leadership roles,[30] liaison roles,[31] the monitor role,[32] the disseminator and entrepreneurial role,[33] disturbance-handling role,[34] resource allocator and negotiation roles, etc.[35]

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[26]See Kolade C., 'Board Performance Analysis', Distinguished Management Lectures 1997, Nigerian Institute of Management, Lagos, *Weekend Concord Newspaper*, Saturday, Nov. 1998, p.18.

[27]See Verr B.B., 'Distinction between Direction and Management', Being a paper presented at the National Workshop on Corporate Governance and the Rights and Responsibilities of Shareholders in Nigeria, 28-29, November, 1994, p.1.

[28]For details of the functions of the Board of Directors, see *infra.*

[29]The Managing Director has the responsibility to great touring dignitaries.

[30]The Managing Director is in charge of an organization, he has the right of hire and fire and that of training of his or her staff. Formal authority is vested in him. Effective leadership will however depend on the judicious use of such authority.

2.01 Historical Overview of Corporate Governance

The foundational argument of corporate governance, as seen by both academics as well as other independent researchers, can be traced back to the pioneering work of Berle and Means.[36] They observed that the modern corporations having acquired a very large size could create the possibility of separation of control over a firm from its direct ownership. Berle and Means' observation of the departure of the owners from the actual control of the corporations led to a renewed emphasis on the behavioral dimension of the theory of the firm.

Governance is a word with a pedigree that dates back to Chaucer. In his days, it carries with it the connotation of 'wise and responsible', which is appropriate.

It means either the action or the method of governing and it is in the latter sense that it is used with reference to companies. Its Latin root, '*gubernare'* means to steer and a quotation which is worth keeping in mind in this context is: 'He that governs sits quietly at the stern and scarce is seen to stir'.[37] Though corporate governance is viewed as a recent issue but nothing is new about the concept because, it has been in existence as long as the corporation itself.[38]

Over centuries, corporate governance systems have evolved, often in response to corporate failures or systemic crises. The first well-documented failure of governance was the South Sea Bubble in the 1700s, which revolutionized business laws and practices in England. Similarly, much of the security laws in the United States were put in place following the stock market crash of 1929. There has been no shortage of other crises, such as the secondary banking crisis of the 1970s in the United Kingdom, the U.S. savings and loan debacle of the 1980s, East- Asian economic and financial crisis in the second half of 1990s.[39]

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31 It is the responsibility of the Managing Director to make contact outside his organization to find relevant information that will benefit his organisation.

32 A director can scan his environment for relevant for relevant information, sometimes through other subordinate managers. Some of this information arrives by way of gossips, hearsay and speculation.

33 A managing director must be on the lookout for good ideas and the development of relevant projects.

34 This role is evident during strike periods. The manner of reaction will depend on how effective the Managing Director is to the organization.

35 See Generally Verr B. B., op. cit. at pp.7-11 193.

36 Berle S.S & Means G.C., *The Modern Corporation and Private Property,* (1932) New York, Macmillan.

37 Cadbury A., 'Report of the Committee on the Financial Aspects of Corporate Governance', Gee Publishing, (1992) London.

38 Imam, Mahmood Osman, 'Firm Performance and Corporate Governance through Ownership Structure: Evidence from Bangladesh Stock Market', Paper presented in 2006 ICMAB Conference.

39 Flannery M. J., 'Financial Crisis, Payment Systems Problems, and Discount Window Lending, *Journal of Money Credit and Banking,* (1996) Vol. 28. No. 4 Pp. 58-65.

In addition to these crises, the history of corporate governance has also been punctuated by a series of well-known company failures: the Maxwell Group raid on the pension fund of the Mirror Group of newspapers, the collapse of the Bank of Credit and Commerce International, Baring Bank and in recent times global corporations like Enron, WorldCom, Parmalat, Global Crossing and the international accountants, Andersen. These were blamed on a lack of business ethics, shady accountancy practices and weak regulations.

They were a wake-up call for developing countries on corporate governance. Most of these crisis or major corporate failure, which was a result of incompetence, fraud, and abuse, was met by new elements of an improved system of corporate governance.[40]

2.02 Needs for Effective Corporate Governance and Management

Good corporate governance and management ensures that the Board of Directors and the Executive Directors of corporations act in the best interest of shareholders and the corporations which they direct. There is no doubt that globalization has greatly influenced many areas of human endeavour, especially the political, cultural and social aspects. More importantly, it has impacted on the governance of corporations leading to a more challenging demand on the Board and Directors.

Globalization of corporate entities entails that companies wherever they exist, must act solely for the benefit of the people. There is no single model of effective corporate governance and management.[41] Irrespective of the model; it is based on the attitudes, practices and values of the changing society. Essentially however, the need for effective corporate governance and management revolve round the belief in accountability of power and the exercise of it to promote human well being; the promotion and sustenance of democratic values in the sharing of corporate power, representation and participation. The need also hinges on the efficient and effective utilization of corporate resources for the provision of good services; performance of corporate social responsibility; promotion of human rights and freedom and maintenance of essential order and security for the person and his/her property. The essence of good corporate governance is that it paves the way for both local and foreign investment and the increase in profit.

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[40] Iskander, Magdi R., and Chamlou, Nadereh, 'Corporate Governance: A Framework for Implementation', (2000) Washington. D.C, The World Bank Group.

[41] See Kwakwa V., and Nzekwu G., 'International Best Practices on Corporate Governance' in Oladimesi Alo (ed) *Issues in Corporate Governance* (Lagos, Financial Institution, Trading Centre (TITC) 2003, p.18 194.

It is undeniable that capital is limited in supply and any nation or corporate entity that seeks to attract and retain capital must strive to create a favourable atmosphere for it. Investors also invest their capital on enterprises that are effectively managed and governed.

The results of ineffective corporate governance and management can be quite disastrous and enormous. It leads to company failure with the consequential loss of money, investments, life savings, and sources of livelihood, jobs and lives.

In the international arena, the case of Enron[42] provides a vivid example. Though not a financial institution, Enron, at the time of its collapse, was a gas pipeline energy company that was rated as the world's largest. The problem with Enron was that of bad management, misleading accounts, shoddy auditing and fraud on a high scale. Enron's problem started when Dyney, a rival company, refused to continue with the merger arrangement with Enron after discovering that Enron's debt was downgraded to junk status. The case reveals the ineffectiveness of the company's external auditor as an external backup corporate governance monitoring device. World Com is another sad example. The company fraudulently treated revenue expenditure of about $3.85 billion as capital investments, an amount that could have been treated as deductible expenditure at the time it was incurred.

When eventually the expenditure was reclassified, the company sustained terrible losses that affected the stock price of the company, resulting in the company's bankruptcy. It is reported that ten thousand people in sixty-four countries lost their jobs as a result of this tragedy.[43]

Nigeria has a fair share of corporate failure, which cuts across both public and private corporations. In fact, it has been listed as the major reason for privatisation in Nigeria. Companies, both public and private, in Nigeria are beset with corruption and mismanagement. A review of the performance chart of most companies in Nigeria would show that in 1998 alone, about N265 billion was granted to public enterprises in the form of transfers, subsidies, tax exemption and waivers, without a corresponding efficient management of the resources.[44]

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[42]For an exhaustive analysis of the Enron's case see Redolfo Apreda, 'How Corporate Governance and Globalization can Run Afoul of the Law and Global Practices in Business: The Enron's Disgraceful Affair'. Universal Del Cema 2003, working paper series, No.225, p.2.

[43]Adeola 'Transparent and Accountable Corporate Governance in the Capital Market: Challenges for Market Operators and Shareholders' in Ndanusa S. and Ezenwa V. (ed) *Nigerian Capital Market and the Globalization Challenge* (Lagos, Macmillan Nigerian Publishers Ltd. 2003), p.2 195.

[44]See El-Rufai N. 'Importance of Corporate Governance', *This Day Newspaper*, vol. 9, No.3012, July 22 2003 at p.24.

Experience has also shown that corporate failures were, in most cases, caused by specific incidents of huge off-book liabilities, procurement and award of contract without due process, conflict of interest of directors and managers, inflation of contracts and so on.

A few examples that have been reported[45] are the African Petroleum Plc scandal. It represents one of the most scandalous cases of corporate abuses in Nigeria, as it attracted even the attention of the National Assembly. Some of their abuses are as follow: a. The former Managing Director, a government appointee, in conjunction with the Company Secretary, drafted and signed Board Resolutions authorizing borrowing by the Board without authority.

The company received a total short-term loan consisting of Commercial Papers (cp) and Bankers Acceptances (Bas) to the tune of N39,060,098,000,= (Thirty-nine billion, sixty-six million and nine-eight thousand Naira). This was received within a period of four years. Information for part of the amount (N17, 535,242,000) was not disclosed to Auditors. Again, the loans were never tied to specific project expenditures neither were vouchers made available to determine their nature or utilization of some of the funds. Nearly all the deals and other letters were negotiated and signed by the Finance Accounts Manager and not sanctioned by the Board. c. After a detailed review of all available information from the company and from the Nigerian national Petroleum Corporation (NNPC), AP's indebtedness to NNPC was initially put at N8, 258,279,951.00. Investigation also revealed an upfront payment of N70 million made to a company being 70% of a N100 million commission charged on a proposed sale of AP plaza for N1 billion, which was not consummated. The company failed to account for N4.8 billion being payment due from the lifting of petroleum products.

The Nigerian Telecommunication Company, NITEL was another public enterprise that was neck deep in the procurement and award of contracts without due process that also became grounded. Apart from this, there were conflicts of interest of Directors and Managers and other financial improprieties amounting to loss of billions of naira. For instance, the tender rules for NITEL made provision for the tender Secretariat to handover the opened tenders to the originating unit for evaluation. The government set up a commission of enquiry to investigate the affairs of NITEL. It was discovered by the commission that the responsibility for evaluating the project was that of the unit. The findings of the commission however revealed that this was far from being the practice, as the Managing Director and the Chairman single-handedly picked an evaluation team to evaluate big contracts without passing through the Tenders Board.

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[45] *Ibid* at p. 26.

Amongst others, it was also discovered that NITEL management gave inconsistent and contradictory reasons for rejecting some contracts. There also existed substantial difference between job specification in the contracts signed after evaluation and job specification eventually adopted after the final work or design. Laziness and incompetence was also found to be the hallmark of the leadership of the planning and operations department of the organization which consequently grounded it leading to its eventual acquisition by Transnational Corporation PLC (Transcorp), a company reportedly owned and managed entirely by Nigerians.[46]

Mention is also made of Cadbury Nigeria PLC. It came to public glare that Cadbury had been engaging in significant and deliberate overstatement of the financial position of the company over a number of years. No doubt, this disclosure raised serious concerns and implication about corporate governance and the effectiveness of the role of regulatory bodies with monitoring functions in corporate governance. The Cadbury case was particularly worrisome and remarkable considering its high profile status among operators in the private sector of the economy and its international affiliation with Cadbury Schweppes, the world largest confectionery group. Having been listed in the stock market, no one in his wildest dreams would have doubted the authenticity of statement of accounts given to the public by the company over the years. The public especially, users of such financial statement would have thought that the Nigerian Stock Exchange as well as the Security and Exchange Commission had scrutinised them before placing them at the disposal of the public. Interestingly, the Cadbury impropriety became public knowledge following an investigation carried out by Price Waterhouse Coopers, an audit firm.[47]

3. Global Initiatives in Corporate Governance and Management

Although the concept of corporate governance can be said to be initially an American phenomenon, it has spread around the world. Consequently, certain initiatives have been adopted at global level to ensure its enthronement in the corporate world. One of such initiative is the Global Corporate Governance Forum (G.C.C.F), which is directed towards assisting countries to improve the standards of governance of their corporations, ensuring accountability, promoting fairness, transparency and responsibility.[48] This is possible owing to the combined initiative of the Organization for Economic Corporation and Development (O.E.C.D) and the World Bank Group.

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[46] See Fanawopo, S. 'NITEL: Can Transcorp reposition the "family brand'? *Daily Sun Newspaper*, Wednesday, Nov. 22, 2006 page 29; Isa Godwin, 'Workers drag Transcorp BPE to Court', *Daily Sun,* Nov. 14, 2006 at page 7. 200.

[47] See Asueliman, F. 'Cadbury, Bunmi Oni and Corporate Governance', *Financial Standard Newspaper*, Monday, December 25, 2006. 201.

[48] Available at http:/www.ecgi.org/codes/countrydocuments/commonwealth/cacgfinal.pdf accessed 01 March 2014.

This international initiative made it possible for the leading bodies in corporate governance to come together to dialogue, partner one another and deliver strategies for reform implementation. The forum achieved the above objectives through:

a. *Dialogue:* This came through Convening Several Conferences and round table meetings at National and Regional levels, debates by players, identification of key reform areas, and development of action plan and spearheading of initiatives.
b. *Technical Assistance:* This came through the provision of legal advice, particularly on legal, regulatory and best practice standards through exchanges and secondment of professionals and experienced individuals.
c. *Capacity Building:* This is achieved through provision of materials, case studies, curriculum design, development training and education for the main players in governance.
d. *Institution Building:* This is done through the establishment of centres for corporate governance.
e. *Exchange of Information:* This is achieved through gathering and essential materials, contracts and case studies.
f. *Task Force:* This comes in form of forming working groups or cases of specialist concern requiring innovation in thinking and practice.

It is important to note that nations and regions are availing themselves of these initiatives to enhance their corporate governance profile. According to G.C.G.F survey; at a global level, the survey responses indicate that companies in these emerging markets traditionally unworthy to pay for corporate governance related services, now understand the importance of changing their Board and disclosure practices in order to better attract international sources of capital.[49]

The result of the survey no doubt authenticates the assertion of the former President of the World Bank, J. D. Wolfensohn that 'the proper governance of companies will become as would the World Economy as the proper governance of countries.'[50] The International Corporate Governance Network has been established to promote and coordinate research and development in Corporate Governance.

3.01 Corporate Governance: Comparative Analysis

a. Corporate Governance in the Commonwealth

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[49] The Inventory – A Survey of Worldwide Corporate Governance Activity: GCGF Publication, 2nd Edition, p. 36 31 Wolfensohn, J. in Financial Times, June 21st 1990.
[50] J. D. Wolfensohn, *ibid* at n. 1.

The globalization of economies in the Commonwealth and their subsequent financial and investment markets gave rise, on one hand, to a convergence of originally separate initiatives in Corporate Governance and a new dimension of Corporate Governance defined to transcend the rules of national boundaries. The requirement for standard that could represent the Commonwealth approach to corporate governance was formulated through the initiative of the Commonwealth Association for Corporate Governance (C.A.C.G) in April 1998 in response to the Edinburgh Declaration of the Common Wealth Heads of Government meetings in 1997.

The objectives of the CACG were the promotion of good standards in corporate governance and business practice throughout the Commonwealth; and to facilitate the development of appropriate institutions for the purpose of addressing, teaching and disseminating such standards. The guidelines set out fifteen principles of corporate governance aimed primarily at the Boards of directors of all business enterprises namely, public, family or state-owned, and also to executive and other forms of enterprises such as Non-Governmental Organizations (N.G.O.s) and Agencies. It is important to note that a number of Commonwealth countries now have national codes even long before the establishment of the CACG guidelines.

b. Corporate Governance in Africa

On the African continent, regional economic cooperation and integration have taken a firm hold. The essence of the activities of the various sub-regional bodies on the continent is the recognition of the need for governance principles that would provide distinctively ‘African solution’ to the numerous governance problems in Africa while still operating within the spectrum of global corporate governance principles. It is in this regard that New Partnership on African Development (NEPAD) has embarked on various initiatives directed towards ensuring sustainable development in Africa.

In the same vein, the African Capital Markets Forum (ACMF) plays a major role in ensuring good corporate practices in Africa. The forum is a non-governmental, non-profit making organisation whose activities are directed towards promoting capital market development in Africa. ACMF pursues good Corporate Governance practices through the building and maintenance of a database on African Capital Markets, the promotion of research and training and provision of technical assistance to capital market institutions in Africa. The activities of the ACMF relate to the followings:

1. Participation and convening of international conferences and workshops seeking to enhance the performance of capital market institutions.

2. Creating a conducive environment for capital market development. Provision of advisory services to African governments, institutions as well as international agencies on issues relating to capital markets development. It carries out the above objectives through the instrumentalities of the stock exchanges, securities regulatory agencies and market operators. The African Capital Development market Forum is a joint initiative of the ACMF and the United Nations Development Programme (UNDP) and the African Stock Exchanges Association (ASEA) in collaboration with New York Stock Exchange (NYSE). In its attempt to create an all-embracing forum, the Pan African Consultative Forum (PACF) on Corporate Governance was launched in Johannesburg in July 2001 with support from World Bank group, the Global Corporate Governance Forum (GCGF), the Organization for Economic Cooperation and Development (O.E.C.D), the commonwealth secretariat and the African Development Bank (A.D.B) and other donors that share the same aspirat ons.
3. To raise awareness of the significance of corporate governance. To reach consensus on the concepts and methods of Corporate Governance.

To develop action plan across the continent. To contribute to and learn from the Global Policy Dialogue on Corporate Governance issues.

At individual levels in Africa, some African countries have taken the initiative to organise workshops, seminars and trainings. Countries like Nigeria[51] and South Africa[52] have also taken the initiative to develop code of best practices.

3.02 Models of Codes of Best Practices

The OECD in its preamble to its 'principles of Corporate Governance' states that 'there is no single model of good Corporate Governance.[53]

This cannot be farther from the truth. Some models that have become guidelines for gauging corporate practice are the Cadbury Report of 1992, the Day Report of Canada 1994, the Greenbury Report of UK 1998, the Kings Reports 1 & 2 of South Africa (1999, 2002) and the Higgs Report of UK (2003). The Cadbury Report is a product of the committee chaired by Adrian Cadbury in May 1991 by the Financial Reporting Council, the London stock Exchange and the accountancy profession.

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51 Code of Best Practice, 2003.
52 The Kings Report 1992 & 2002.
53'OECD Principles of Corporate Governance', Preamble at www.oecd.org/daf/governance/principles.html. Accessed 14 February 2014.

The essence of the committee was to address the financial aspects of Corporate Governance owing to the low level of confidence in financial reporting as well as the questionable ability of auditors to provide the necessary safeguards for financial reports. This lack of confidence was necessitated by failures in major corporations in UK. The report reviews the Kings Report 1992 & 2002, structure and responsibilities of Boards of directors, role of auditors and the rights and responsibilities of stakeholders.

The Greenbury Committee on Corporate Governance was set up in response to public and shareholders' concern for the remuneration of directors. The Greenbury report emphasised accountability, responsibility, full disclosure, alignment of directors and shareholders' interest and improved performance.[54]

In the case of the Kings Report on Corporate Governance for South Africa, the Kings committee on corporate governance was headed by a former Supreme Court judge, Mervyne King, S.C. The committee published its reports in 1994 to incorporate a code of best practice to promote the highest standard of corporate governance.[55] The ambit of the report, apart from incorporating the financial and regulatory aspects of corporate governance, also advocates an integrated approach to good corporate practice. Due to perceived inadequacies in the 1994 report, and the need for greater corporate accountability, transparency and shareholder confidence, the Kings committee released the Kings Report 2002, which embodies essentially the concept of "triple-bottom-line reporting" encompassing the economic, environmental and social aspects of corporate governance. The report emphasised the involvement of a wider spread of internal and external stakeholders consisting of workers, trade unions, consumers, suppliers, communities and the media. The Report encourages stakeholders' institutional activism, business and the financial press and relies on disclosure as a regulatory mechanism. A major distinctive feature of the report is that the recommendations were regarded as binding instead of being voluntary. According to the report, the legal mechanism for the enforcement of the 2002 code remains the existing legal remedies of the South African Company Law of 1973 as amended, the Common Law, and the provision of the amended listing requirements of the South Africa Securities Exchange.

3.03 The Nigerian Code of Best Practice on Corporate Governance and Management

The need to align with global trend on corporate governance prompted Nigeria to identify with the nations with codes of best practices.

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54 Greenbury, R. 'The Greenbury Report, Chairman's Preface'. Available at www.ecgi.org/codes/country accessed 12 March 2014.

55 King Report 2002 – Sarbanes Oxley www.ecgi/codes/country accessed 02 April 2014.

This was made possible because of the collaborative efforts of the Securities and Exchange Commission (SEC) and the Corporate Affairs Commission (CAC) in inaugurating a seventeen (17)-member committee in June 15, 2000 to design a code capable of meeting the needs of the Nigerian corporate sector. The report is what is now known as the Code of Best Practices for Corporate Governance in Nigeria. The code was inaugurated in November 2003. The code is a replication of the essential features of the following combinations, namely, the OECD principles, the recommendations of the 211 Cadbury, Dey, Greenbury, Kings 1 & 2, and the Higgs reports respectively.[56] The main trust of the code is the emphasis on the board of directors as leaders of corporate entities, the responsibilities of stakeholders such as shareholders and professional bodies as monitoring devices. The code covers the responsibilities and composition of the Board of Directors of quoted companies and multiple stakeholders companies in Nigeria. It states that the functions of the Board of Directors should cover policy and strategic matters.

Another highlight in the code is the provision that the composition of the Board of Directors should reflect the diversity of experience without compromising compatibility, integrity, availability and independence. The separation of the position of the managing director of the company from that of the Chairman is also well emphasised in the code.[57] Also adequately covered is company proceedings generally, the frequency of meetings, executive and non-executive directors.[58]

The code does not leave out either, the all-important issue of the need to promote transparency in financial and non-financial reporting. The code thus requires the board to ensure inter alia, that internal controls are properly put in place; constitution of audit committee; proper preparation and presentation of annual reports and the compliance with the Section 9 of the code has also directed the protection of both the statutory and general rights of shareholders. A new dimension in the recognition and articulation of the shareholders' rights is the codes provision that shareholders possessing more than 20 percent of the total issued capital of the company should ensure that they are represented at the Board unless they are in a competing business or have conflict of interest.

Apart from the role of the shareholders, the code equally emphasises the need and importance of audit committees in corporate governance. Consequently, the code mandates all companies to establish Audit Committees with the aim of raising standards of corporate governance.

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56 See El-Rufai N. 'Importance of Corporate Governance'. *This Day*, Vol. 9, No.30 of 12th July 2003 at p.24 40.
57 Section 2.
58 Section 3-7.

The composition, qualification and experience of members of that committee and its terms of reference are also dealt with. The preface to the code also touches on the issue of enforceability of the code. While the code urges companies to comply with the provisions of the code, it however states that the Securities and Exchange Commission and Corporate Affairs Commission will give due consideration to the compliance or otherwise of the provisions of this code in the treatment of the issues brought before them. Apart from merely stating that due consideration will be given to the compliance of the provisions in the code, nowhere is it stated what the legal consequences for non-compliance would be. Would the provision of the CAMA or ISA be the basin for due consideration of compliance? We have not been told.

3.04 Rules of Corporate Governance and the Convergence Debate

Currently, there is a raging debate by academics, whether the corporate laws regimes of difference jurisdictions are converging due to the effects of globalization of economies of the world. In the United States particularly, some of the proponents of the view argue that convergence is not in substance but in form only.

Other are however of the opinion that it is in function. Yet another view is that the convergence can be self-imposed by corporations through the instrumentality of contract.[59] Convergence in form is said to occur where the appropriate corporate governance regulatory institution in one jurisdiction is transplanted in another jurisdiction by legislative action.[60] A major feature of formal convergence is that the basic structure of the existing governance institution of the recipient country is altered or restructured. This is not so in the case of functional convergence where the existing governance institutions are adequately elastic to meet the changed circumstances without necessarily changing the characteristics of the institution. In the case of contractual convergence, however, response may take the form of contract. It is our submission however, that owing to differences in legal systems amongst nations of the world, which have serious foundational implications on their corporate governance principles complete convergence may, not be attainable now but in the nearest future. The various initiatives at the international, regional, sub-regional levels are a pointer to the above assertion.

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[59]See Gibson, J. Ronald, 'Globalizing Corporate Governance: Convergence of Form or Function', *Columbia Law School Centre for Law and Economic Studies*, Working Paper 174, Feb. 2000. Available at http://papers.ssrn.com/paper:taf.abstract.ib=229517 pp.1-5. Accessed 01 April 2014.

[60]See Khana, T.; Koganm, J. and Krishna P., 'Globalization and Corporate Governance Convergence: A Cross Country Analysts', October 30, 2001, p.1 214.

Because of social, political, cultural and legal differences in societal foundations, it is more likely that the various corporate governance standards would be subject to modifications depending on the local circumstance of the particular country.

3.05 Lesson from Other Corporate Governance Models

We have seen that majority rule will work well only where it is easy to identify the majority shareholder(s) in a company. Where the shares are dispersed, it may be impossible for the majority shareholders to come together and assert their rights. Such right will include voting, removal and appointment of directors, alteration of the memorandum and articles of association, where necessary. With the emergence of large companies, the shareholders and the directors are pitch up in a cold war of supremacy and the shareholders seemed to have lost out because they remain relatively inactive. Several societies have tried to address the problem arising from the dominance of company‘s management by the directors at the expense of the shareholders. The majority rule was found to be incapable of meeting the challenges thereby posed. Consequently, there have been initiatives at national and international level towards addressing the problem of ownership and control of companies.

Starting from the Berle and Means which drew attention to the weakness of corporate law in protecting the shareholders; to the political model which tried to use the instrument of proxy, institutional investors and independent directors; to the German co-determination system which emphasized dual board system with the employees having a say in corporate governance; to the Japanese bank proxy model; to the development of the securities market which resulted in the evolution of the disclosure model in the United States and Britain; to stakeholders model resulting from the various corporate scandals in Europe and the United States and even down to the Nigeria‘s contribution in the area of Shareholders‘ Association.

The various initiatives will be discussed in this chapter with the aim of seeing how they have been helpful in improving the corporate governance.

a. Berle and Means Model

This is what some people referred to as the traditional model of corporate governance. The model emphasized two major structures of corporate governance; that is ownership (shareholders) and control (directors or managers of corporations). It assumes that the management of a company is vested on the board of directors and ownership vested on the shareholders and that there is a wide gap between ownership and control.

This is true of both private and public companies but in a private company, where the owners are the same as the directors, the two are fused and there is no problem of gap or separation of ownership and control.

But for public companies where there are several shareholders, there is no way all the shareholders can participate in management; hence a smaller management board has to be constituted. Where one shareholder is able to have majority shares in such a company, there may be no corporate governance problem. But problem may arise where the shares are so dispersed that a single shareholder is not able to command the required majority to monitor the performance of the directors. This is especially the case of the recent upsurge of listed companies sometime arising out of sophistication of modern business or through the policy of liberalization and globalization-like the privatization programme and the current bank reforms in Nigeria.

Based on the laws relating to corporations, shareholders are regarded as the owners of the firm and they choose a board of directors to 'direct' their business.[61]

Because shareholders could select the directors, it was presumed that the board would serve shareholder's interest by maximizing firm profits and the relevant laws obliged directors to do so. The board in turn designates officers to 'act as agents of the board and execute its decisions'. In this ideal setting of corporation's law, ownership and control are not materially separated; the officers are subservient to the directors and the directors are responsible to the shareholders.

But in 1932, Berle and Means[62] disproved this hypothesis. They argued that in large public companies, managers had seized control from the shareholders, the ostensible owners. Separation, they posited, resulted not from a conspiracy of managers, but from the pattern of stock ownership in public companies. Each shareholder owned few shares and lacked the means or inclination to participate actively in electing directors. The managers, who had both means and motive, easily induced shareholders to elect a board subservient to the managers. Their thesis suggested that managers enjoy broad discretion in running public companies. Unconstrained by shareholders' demands for maximum profits, managers might be lazy or divert profits from shareholders to others, principally themselves. It implied that economic production was inefficient and that investors were being mistreated, which not only was unfair, but meant that capital markets were inefficient. This model is sometime called the Anglo- Saxon model.

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61 However, in *Okomu Oil Palm Limited v. Iserhienrhien* (2001) 85 LRCN 873 it was held that having a controlling share in a company is not synonymous with its ownership. Once a company is incorporated, it has its own separate entity.

62 In their book titled, *The Modern Corporation and Private Property*. New York: Macmillan,1932.

The Berle and Means Corporations are those with widely scattered ownership and a predominantly self perpetuating board. This is prevalent in North America, United Kingdom, Australia and recently in Nigeria but not popular in the continental model of enterprise.

Berle and Means[63] concluded that the separation of ownership from control 'produced a condition where the interests of owner and of ultimate manager ... often ... diverged, and where many of the checks which formerly operated to limit the use of power disappeared'. For one thing, Means's statistical studies illustrated that some 200 corporations, controlled by fewer than 1,800 men, administered over one-third of the national wealth. The possibility of mass concentration of power augmented the risk of inefficient uses of power, which could adversely affect the economy at large. The power that corporations could amass and ways to tame it became the book's underlying theme. Berle and Means described two dimensions of power: an internal dimension and an external one. The internal dimension focused on the power of corporations over individuals within them, specifically power over employment decisions. The external dimension emphasized corporations' impact on society at large, specifically corporations' power to control markets by administering prices, their capacity to accumulate capital and affect the economy, and their ability to shape the forces of production through the development of new technology.

Both dimensions of power underlay Berle and Means's proclamation that the corporation's economic power resembled the power of the sovereign state; hence, it could not be curbed by the state. As Dalia Tsuk[64] explained, their theory- having called attention to corporate power, as augmented by the separation of ownership from control, Berle and Means began to formulate a unified theme for the law of corporations. They evaluated three ways to guarantee responsible exercises of power. The first way--the application of strict property rules to passive ownership would have required the control group to exercise corporate power for the 'sole benefit of the security owners'. Berle and Means feared that such rules would have 'the bulk of American industry … operated by trustees for the sole benefit of inactive and irresponsible security owners'.

The second way--application of strict contractual rules--would have invested in the control group uncurbed powers and seen security holders as having 'agreed in advance to any losses which they might suffer by reason of such use'. Berle and Means believed that such rules would create 'a corporate oligarchy coupled with the probability of an era of corporate plundering'.

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63 *Ibid* at p 6.
64 Op. Cit. at 188.

Rather than choosing traditional rules of property or contracts as the underlying theme of the modern law of corporations, Berle and Means settled on a third alternative; it 'offered a wholly new concept of corporate activity'. Specifically, Berle and Means argued that shareholders, 'by surrendering control and responsibility over the active property, had surrendered the right that the corporation should be operated in their sole interest, they had released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights'. But this tampering with the interests of the owners did not make the controlling group the beneficiary of corporate power.

Rather, Berle and Means concluded that if the separation of ownership from control was a problem, it also pointed to the solution. Specifically, it had 'cleared the way for the claims of a group far wider than either the owners or the control'. It had 'placed the community in a position to demand that the modern corporation serve not alone the owners or the control group but all society'. Simply put, Berle and Means announced that (because ownership was separated from control) publicly held business corporations were public trustees. Their power was to be exercised to satisfy the demands of the community; however these were to be defined.[65]

Explaining the Berle and Means thesis George Dent[66] stated that: Since Adolf Berle and Gardiner Means published The Modern Corporation and Private Property in 1932; corporate law's central dilemma has been the separation of ownership and control in public corporations. On one side are shareholders, the ostensible owners; on the other side are corporate officers, the shareholders' ostensible fiduciaries. Between them is a black hole: the board of directors. In traditional legal theory, the shareholders select the board, which manages the corporation. Berle and Means, however, showed that in an increasing number of large companies, management was not chosen by shareholders, but was a self-perpetuating oligarchy. He also stated that separation of ownership and control leads to economic inefficiency and mistreatment of shareholders. To remedy these problems, he stated that, innumerable proposals have been floated to reform corporate governance. The central battleground in the corporate governance debate is currently the American Law Institute's (ALI) Corporate Governance Project. The learned writer claimed to have found solution to the problem raised by Berle and Means which seemed to have defied all solutions and his prescription is simply to take over control over proxy from management and give it to a committee of the corporation largest shareholder. In his words:

[65] Bearle and Means at pages 354-356.

[66] Dent, G.W. Jr., 'Towards Unifying Ownership and Control in the Public Corporation', 1989 *Wisconsn Law Review* 881 at 881.

This Article seeks to hurdle this increasingly sterile debate and find new solutions to the corporate governance problem. In short, separation of ownership and control stems from management's domination of proxy voting. Although commentators recognize this, most accept it as inevitable; shareholders are too numerous, scattered and indifferent to coordinate their voting. So long as management controls proxies, corporate governance reform efforts are doomed. An effective shareholder franchise, however, would remedy the separation of ownership and control and, with it, most other corporate governance problems.

This Article analyzes the corporate governance impasse and proposes to unite ownership and control by transferring control of proxy solicitations to a committee of a corporation's largest shareholders. The Article concludes that such a change would ameliorate or eliminate many of the gravest problems of corporate law relating to tender offers, ineffective boards of directors, skewed executive compensation, shareholder derivative suits, and de equalisation.[67]

Corporate law theory in the opinion of George Dent[68] has since grappled with this problem, producing three kinds of responses: one denies that corporate managers have significant discretion; a second concedes discretion and applauds it; and a third concedes discretion but deplores it, and seeks to eliminate discretion by reforming corporate governance.

Commenting on this model, Paul Davies[69] further said:

In 1932, Berle and Means drew attention to the fact that in large companies in the UK, the need for capital was tending to a situation in which no one shareholder held a significant block of shares and that, in consequence, the costs to any one shareholder of operating the traditional internal corporate machinery for holding management accountable were increasing (because of the level of collective action required on the part of the shareholders), while the likely benefits from such action were decreasing (because of the small proportion of the equity held by any one shareholder). Sale, rather than activism, was thus the rational response by such a shareholder dissatisfied with management‘s conduct of the company‘s affairs.

The model concedes the fact that the power over management is for the board and not the shareholder. In fact this is a foundational basis for corporate governance which has been accepted in all jurisdictions and subsequent debates have been how to make the model better- hence other models emerged.

67 Ibid. at 882-3.
68 Ibid. at 884.
69 Op. Cit. at page 74.

For instance the Institutional investors arose to remove the gap and separation caused by the vesting of the powers on the directors and as Paul Davies pointed out that if there is a worry about the development by management of an element of unaccountable discretion, one obvious starting point for reform is to try to make the traditional model work.[70]

The present debate on corporate governance centres on how to bridge this wide gap between ownership and control.

As explained by A. Chambers,[71] a fundamental purpose of corporate governance is to minimize the risk associated with the separation of ownership from management. So corporate governance includes the control exercised by the legitimate stakeholders over their respective stakes in the entity; and the mechanisms (such as the accountability of the directors) that facilitate this external control.

In part it is also internal control which compromises the oversight of management by the board of directors together with the internal control mechanisms which management implement and apply (including management's accountability to the board) in order that the board has reasonable assurance of the achievement of the entity's objectives. He maintain a distinction between the board and management of a company and also in their responsibilities which sometimes is often blurred especially in the case of Anglo-Saxon unitary board which may be balanced in its membership between executives and non-executives. However, an executive who is a board director is not acting in a managerial capacity when he or she participates in decision making at the board. He or she is acting in a managerial capacity when reporting to the board on the operations for which he or she has executive responsibility.

Additionally Micheal Jensen[72] while lamenting the problem of widening gap between ownership and control and the failure of the board of directors to provide the appropriate monitor stated that there is now a move from public corporation into other new forms of organization such as takeovers and leverage buy out which he called LBO. He said:

The publicly held corporation, the main engine of economic progress in the United States for a century, has outlived its usefulness in many sectors of the economy and is being eclipsed. New organizations are emerging in its place-organizations that are corporate in form but have no public shareholders and are not listed or traded on the organized exchanges.

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70 Ibid. at pages 78-79.
71 Andrew D. Chambers, Corporate Governance Handbook, 6th ed (Bloomsbury Professional: UK).
72 'Eclipse of Public Corporation', *Harvard Business Review*, September-October, 1989. This work was revised in 1997 and contained in Http://papers.srcn.com/abstracts146149. Accessed 18 March 2014.

These organizations use public and private debt rather than public equity as their major source of capital. Their primary owners are not households but large institutions and entrepreneurs that designate agents to manage and monitor on their behalf and bind those agents with large equity interests and contracts governing the distribution of cash.[73]

However, Berle and Means theory has been disputed and rejected by some scholars. According to George Dent,[74] two schools opposed this theory.

There is the business executive school represented by what he called business roundtable[75] corporate lawyers and a few academics. In their view, separation of ownership and control, if it exists at all, has not impaired corporate performance; American companies are soundly managed.

Reformers, they claimed, misread corporate actions by viewing them with hindsight and ascribing all unsuccessful risk-taking to managerial mistakes. They portrayed corporate executives not as enjoying the broad discretion and carefree existence suggested by Berle and Means, but rather as beleaguered by powerful interests, including labour, suppliers, consumers, political activists and government bureaucrats. They argued that few managers shirk responsibility or divert profits that managers who do so are usually punished or fired by fellow managers, and that outside directors furnish further discipline in the rare cases where it is needed.

Another group that opposed this Berle and Means theory consists of neoclassical economists.[76] While conceding that shareholders rubber stamp managements' board nominees, they claimed that economic forces compel managers to maximize profits as shareholders would if they controlled the firm. In other words, this group posited that there is no defect in corporate governance or gap between ownership and control but that what determines corporate performance are product and capital market and manager‘s compensation schedules. Therefore, the form of an organization that survives in an activity is one that delivers the product demanded by customers at the lowest price while covering costs.

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73 Ibid at 1.

74 Op. Cit. at 884.

75 See Statement of the Business Roundtable on the American Law Institute's Proposed ‘Principles of Corporate Governance and Structure: Restatement and Recommendations’, (1983) [called the Business Roundtable].

76 See e.g Fama & Jensen. ‘Separation of Ownership and Control.’ (1983) 26 *Journal of Law & Economic*. 301, 301. See also Easterbrook & Fischel. ‘Voting in Corporate Law’. (1983) 26 *Journal of Law & Economic.* 395, 416, 418-19 (1983) and Fischel, ‘The Corporate Governance Movement.’, (1982) 35 *VAND.L.REV.* 1259, 1260.

Moreover, manager‘s compensation schedule based compensation on performance thereby motivating to maximize profits or share value. Managers who let profit dwindle invite a takeover by a corporate raider who will remove him.

But Dent has explained that capital markets only discipline managers when there is need for outside funds. In his words: Capital markets discipline managers only when they need outside funds. Most companies can survive and even grow with internally generated capital; managers of public companies are almost obsessive about retaining earnings. Even when necessary, outside financing does not fully constrain managers. For debt financing, lenders care only whether the firm can pay principal and interest when due; they care little whether the firm maximizes profits, and they even share the managers' distaste for risks that might appeal to shareholders.

New equity financing by public companies is extremely rare and does not constrain managers; if firm profits are low, the price of the new stock will also be low, but that has little effect on managers.[77]

One cannot but agree with Dent as the gap between ownership and control has not only been proved to be true of public companies, but it has been identified as the cause of frequent conflict between shareholders and managers on matters of dividends. Because of the diverse nature of ownership, shareholders especially of small shares have found themselves to be at the mercy of these few managers. For instance, on issue of dividend, while shareholders wants dividends to be paid regularly, the directors prefer an expansion of the business and the profit of the company is plough back to the firm.

Moreover, corporate growth enhances the social prominence, public prestige, and political power of senior executives. For instance, Micheal Jensen[78] stated that in 1988, the 1000 largest public companies (by sale) generated total funds of $1.6 trillion. Yet they distributed only $108 billion in dividends and another $51 billion through share repurchases. He emphasized that Berle and Means not only talk about the separation of ownership and control but also about the growth of giant corporations with the political and social changes occurring in a rapidly growing industrialized society.

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[77] Ibid. at at 887.
[78] Op. Cit. at 9.

This point was forcefully reiterated by Dalia Tsuk[79] who said that the Modern Corporation and Private Property was one of the earliest attempts to connect the growth of giant corporations with the political and social changes occurring in a rapidly growing industrialized society. Seven decades later, Berle and Means's prophecy rings true. The rapid economic, social, and technological changes of the 20th century have led to the emergence of large corporate bureaucracies. As national governments amass political power, multinational corporations dominate the global economy, over which centralized national governments have less and less control. Surprisingly, in the collective imagination of corporate law scholars, *The Modern Corporation and Private Property*, which remains one of the most cited works in recent decades, is remembered not as the book that called attention to corporate power, but as the book that called attention to the separation of ownership from control in large public corporations.

While Berle and Means emphasized a divergent between ownership and control in public companies, it has been argued that the corporate governance across the world is basically divided into two- dispersed ownership and concentrated ownership. Explaining this twin nature of ownership John Coffee said recent scholarship on comparative corporate governance has produced a puzzle.

While Berle and Means had assumed that all large public corporations would mature to an end-stage capital structure characterized by the separation of ownership and control, the contemporary empirical evidence is decidedly to the contrary. Instead of convergence toward a single capital structure, the twentieth century saw the polarization of corporate structure between two rival systems of corporate-governance:

(1) A Dispersed Ownership System, characterized by strong securities markets, rigorous disclosure standards, and high market transparency, in which the market for corporate control constitutes the ultimate disciplinary mechanism; and
(2) A Concentrated Ownership System, characterized by controlling blockholders, weak securities markets, high private benefits of control, and low disclosure and market transparency standards, with only a modest role played by the market for corporate control, but with a possible substitutionary monitoring role played by large banks.[80]

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79 'From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought', 30 Law and Social Inquiry, 179 (*Review Essay*) at 178-180.

80 Coffee, J.C. Jr. 'The Rise of Dispersed Ownership: The Roles of the Law and the State in the Separation of Ownership and Control' Op. Cit. at pp 3 and 4.

One of the reasons for the prevalent of concentrated ownership, in the opinion of Lucian Bebchuk,[81] is the rent-protection‖ argument which postulates that when the benefit of control is high concentrated ownership will dominate dispersed ownership. The core idea here is that the entrepreneurs taking a firm public will not sell a majority of the firm's voting rights to dispersed shareholders in the public market, because they can obtain a higher price for such a control block from an incoming controlling shareholder or group, who alone can enjoy the private benefits of control. Thus, the control holder will sell only a minority interest or will sell control as a block, but will not break up its control block and hence concentrated ownership will persist. This is even true of Nigerian privatization exercise where government sells about 51 per cent shares to core investors while the remaining 49 per cent are to be sold to the public through public offer for sale.

However, in contrast with John Coffee‘s view that corporate models could be divided into dispersed and concentrated, Hansmann and Kraakman[82] are of the view that there seem to be a convergence of corporate governance principles all over the world now and the difference in the corporate governance is being minimized whether of dispersed ownership or concentrated ownership.

That there is unanimity among the corporate governance of various jurisdictions n such issues as legal personality, limited liability, shareholder ownership, delegation of authority and transferability of shares. In debunking a separated corporate governance principle for dispersed ownership and concentrated ownership they stated that there is no country with exclusive dispersed ownership and exclusive concentrated ownership. They both integrate into what they call shareholder-oriented model and no separate principle is desirable. By shareholder- oriented model, they mean the ability of corporate governance to advance shareholder‘s interest in the face of serious agency problem.

The Berle and Means model is not a farce after all as steps have been taking to avert some of the problems it envisaged. Not only that steps have been taken, some of the corporate fraud and scandals that pervaded the UK and US corporate system in the past few years arose as a result of that wide gap mentioned by Berle and Means. Even in the US and UK, steps have been taken to minimize the gap by maintaining a privately regulated stock exchange requiring full disclosure and a transparent system and it evolved out of functional convergence‖.

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81 Bebchuk, L. ‘A Rent-Protection Theory of Corporate Ownership and Control’, (*Nat'l Bureau of Econ. Research, Working Paper No. 7203,* 1999), available at http://www.nber.org/papers/7203. Accessed 18 March 2013.

82 Hansmann, H & R. Kraakman, ‘The End of History for Corporate Law’. Op. Cit. at 439-440.

Reforms going on in some civil law countries showed a shift from concentrated ownership to dispersed ownership and an astronomical growth in European Stock Market. In 1996 for instance, a pan-European stock market, known as Easdaq, was created and has been acquired by Nasdaq. An equity culture is gradually been established in Europe. Research conducted by Carolyn Brancato[83] showed a measurable decline in the stakes held in twenty-five largest corporations by banks and non financial corporations in Germany, France and Japan. Most of theses shares have been transferred to some British and America Institutional investors.

However, one of the problems identified with this transformation is the high level of capital gain tax especially in Germany. The Government was so eager to remove this constrain as from January 1, 2002 the capital gain tax on such investment was eliminated. This paved the way for Germany to completely unbound.[84] As a result of these reforms, the economy of Germany, France and Spain which were initially dependent upon banks and debt financing is being transformed into equity financing and it has been stated that these countries are raising more equity through initial public offerings as a percentage of GDP than were either the United States or the UK. Funny enough, there is no corresponding legal structure put in place for minority protection.

Mark Roe's position[85] on US corporate governance whereby there is a strong tie between the managers of public companies and their shareholders also supports the fears expressed by Berle and Means. He argued that the gap created between ownership and control has been closed in the US by ensuring a strong tie between the managers and the shareholders of US public corporations. But that the gap still exists in social democracy countries because the system raises the cost of closing the gap. Since the main objective of dispersed shareholders is to maximize profit, the corporate governance has to developed a system whereby the managers of these enterprises will be tied to the shareholders and ensure that profit is maximized. For this reason, the shareholders'interests are given priority over those of the managers and employees.

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83 'Corporations outside US become more Subject to Investors Demands'. *Corporation Governance Advisor*, July - August 2000 at 1 but see Coffee, J.c. Jr., 'Privatization and Corporate Governance: The Lessons from Securities Market Failure'. Op. Cit. at 15.
84 See Coffee, J.C. Jr. Ibid at 15-16 and Simonian, H. 'German Unbound: Measures to Reduce the Country's Restrictive Tax Burden Have Delighted Many Businesses', *Financial Times* (London), 10 August, 2000 at 14.
85 'Political Preconditions to Separating Ownership from Corporate Control'. Op. Cit. at 539.

In social democracy system, shareholders are restricted from maximizing profits at the expense of the interest of the employees and it also weakens the ties between managers and dispersed shareholders thereby leading to a large gap between ownership and control. Some of the restructure explained above may not be possible in a social democracy leading to a high managerial agency cost. Social democracy favours employees, especially the German codetermination system as such the employees will always advocate for a high wage and resist any attempt to down seize staff strength even when the company is not doing well or when technology demands.

In view of the fact that the system does not tie management to shareholders, the managers are likely to support the workers. Thus, the gap between the management and labour on the one hand and the shareholders is enlarged. Social democracy not only widen the gap between ownership and control but make the gap-closing tools-shareholder value norms, transparent accounting, incentive compensation, and hostile takeovers and proxy fights harder to use.

It was also because of the alarm raised by Berle and Means that the congress decided to enact the Federal Securities Act in 1934. As explained by George Dent,[86] Berle and Means helped to spark adoption of the full disclosure policy of the federal securities laws. Although this policy was designed primarily to facilitate investment decisions, it was also meant to assist shareholders in controlling their companies.

To this end, Congress authorized the Securities and Exchange Commission (SEC) to require full disclosure in, and otherwise to regulate, proxy solicitations. And supporting this view, Bernard Black[87] said that in response to Berle and Means, the US congress decided to enact the Securities and Exchange (Exchange Act).

In Nigeria, the nature of shareholding was concentrated ownership until recently. With the bank reforms and privatization, dispersed ownership is becoming prominent. As a result of the prevalent of concentrated ownership before now, the gap between ownership and control raised by Berle and Means was not much of a problem in Nigeria. This is because the ownership and control is fused and there is hardly a distinction between the meeting of the board of directors and the general meeting of most companies. However, with the privatization exercise and the bank recapitalization in Nigeria, the situation is no longer the same.[88] Dispersed ownership is fast emerging in Nigeria and the gap between ownership and control is imperative.

b. Takeover Model or Market for Control Model

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86 Op. Cit. at 895-6.

87 Op. Cit.at 527

88 On the growth of dispersed ownership in Nigeria, see Adamu, H.A, 'Virtues of Shareholding in a Third World Economy.' Op. Cit. at p 56.

This is also known as Sale of Control (Mergers and Acquisition) or Managerial Discipline Model. Takeovers have been seen by some scholars as corporate accountability mechanism.[89] In the opinion of D.D. Prentice[90] the theory of the role of takeovers with respect to corporate governance is straight forward and brutal- it is the threat of a bid which provides management with an incentive to maximize shareholder- return since (if successful) this will make their company bid-proof because they have ensured shareholder loyalty. The takeover model has been regarded as one of the most effective means of corporate governance. This is because an enterprise that is performing below capacity can be taken over and rejuvenated by an informed and expert new owner. Takeover generally targets underperforming enterprises for long period prior to takeover attempts thereby signalling the opportunity for gain if more successful managers were reinstalled. Thus, the managers are removed immediately after a success hostile take-over bid.

Tunde Ogowewo[91] gave an insight as to how this model of corporate governance works. He said that one of the important factors that will reflect in the price of a company‘s securities is the capability of its current management. A company that is poorly managed and therefore has poor profitability prospects will be assigned a relatively lower share price per unit of assets while remaining under existing management. Such a company‘s poor profitability prospects are induced by its management‘s deviation from profit maximization as their central goal.

Deviation from profit maximization decreases a company‘s value. This decrease usually referred to as agency cost, apart from making it relatively difficult for the company to raise investment funds at the rate efficient companies would obtain, also attracts those who perceive that they would be able to put the assets to their best use. Those attracted by the detection of agency cost would consequently offer a premium to gain control of the company. The intended reduction in agency costs makes the company‘s assets worth more in the hands of the new controllers than they were worth in the hands of the company‘s management.

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89 See Bebchuk, 'The Case for Facilitating Competing Tender Offers' (1982) 95 Harvard Law Review 1028; Easterbrook & Fischel. 'The Proper Role of a Target's Management in Responding to a Tender Offer.' (1981) 94 Harvard Law Review 1161, 1169-73 and Epstein. 'Who Owns The Corporation?' A Twentieth Century Fund Paper (1986). See also Manne, H.J. 'Mergers and the Market for Corporate Control.' (1965) 73 Journal of Political Economy 110, 112-18.

90 Op.Cit at 36.

91 'The Market for Corporate Control and the Investments and Securities 1999, London; The British Institute of International and Comparative Law', 2002, 4-5.

Therefore, the premise underlying the market for corporate control theory is the existence of a high positive correlation between corporate managerial efficiency and the share price of accompany. It was Manne[92] who said that apart from the stock market, we have no objective standard of managerial efficiency‘. Accordingly, the theory is that inefficient managers, if not responsible to, and subject to displacement by, owners directly, can be removed by stockholders acceptance of take-over bids induced by poor performance and a consequent reduction in stock value. Henry Manne, writing in 1965[93] stated that acquisitions were the most efficient mechanism for overseeing management and correcting inefficiencies in existing corporate policies. Alfred Rappaport also observed that "[i]t is impossible to overstate how deeply the market for corporate control has changed the attitudes and practices of U.S. managers.

. . . [That market] represents the most effective check on management autonomy ever devised.[94]

From available statistics, takeovers have improved the fortunes of many companies. In a study by Joseph Grundfest,[95] he reported that accounting data buttress the implications of the stock price evidence.

For example, a study of the fifty largest acquisitions between 1979 and 1984 found that post-takeover firms improved their operating cash flows relative to industry averages, primarily through greater asset productivity. The study also found that cash flow improvements "explained a significant portion of the increase in equity values of the firms involved in the transaction." This finding supports the view that takeover premiums reflected real anticipated economic gains that were "at least partially due to the replacement or disciplining of inefficient management.

The British takeover model remains outstanding. At the collapse of Czech securities market in 1996, the British model was introduced whereby no person could cross a particular ownership threshold except by making a tender offer for the entire firm‘s share. A threshold of 50% was set under the Czech law which has been considered to be too much and offering the remainder at an average price over a given period is still unsatisfactory; at least certain premium ought to be paid.[96] John Pound further explained the takeover model thus: As I will document in this Section, a series of market-based solutions have been used in the United States to correct both the collective-choice problem and the dysfunction of boards. Market based solutions depend on the depth and liquidity of American capital markets.

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92 Manne, H.J. ‘Mergers and Market for Corporate Control’ Op. Cit. at 112.
93 Ibid. at 119.
94 Rappaport, A. ‘The Staying Power of the Public Corporation’, *Harvard Business Review*, Jan.-Feb. 1990, at 96, 100.
95 Op. Cit. at 870.
96 Ibid at n 90.

These conditions provide an incentive for entrepreneurs to amass block investments and mount challenges to management when clear evidence of underperformance exists. By mounting a successful challenge, an entrepreneur can capture a portion of the value gain that can be achieved at the company, thereby acting as a "catalyst" or agent for more dispersed shareholders who lack the information, skills, or incentives to undertake corrective action on their own.

While the take-over model and political model continue to operate side by side, however from the 1960 the take-over model became much more prominent. This was as a result of the introduction of the cash tender offer and because the proxy solicitation was becoming expensive for shareholders. Cash tender offer were made directly to holders of common stock without the consent or even notification of management. According to John Pound, by the early 1950s, large-scale proxy contests had escalated in complexity and cost; fees totalling over $1 million were frequently expended on advertising, legal services, and solicitation. In a tender offer, by contrast, there was no need to convince other, less-informed shareholders of either party's case. Instead, raiders could purchase influence for a slight premium to the market price in a matter of days or even hours.[97] In the same vein, Victor Muscat,[98] a well-known corporate raider of the time, described the difference succinctly: They) proxy fights aren't worth the trouble. Tender offers are easier.

At least the money is going into stock and not such things as proxy solicitations and court suits." This was further accentuated by the fact that banks were prepared to provide the funds upon the completion of the offer. This led to the eradication of the political model. The takeover model was converted by corporate raiders as a shareholders protection mechanism.

The advantages[99] of this model over other types of corporate governance are:

1. Takeovers offer all the advantages that economists traditionally associate with a pure "market" approach to governance. They are based on decentralized decision making, wide opportunity for participation, and competition. By rewarding investors who spot undervalued companies and develop a plan to improve them, takeovers create a thriving market for information and research on corporate policy, a coterie of active investors competing for "good deals," and a vigorous "market" for corporate control.

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97 See Pound, J. Op. Cit. at 1015- 1016.
98 Quote lifted from Pound, J. Op. Cit. at 1016
99 See Pound, J. Ibid. at 1019.

2. Proponents have also argued that takeovers are efficient because they eschew cumbersome and bureaucratic "processes" associated with traditional voting-based challenges. Takeovers dispense with the need for formal and time-consuming solicitation, for planning challenges around annual meetings or petitioning for special meetings, and for ex post negotiations with remaining shareholders about the nature of corporate change. The takeover mechanism is remarkably simple and direct. An active investor can make an acquisition offer on any day of the year, and a few days later own a controlling interest in the company.
3. Some economists have also argued that the acquisition model offers a solution to complex information problems that occur in the proxy process. In a takeover contest, shareholders are not asked to evaluate complex alternative business plans for the company. Rather, they need only assess who is offering a higher value for their shares. This decision framework offers advantages for the relatively uninformed shareholder. In addition, it saves the active investor the expense of a costly information campaign aimed at shareholders who do not really understand the subtleties of the corporation's policy.
4. Tender offers are also attractive and cheap for active investors because they are contingent. Since a tender offer is not an irrevocable commitment to purchase shares, it can be used as a simple way of "polling" shareholders on their views of corporate value. For example, an offer can be extended inviting shareholders to tender. If enough shareholders tender, shares are purchased and a change of control effectuated. If not, shares are returned, and the dissident folds his tent. This also stands in stark contrast to the formal proxy contest, in which an extensive, expensive outreach campaign must be undertaken to determine shareholders' views on the substantive merits of a dissident case.
5. An additional advantage of takeovers is that shareholders are offered the chance to sell out and realize an immediate premium, rather than being asked to hold on to their shares while someone else undertakes changes that may or may not improve performance. The "bond" inherent in tender offers serves as a check on adverse selection. Would-be bidders who cannot increase value, and/or whose main goal is to abscond with corporate assets, will not be able to offer the requisite premium.
6. Takeover proponents have also argued that by transferring assets to new owners, acquisitions facilitate quick shifts in policy. With ownership in the hands of a small partnership, the company may no longer be public, allowing new owners to make drastic changes without protracted negotiations with entrenched interests or remaining public shareholders. Because the new owners are likely to have borrowed significantly to finance the acquisition, they are likely to have stronger incentives to increase profitability than did the previous owners. Thus, the combined effect of private ownership and high finance costs arguably improves performance.

Notwithstanding the advantages of this model, there are several pitfalls with the model. This accounted for the increasing growth of the political model as an alternative. The takeover model is a one way model that focuses only on an outright sale of the company. Mistakes are bound to occur but takeover model punishes mistakes by dissolving or dismissing management without giving them an opportunity to correct their mistakes. It does not give room for flexibility and the best management does make mistakes and if they are sent packing because of one mistake, there will be no growth. Even the new management will be afraid to take decision because they will be afraid of making mistakes to avoid the enterprise being sold.

Moreover, the model is too expensive as the sale of a company brings along other administrative expenses which may not be envisaged and this cost is in turn built into the economy and the final consumer bears the burden. Those expenses may include commissions to be paid to intermediaries for brokering the sale, legal fees and tax.

Another major problem is that sale of control is not in the overall interest of the economy and the public at large. The shareholders may make enormous gain because of the premium but where the enterprise is purchased by a raider, it may soon face extinction and the enterprise may be resold again or even fold up altogether destroying the corporate franchise. So some people felt it is not really a model of governance but a stop gap model.[100]

In addition, the takeover model may lead into monopoly whereby investors with strong financial base can buy up all other similar business and become the only producer and there will be no competition and effective utilization of resources. This point has been identified by a Wall Street Magazine[101] since 1929 when it argued that the large mergers of the time were caused by greed, lust for power, and desire to eliminate competition.

Not very favourable words have been used for the actors in this takeover business. A catalogue of some negative opinions about them was chronicled as follows: It hardly needs stating that such affirmations are nowhere to be found in popular writings on the takeover mechanism in the 1980s. In books, movies, and popular reporting, takeover artists were portrayed as cynical, wealthy manipulators, out to make millions by exploiting corporations and their shareholders.

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100 Ibid. at 1022-3.

101 Knappen, T.M. "What Inspires Today's Mergers?" Mag. Wall Street, 4 April, 1929, at 1000 cited by Pound, J. Ibid. at 1025.

Suspicion of their motives was pervasive, and popular support of their activities was rare. In 1985, for example, Business Week published a cover story entitled "The Raiders"; the cover painting depicted a not-very disguised T. Boone Pickens with his face obscured by an outlaw's kerchief. The 1987 film Wall Street chronicled the pursuits of a corrupt and greed-driven raider who ruthlessly manipulated stocks, conducted insider trading, and contributed to the destruction of major corporations. Virtually all books on the subject chronicled the alleged abuses and arrogance of financial entrepreneurs engaged in both hostile and friendly deals.[102] This may account for enactment of antitrust law in some countries whereby large shareholders are required to file disclosure form with necessary government department like Federal Trade Commission in the US or Monopoly Commission in Germany (which limits banks holdings in a nonbanking corporations to a maximum of five percent) and they must receive the approval of the government agency before buying more than a percentage (in US 15% or $15 million whichever is less) of the public company stock.

Again takeover model will only be effective in an economy where both equity and debt financing are well developed and the investment banking solid. In an economy like Nigeria where the debt financing is most unstable, unpredictable and uncertain, this model will only be of little use. Since the privatization exercise in Nigeria, only shares of a few company has been acquired in that manner. Again the bankruptcy law is not well developed to protect creditors for a failure of their money. As explained by Chongs and Lopezde- Silanes,[103] before privatization, government banks are typically used as a source of financing. Yet in most privatization programs, the banking sector is one of those turned over to private hands.

If financing for privatized SOEs is expected to come from privatized banks or from any other private credit institution, there is an urgent need to make sure that creditors' rights, embedded in bankruptcy laws and the efficiency of courts are strengthened and streamlined.

Without proper bankruptcy procedures that allows for expedient recovery of assets, financial institutions will be afraid to lend in fear of potential losses and may end up failing to satisfy the financial needs of the private sectors.

Moreover the banking sector itself is rendered more vulnerable to crises without effective creditor's right as it loses its ability to repossess collateral expediently. The takeover model has not been very popular in civil law country like Germany and France.

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102 Pound, J. Ibid. at 1037-8.

103 Chong, A., and F. Lopez-de-Silanes. 'The Truth About Privatization in Latin America.' Working Paper at 42.

In Germany, workers have always campaigned vigorously against takeovers and politicians have always sided them against the capital owner as such no single hostile takeover succeeded in Germany until 1999.[104]

Mark Roe[105] recorded on France experience that takeovers did occur from time to time in France. But Ministry approval historically had usually been necessary, sometimes as a formal requirement, sometimes as an informal understanding. Moreover, the Ministry rarely approved a takeover without a social plan in place, one that had the offeror renouncing laying off any employee at the target for two to five years. If a no-layoff policy was the price for a takeover, as it usually has been, an offeror had to see a takeover as less valuable because restructuring would be harder (as restructurings often lead to layoffs) and because employees' motivation after the takeover might change for the worse. The Minister of Finance has been suspicious of high-priced takeovers because, as he said when deterring one such high-price offer in 1998, the "high price means the buyer would have to look immediately at higher profits to pay for the acquisition, which could be negative . . . for jobs." Until 1999 the state often decided takeover results and, even when it withdrew from overall control, it continued to seek to avoid takeovers that would yield "a social massacre" with "massive layoff[s]

While criticizing the takeover model, Bernard Black[106] said that takeovers have their place, but they are a costly and imperfect way to discipline wayward managers. Only a badly mismanaged target can justify the typical 50% takeover premium. Hostile takeovers also face strong legal obstacles, notably poison pills and state antitakeover laws, that didn't exist a few years ago.

And for companies with competent managers who just need closer oversight, the takeover remedy, which usually involves kicking out the old managers, is disproportionate to the problem, and adds large disruption and transaction costs. So it's important to know whether shareholder voice can't work, as the critics claim, or whether it just hasn't been tried.

The poison pills in takeover require the acquirer to tender not just for the block shares but all the existing shares. This is one of the major impediments to the model and often employed by the controllers to frustrate a hostile bid.[107]

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104 For details, see Boston, W. 'Hostile Deal Could Breach German Resistance.' *Wall Street Journal*. 17 November, 1999, at A17. Vodaphone's takeover of Mannesmann changed this.
105 Op. Cit. at 559.
106 Op.Cit. at 522.
107 See Roe, M. Op. Cit. at 592 and Grundfest, J.A. Op. Cit. at 858.

There is also what Mark Roe51 called capped voting whereby the voting rights of the shareholders can be restricted in a takeover bid. For instance, the controllers may by amending the charters incorporate poison pills and capped voting to frustrate a bid. Capped voting--by which no holder is allowed to vote more than, say, five percent of the votes at the firm's shareholders' meeting, no matter how much stock he or she owns--can prevent a new controller from entering. Capped voting played a role in late nineteenth-century Japan, when securities markets emerged in Japan's large cotton industry despite weak corporate law. Its lacklustre history in Europe in recent years a few firms in Germany used it for awhile, then it was barred, but grandfathered, and most companies abandoned it suggests that it was creating more problems than it was solving.

The problem with corporate raiders is that they are only interested in taking over control of a company and thereafter they do indulge in a lot of insider dealing to the detriment of the minorities and sometimes they use their subsidiary company to expropriate the company‘s funds. While the law is interested in acquisition, it ensures that the acquisition is made purposely for investment and not to take over management.

Thus, with all these problems and constraint with takeovers, shareholders cannot expect much help from the capital marketing disciplining or removing inefficient managers. Merger and acquisition became a popular scenario during the last banking recapitalization in Nigeria. The management of most of the banks acquired were sacked. For instance, Diamond Bank PLC acquired the shares of Lion Bank PLC. After the acquisition, the management of lion Bank PLC was sacked. The operation of Lion Bank PLC is now integrated into Diamond Bank PLC. The same thing happened in the merger of Standard Trust Bank PLC and United Bank for Africa.

According to Tunde Ogowewo,[108] a takeover may be effected through any of the following ways in Nigeria:

1. Private treaty: This is used when majority of the shares are in the hands of one or few shareholders who can sell their shares to those seeking to take control of their company.

2. This method was used in the acquisition of Lion Bank PLC by Diamond Bank PLC where the majority shareholders in Lion Bank PLC sold their shares to Diamond Bank PLC thus leaving the management of Lion Bank PLC with no chance than to succumb to acquisition by Diamond Bank.

[108] See Ogowewo, T.I. Op. Cit. at 19.

Where the Companies are listed on the floor of the Stock Exchange, Rule 109(A) of SEC‘s regulation must be complied with. The rule requires any transaction made by a shareholder in his shares which is more than 5% of the share capital to be filed with the commission on form SEC 6B within five days of the change of ownership.

3. The second method of effecting a take-over in Nigeria is through a reconstruction otherwise known as arrangement and compromise in pursuant of a voluntary liquidation under section 583 part xvi of the Companies and Allied Matters Act (CAMA).

Here, a company may by special resolution resolve that the company be put into member‘s voluntary winding up and that the liquidator be authorised to sell the whole or part of its undertaking or assets to another body corporate, whether a company or not, in consideration or part consideration of fully paid shares, debenture, policies, cash or other like interests in the transferee company and to distribute the same in species among the member of the company in accordance with their rights in liquidation. This arrangement by a special resolution shall be binding on the company and all the members thereof. This does not require an order from the court except where, within one year of the special resolution, there is an action for relief on grounds of unfairly prejudicial and oppressive conduct or a creditor voluntary winding up is brought. A member may also within 30 days dissent to the arrangement by giving proper notice to the liquidator and the liquidator may either abstain from carrying the special resolution into effect or purchase the shares of the aggrieved shareholder in line with the price determined by Securities and Exchange Commission; in the case of a public company or a private company where an alien is involved and in all other cases at the market value as a going concern less the rateable cost of winding up.

Commenting on this type of takeover, Tunde Ogowemo[109] said- A reconstruction in pursuance of a voluntary liquidation under the CAMA can be used to bring members of two companies together as members of one company owing the Joint enterprise of both companies.

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109 Ibid. at 20.

In another article, Tunde Ogowemo[110] stated that a reconstruction under this provision can also be effected either by one company going into voluntary winding up and its business transferred to another company or two companies giving into voluntary liquidation and by special resolutions transferred their undertakings to another separate company in consideration for the shares of this latter company. The writer,[111] however, criticised the price fixing role reserved for SEC under the Section 583(4) of CAMA.

4. Conclusion and Recommendations

Privatization exercise in Nigeria was the result of the failure of the public enterprises; as government could not justify the huge amount spent on those enterprises yearly. Privatization is today a reality in Nigeria and several enterprises have been privatized. In the process, large numbers of shareholders were created for those companies which have not been witnessed in Nigeria before. This has introduced a form of dispersed ownership into the Nigerian corporate governance debate.

The rivalry between the board of directors and the general meeting in the management of a company was also examined. The various management theories arising thereby viz- management theory and parallel theory were discussed. The common law position and controversies were x-rayed and the relevant provisions of the CAMA clearly brought out in the work. While it may be correct to say that management powers are vested on the board of directors, there are certain statutory powers that can only be exercised by the general meeting. Moreover, directors may have to refer certain transactions to the general meeting for ratification. So the general meeting exercises some form of supervisory powers over the board of directors.

The initial corporate governance debate was based on the conventional majority rule as established in the case of *Foss v. Harbottle*.[112] If a wrong is committed against the company, it is the directors that can bring an action to remedy such wrong. Where the directors fail to do this the shareholders can always remove the directors and in addition institute the action to remedy the wrong. This is part of corporate oversight in corporate governance.

However, where the directors and shareholders, using their majority votes approve of such wrong, then a minority may be left without a remedy.

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110 Ogowemo, T.I. 'Reconstructions by a winding liquidation in Nigeria: A step ahead of the British, (1995) 16 *Contemporary Lawyers* 317.
111 Ibid. 519.
112 (1843) 67 ER 189.

The majority shareholder may deliberately appropriate the company's property to the disadvantage of the company itself and the value of the shares of the company diminished.

It is the minority shareholders that will be worst off for it. The common law recognized minority action through personal or derivative action. Subsequently, several statutory protections were allowed as discussed in this work. Those remedies have to, a large extent, empowered the shareholders to perform corporate oversight on the directors.

Moreover, relevant legislations on the privatization exercise in Nigeria were discussed in this work. The idea of privatization entails well-established legal frameworks which include securities, commercial and even banking legislation. From 1988 when exercise started in Nigeria, we have witnessed the enactment of three principal legislations on privatization and commercialization viz the Privatization and Commercialization Act of 1988, the Bureau of Public Enterprises Act 1993 and the current Public Enterprises (Privatization and Commercialization) Act of 1999. A necessary condition for the success of the privatization exercise is a well-established Stock Exchange Market for a successful public offer. The Nigeria Stock Exchange, since 1988 when the privatization exercise commenced, recorded her greatest boom. Consequently in 1999, Government decided to introduce more comprehensive and wide legislation on the operation of securities in Nigeria with the enactment of the Investments and Securities Act.

Moreover, in order to encourage more foreign investment and foreign participation in the privatized enterprise, the Nigerian Investment Promotion Commission Act was enacted in 1995. The Act repealed the Nigerian Enterprises promotion Act of 1988, which in so many ways restricted foreign investment. The National Council on Privatization (NCP) and Bureau of Public Enterprises (BPE) have been the pivot institutions for the privatization exercise in Nigeria. In some countries, privatization is de-centralized with each enterprise selecting and implementing its own method of privatization, such as in Czech Republic. But in Nigeria, it is centralized; the NCP and BPE have been responsible for the Privatization of all the enterprises. The Securities and Exchange Commission also played some significant role. Unlike in some countries where those enterprises were sold in their existing state or condition, in Nigeria, there was a transformation of those enterprises into a new corporate entity so as to make the shares more marketable through the capital market. On transformation, the Federal Government shares are maintained until privatized. This is in contrast to the practice in some countries where on transformation, Government shares are held by the privatization Agency. For instance in Hungary, the State Asset Holding Company held government shares before privatization to the public.

All the enterprises privatized were first converted into public companies and their shares were sold to the public through the stock exchange. Therefore, the companies will apart from complying with the rules of corporate governance also have to comply with the rules of the stock exchange. There are some listing rules of the stock exchange that enhance good corporate governance.

All the privatization methods were adopted in Nigeria. This ranged from public offer to private placement, to deferred offer, to management buyout and sale of assets. In all, the public offer system has been subjected to the due processes of law, the other methods, especially private placement involving sale to core investors, deferred offer and sale of assets were not carried out in line with the provisions of the Investments and Securities Act and the Companies and Allied Matter Act.

It has been established in the work that the lack of good corporate governance led to the collapse of the Czech and Polish stock exchanges after their own privatization. The reason for the crash, as stated by John Coffee,[113] was because the privatization was carried out under a legal regime that was meant for concentrated ownership while privatization produced dispersed ownership.

Thus, shareholders of those privatized companies decided to seek for a fairer rules and they began to pressure for legal changes. Corporation law is being considered as a powerful tool for development. And as pointed out by Berle and Means3, modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state and they predicted that in the future, the corporation could supersede the state and might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship. This prediction is fast coming to pass in this era of liberalization with the evolving international rules of best practices.

One of the major concerns of this work is how to reduce the agency cost of monitoring corporate performance. Thus, we examined the concept of managerial agency cost as propounded by Mark Roe4. This has been identified as one of the reasons for shareholder‘s passivism. The only way out of this is getting the shareholders together to share the cost of monitoring performance. The growth of institutional investors in Europe and America has greatly helped in reducing agency cost. This is because, apart from the fact that they hold shares in several companies, they have gotten the resources and the expertise to monitor management. The emerging Shareholders Associations in Nigeria is expected to play a similar role.

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113 See Coffee, J.C. Jr. 'Privatization and Corporate Governance: The Lesson from Securities Market Failures.' Op. Cit. at 23.

In this work, I have also considered the various models of corporate governance and have seen that the United States and United Kingdom experience on dispersed ownership and the post Enron reforms will no doubt be significant in determining corporate governance for a post privatized Nigeria.

The German co-determination systems as well as the Japanese baking system and leverage buy out were also in focus. Until recently, corporate governance structure gave large public companies in the United States and United Kingdom little reason to make their primary focus shareholders interest; their aim was not to maximize shareholder‘s wealth but rather ensuring growth of the companies. The proxy system was dominated by management and corporate board tended to be dominated by management resulting in boards with weak oversight. The shareholders were powerless and the option opened to them was to sell their interest in the company. Thus, takeover was common and the takeover model of corporate governance evolved. This also grew up the use of debt financing as many companies repurchased their own shares, borrowed to finance takeovers and this led to the Management/leveraged buyout model of corporate governance.

The takeover model resulted in series of fraud and corporate raid, with its concomitant method of tunnelling. By the 1990s, the face of corporate governance began to change. Other corporate governance mechanisms began to play a bigger role such as greater involvement of boards of directors and shareholders and executive stock options. Thus, shareholders value became an asset and not a threat and the fear that management will pursue their own objectives at the expense of shareholders began to diminish. Thus, the era of takeover deals was aimed at forcing assets out of the hands of the managers who could not use them effectively. There is therefore, a move towards shareholder value and increased capital market influence. Managers have ceded authority to the markets. We are now in the era of the political model of corporate governance where shareholders are given wider opportunities for corporate participation through proxy reforms and the institutional investors who have brought professionalism into corporate governance. The transparency model as well as the stakeholder‘s model also emerged in the process. All these were discussed in this work.

4.01 Recommendations

One of the ways of organizing the dispersed shareholders for corporate monitoring is through the instrument of proxy. In view of the problems associated with the proxy system, the Japanese and the German bank-proxy model is being recommended as a means of reforming the proxy system in Nigeria.

Under the bank-proxy system, the shares are bought by the banks on behalf of their customers who executes proxy authorization on their behalf so that the bank can sit on the board of those companies and also vote at the general meeting. Most of the time those banks also have shares in those companies. The proxy rules process should be changed to accommodate relatively new and important category of shareholder activity namely the desire to influence management and board of directors without directly seeking control of the entire board through proxy contest. In some cases, a shareholder

Advisory Committee is put in place to serve as a shadow board. This is a product of the voting rights exemplified in the proxy process. It is further recommended that the management of the affairs of the company should be left in the hands of the directors. Directors are technocrats in the art of corporate governance and they are in a better position to manage the affairs of the company and control management. However, we have witnessed several cases where the directors have failed in their responsibility resulting in cases of corporate scandals ever recorded in history.[114] This led to various suggestions as to the composition of the board of directors. Some people have advocated for a single board consisting of independent directors.

Others prefer a dual board structure as in Germany. Because of the peculiar situation of Nigeria, the unitary board with independent directors is hereby recommended. However, for public companies, half of the board should consist of independent professional outside directors. The directors will serve as full time basis and they will be on the board of several companies. This will consist of academics, chartered accountant, management and financial experts etc.

It is also recommended that good corporate governance can only be achieved by a combination of both formal and functional convergence. Formal convergence alone may not be effective but functional rules without some elements of coercion will even be less effective. Most of the principles expressed in the rules of best practices are already part of an existing legislation which is enforceable. The conventional means of minority protection is no longer suitable for the type of dispersed ownership we are now witnessing in Nigeria. In order to avoid the crash of our stock exchange, just as it happened in Czech and Poland, urgent steps must be taken to evolve a suitable corporate governance rules. As we have pointed out that the British conventional means of minority protection afforded protection against controlling shareholders and not against management.

[114] For example, the fall of hitherto acclaimed first class companies like Enron, WorldCom, Tyco International, Adelphia Communications, Imclone, Nicor, Global Crossing, Sprint and Merck in the case of the United Stateswoke the corporate world from its inebriate slumber.

While the government has taken steps to reform the capital market, however, the level of ignorance on the part of Nigerian investors is still a cause of serious concern. Therefore, the SEC and Stock Exchange still have a lot to do in sensitizing the investors on the operation of the securities market.

The leveraged buyout option is being recommended for Nigeria. As we have seen in LBO brings together three groups of people (expert in their own right)-the management, the financier (banks) and institutional Investors. It is also a cross between equity capital and loan capital.

Because of the involvement of funds from the bank, there is effective check in the management to run the enterprises to repay back the loan. This process could have complemented the public offer for sale employed by the banks in making the mandatory equity ceiling of the Central Bank of Nigeria.

Although, there has been significant inroad to derivative action under CAMA, much still has to be done in this area. As has been shown in this work,[115] the derivative action has been more effective in the United States which gave shareholders unhindered access to the court to challenge any corporate wrong. Nigeria has a lot to learn from the U.S system. Moreover, there will be the need to clearly spell out, as is done in England presently, the procedures for bringing a derivative action under the Rules of the Federal High Courts in Nigeria as far as it affects corporate rights.

It is recommended in this work that institutional investors should get more involved in the sale of shares on the stock exchange. There is a need for a systematic growth of this investment group in Nigeria especially with the dispersed ownership being witnessed today. It is against this background that we further endorsed the three approaches suggested by John Coffee[116] for a privatization economy like Nigeria.

Apart from suggesting optimal monitor through the institutional investors who has the necessary skill to monitor management, he suggested three approaches to reforms in privatized economy of the civil law jurisdiction. They are Judicial, Structural and Legislative reforms. In his judicial reforms, he posited that the courts should be prepared to fill any vacuum created by statutory provisions. A corporate charter is highly incomplete contract and those gaps contained in the contract must be filled up.

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[115] Privatization and Corporate Governance: The Lessons from Securities Market Failure, Op. Cit at 27- 32.

[116] Coffee JC. Jr, ibid n. 114.

That the courts in common law jurisdiction has much more discretion to fill in the gap than those of civil law jurisdiction and this accounted for the protection offered by the corporate governance of common law countries.

Another aspect of judicial reforms he recommended has to do with the establishment of specialized courts to hear and determine security law disputes. For instance, in the US some aspects of the Federal Securities Act can be enforced before administrative law judges and SEC has powers under section 21C of the Act to impose administrative cease and desist‖ orders-in effect, a type of civil injunction. This is a form of in-house securities remedy. Section 224 of the Investments and Securities Act 1999 in Nigeria established an Investments and Securities Tribunal which powers seem to cover this.

However, there is the need to train judges of the tribunal on corporate governance and especially on securities law. The time for our public companies to devote more funds to serious professional research on corporate governance has come. This should not be left for government or agencies like SEC, CAC alone. The study carried out by John Pound[117] showed that the institutional investors in the US devote enormous resources to research.

Thus, institutional investors would not mind committing a sum of $18 million on research in order to get an appreciation in the value of the shares that may fetch additional $80 in a year. The SEC could come in here and insist on companies committing a percentage of their fund on research and also the Bureau of Public Enterprises could do same for their privatized enterprises. The special share introduced in Britain for privatized company can also be explored in Nigeria to prevent a situation where the privatized companies are left exclusively at the mercy of core investors. One of the reasons for bringing in core investors and giving them majority shares is because they are considered to have the required technical and managerial abilities to manage those enterprises better. So Government could retain some shares in enterprises rendering essential services to avoid a situation where the country could be held to ransom. However, government will undertake not to be involved in the directional policies of the company.

It is also recommended that the Nigerian Bar Association should be more involved in the evolution of suitable corporate governance for Nigeria. They should take a clue from the American Bar Association which has intervened severally to ensure that effective corporate governance rules are put in place in the United States. For instance, in March of 2002, following the bankruptcy of Enron, the President of the American Bar Association appointed a task force to investigate corporate responsibility concerns.

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[117] Cited by Coffee, J.C. Jr. Ibid.

The task force produced a report which has been helped in shaping corporate governance debate in the United States. The Nigerian Bar Association should follow this honourable path.

It is recommended that the Nigerian codes of best practices should be reviewed with the aim of incorporating some of the corporate and securities legislations that were enacted since 1995. These legislations include the Nigerian Investment Promotion Commission Act, the Investments and Securities Act. This will give investors, especially international investors, a good idea of the investors' protection in Nigeria.