Corporate Governance Code and Corporate Governance Implications for Business: A Critique of Nigeria's 2016 and 2018 Codes

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Abstract

Corporate governance is the system by which companies are directed and controlled. Board of directors are responsible for the governance of a Nigerian company. However, the shareholders of a Nigeria company have power of oversight over the board. This power is exercised by a majority of shareholders. It is this separation of ownership and control that makes good corporate governance imperative to protect shareholders against corporate board misbehaviour, as well as to protect minority shareholders against the opportunism of corporate insiders (board of directors and majority shareholders). Even though corporate law is the primary legislation that regulates the corporation, corporate governance codes have become important corporate governance standards that helps to guide the board and promote effective managerial engagement with shareholders to promote corporate accountability. The Financial Reporting Council of Nigeria (FRCN) issued two corporate governance codes in two years – the National Code of Corporate Governance 2016 and the Nigerian Code of Corporate Governance 2018. This shows a clear intention to promote good corporate governance in the country. This essay identifies the peculiar corporate governance challenges in Nigeria, and reviews the two corporate governance codes to show how they address the peculiar challenges. The paper undertakes a criticism of the 2018 and compares to the 2016 Code and corporate governance regulations in other regulations. This criticism highlights the weaknesses in the code and the need for a review. The essay thus suggests a review of the 2018 to provide for Independent Non-Executive Directors dedicated to the interest of minority shareholders as an important first step towards providing access to corporate boards for minority shareholders, as a strategy for promoting corporate accountability. The paper concludes that since the very essence of a corporate governance code is to promote good corporate governance and accountability, any corporate governance Code for Nigeria must address the peculiarity of the Nigerian corporate environment for it to be able to achieve this purpose.

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I. Introduction

Corporate governance is a key driver of corporate accountability. The Nigerian Code of Corporate Governance 2018 seeks to institutionalise corporate governance best practices in Nigerian companies. The Code is also to promote public awareness of essential corporate values and ethical practices that will enhance the integrity of the business. By institutionalising high corporate governance standards, the Code will rebuild public trust and confidence in the Nigerian economy, thus facilitating increased trade and investment.[1]

The above is the stated aim of the Nigerian Code of Corporate Governance 2018. It is how the principles articulated in the Code can promote corporate accountability, and thus rebuild public trust and confidence in the Nigerian economy so as to be able to facilitate trade and investment that is the subject of the present inquiry. Even though corporate law is the primary legislation that regulates the business corporation,[2] the relevance of corporate governance codes to Nigeria and other common law jurisdiction that have adopted the UK shareholder centred model of corporate governance[3] cannot be overemphasised. Separation of ownership and control highlights this model. This separation created the potential for shareholder and managerial interest to diverge.[4] This makes the corporate governance code a useful standard to guide those in control on how to effectively engage with shareholders in order to promote corporate accountability.

This inquiry focuses on the protection of the shareholder class, especially the minority shareholders who are arguably the most vulnerable to corporate opportunism. The fact that the Financial Reporting Council of Nigeria (FRCN) issued two corporate governance codes within three years underscores the importance of corporate accountability to the Nigerian corporate environment. Therefore, this paper will interrogate the 2016 National Code of Corporate Governance (NCCG 2016) and the 2018 Nigerian Code of Corporate Governance (NCCG 2018) to find out how the current version can promote good corporate governance that will rebuild public trust and confidence in the Nigerian economy.

This interrogation will be followed with comparative critique of the 2018 Code. This criticism will involve a comparative analysis of the Nigerian 2016 Code and the NCCG 2018. Since corporate law is the primary legislation for regulating the corporation, references will be made to some provision in Nigeria's Companies and Allied Matters Act (CAMA)[5] as well as corporate law and other corporate governance rules and regulations in oth-

1 Nigerian Code of Corporate Governance 2018 at iv.

2 In Nigeria the Companies and Allied Matters Act (CAMA) Cap C20 LFN is the principal Act that regulates the relationship amongst corporate participants as well as the relationship between the corporation and some "outsider" groups, such as the trade creditors class.

3 *Lorain Talbot*, Progressive Corporate Governance for the 21st Century (Routledge 2013) at 162–163.

4 *Adolf A. Berle* and *Gardiner C Means*, The Modern Corporation & Private Property (10th Print, Transaction Publishers 2009) at 66–111.

5 Cap C20 Laws of the Federation of Nigeria (LFN) 2004.

er jurisdictions, such as the UK. The aim is to highlight the weaknesses in the Nigerian corporate governance system, and thus provide the basis to suggest the reform necessary to promote corporate accountability and long-term sustainable business success.

II. The National Code of Corporate Governance 2016 (NCCG 2016)

The National Code of Corporate Governance 2016 was the product of the Steering Committee on the National Code of Corporate Governance set up on the 17 January, 2013.[6] The focal remit of this Committee "was to harmonize and unify all the existing sectoral corporate governance codes in Nigeria".[7] The sectoral codes identified in Nigeria were the Code of Corporate Governance for Banks in Nigeria Post-Consolidation 2006, the Code of Corporate Governance for Licensed Pensions Operators 2008, the Code of Corporate Governance for Insurance Industry in Nigeria 2009, the SEC Code of Corporate Governance in Nigeria 2011 and the CBN Code of Corporate Governance for Banks and Discount Houses 2014.[8]

The reason for this harmonization and unification was "that there were not too many nations, and in fact none was observed during the Steering Committee's very extensive corporate governance literature reviews, that have adopted this sectoral multiplicity of governance codes".[9] This task of harmonization and unification of corporate governance codes in Nigeria, thus set the premise for the work of the Steering Committee of the National Code of Corporate Governance 2013.

The Committee identified the perceived challenges to good corporate governance practices in the Nigerian environment. First, the Committee identified "ownership structure and national culture as defining factors in the corporate governance system of any country because these determine broadly the nature of agency problem".[10] This is a fact acknowledged by current corporate law scholarship,[11] and it underpins the focus of the Committee towards delivering a corporate governance code that addresses Nigeria's peculiar challenges. Thus, even though the Nigerian corporate governance system is predicated on wide dispersal having adopted the Anglo-American corporate governance unitary board structure in which the dominant conflicts are between managers and shareholders,[12] the Nigerian investment environment presents a different characteristic. According to the Committee, the Nigerian investment environment is "replete with ownership concentration, in which the

6 NCCG 2016, at 4.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 NCCG 2016, at 5.

11 *Bryan Horrigan*, "Comparative Corporate Governance Developments and Key Ongoing Challenges from Anglo-American Perspectives" in Stephen Tully (ed), Research Handbook on Corporate Legal Responsibility (Edward Elgar Publishing, 2005) 20 at 20.

12 NCCG 2016 at 5.

dominant conflicts are usually between the controlling shareholders and the minorities, thus creating a mismatch between the country's ownership structure and its governance system".[13]

The implication of the above is that the more germane and dominant conflicts of ownership concentration between controlling shareholders and minorities are largely ignored. As a result, minority voice and protection, adequate disclosure, accountability, transparency and financial reporting integrity remain significant contending issues in Nigeria.[14] This is the basis upon which the 2016 Code was formulated to address the peculiar challenges in the Nigerian investment environment, especially to address the challenges of "insider"[15] opportunism against the company and those classified as corporate "outsiders".[16] One significant first step towards aligning the NCCG 2016 with the peculiarity of the Nigerian environment was that unlike the corporate governance Code in other jurisdictions which does not set out a rigid set of rules;[17] instead set voluntary principles,[18] compliance with the 2016 Code is mandatory.[19]

To address the challenges it has identified, the NCCG 2016 starts in Part C by defining the main purpose of the board in Principle 3. This is followed with responsibilities of the board in Principle 4.1 which provides that "[e]very company shall be headed by a board that shall govern, direct and be in effective control of its affairs". The main purpose as stated in Principle 3 "is to provide entrepreneurial, strategic and ethical leadership to a company, ensure that management is acting in the best interest of owners and other stakeholders through the board's advisory and monitoring roles".

It is perhaps important to discuss the basis for the powers of the board to manage a company at this point in order to understand why corporate governance aims to drive corporate accountability and business prosperity. A company becomes a legal person upon in-

13 *Ibid.*

14 *Ibid*. at 5.

15 *Rafael La Porta* classifies corporate managers and controlling shareholders as "the insiders"; see *Rafael La Porta et al.*, Investor Protection: Origins, Consequences, Reform' (1999) Discussion Paper Number 188, Harvard Institute for Economic Research, Harvard University.

16 The NCCG 2018 classifies persons connected to the company as "insiders". Examples are Directors and those shareholders with majority shares. See Principle 29.1.15. The term corporate "outsiders" is used to identify other corporate stakeholders, outside majority shareholders and directors, such as minority shareholders, employees etc. See *Luca Enriques, Henry Hansmann, Reinier Kraakman,* and *Mariana Pargendler*, "The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies" in *Reinier Kraakman et al.*, The Anatomy of Corporate Law: A Comparative and Functional Approach (3rd ed., Oxford Press 2017), pp. 79–108.

17 See the UK Corporate Governance Code 2018, at 1; see also King Code IV: Report on Corporate Governance for South Africa 2016, at 7.

18 See also King Code IV: Report on Corporate Governance for South Africa 2016, at 35.

19 NCCG 2016, at 6.

corporation.[20] However, this legal person is artificial, "invisible, intangible and existing only in contemplation of law".[21] As an artificial person it cannot perform its own act. It requires human organs to represent it and act on its behalf. The board of directors is that human organ that has the responsibility to act for the company and they owe a responsibility to the company and those who have brought it into existence. This is the basis for the duty of accountability which corporate governance seeks to drive.

To enable the board to effectively carry out its role of managing the company efficiently, the NCCG 2016 provides for a board structure that is composed of specified officers in Principles 5 and 6. The officers of the board include, the Chairman, the Managing Director/ Chief Executive Officer (MD/CEO), Company Secretary, Executive Directors (EDs), Non-Executive Directors (NEDs) and Independent Non-Executive Directors (INEDs). The discussion here will focus exclusively on the directors because they are those who are directly responsible to the shareholders under the Code.[22]

The NCCG 2016 prescribes minimum membership for a company's board and mandates a reflection of the different classes of directors on the board. Thus, membership of the board of a Nigerian public company shall not be less than eight (8),[23] and the number of EDs shall not be more than one-third of the board.[24] Other types of companies, such as regulated private companies that are not holding companies or subsidiaries of public companies shall have a board membership of not less than five (5). The membership of their board shall comprise at least three (3) non-executive directors (of which majority shall be independent non-executive directors).[25]

The Chairman shall head the board, but he shall not be involved in the day-to-day management of the business.[26] Day-to-day management of the company is the business of the

20 CAMA s 37. Section 37 of CAMA states that once a company is incorporated, it becomes a separate legal entity of its own, and it is different and distinct from the members that established it. But it should be noted that the company itself cannot act in its own, it is an artificial person, it can only act through human organs, agents and officers and in most cases, it acts through the directors. The relationship subsisting between the company and directors had been described as that of principal and agent. But the interesting aspect of company management is the nature of the relationship between the Board of Directors and the General Meeting. The position now is that the shareholders cannot interfere with the exercise of those powers given to the directors by the Article of Association, the shareholders at the general meeting can pass a resolution to remove the recalcitrant directors and put in their place person who agree to their policy, see *Shaw v Shaw* where powers to commence action was given to directors who validly commenced action in company's name. The General Meeting passed a resolution purporting to withdrawn the action from court. It was held that their resolution was nullify.

21 Per Justice Marshal in *Trustees of Dartmouth College v Woodward* (1819) 17 US (Wheat) 518 at 636.

22 NCCG 2016, 20–22.

23 NCCG 2016, Principle 5.4.

24 *Ibid*., Principle 5.5.

25 *Ibid*., Principle 5.7.

26 *Ibid.*, Principle 6.1.1 & 6.1.6.

MD/CEO and the executive directors.[27] The MD/CEO is the head of the Management and he is answerable to the board.[28] He must be an ED but shall not be the only ED on the board of the company.[29] To avoid the concentration of power in the hand of a single individual, the positions of the Chairman of the board and MD/CEO shall be separate and held by different individuals.[30]

The EDs are persons knowledgeable in relevant areas of the company's activities[31] and just like the CEO they shall be involved in the day-to-day management of the company.[32] The remuneration of the MD/CEO and EDs shall be determined by the remuneration committee.[33] In addition to the requirement for the office of the Chairman and the MD/CEO to be occupied by different individuals, there are other important restrictions on the functions of the Chairman, the MD/CEO and the EDs that aims to prevent conflict of interest. For example, the Chairman is precluded from sitting on any board committee. The EDs on their part are precluded from sitting on the nomination and governance committee, remuneration committee or audit committee (whether statutory or board audit committee) under any circumstance.[34] This effectively puts the matters that pertain to their interests in the hands of the other class of directors – the NEDs.

The NEDs is provided for in Principle 6.6. The NEDs are required to be appointed based on their experience, specialist knowledge and personal qualities,[35] and they are required to constructively challenge and contribute to the development of the strategy of the company.[36] As discussed below the NEDs are the group that dominates the committees. They have the responsibility for the performance evaluation of the MD/CEO.[37] NEDs, led by an INED, shall also be responsible for performance evaluation of the chairman, taking into account the views of EDs.[38] The mention of INEDs here makes it important to emphasise the position of INEDs as NEDs with peculiar characteristics necessary to maintain their independence. It is the peculiarity of their position that makes them a class of interest in this essay.

The INEDs hold special significance to this essay because of their role on the board concerning the interests of the minorities (outsiders). The fact that the NCCG 2016 recog-

27 *Ibid*., Principles 6.3,5 & 6.5.2.
28 *Ibid*., Principle 6.3.1.
29 *Ibid*., Principle 6.3.3.
30 *Ibid*., Principle 6.1.2.
31 *Ibid*., Principle 6.5.1.
32 *Ibid*., Principle 6.5.2.
33 *Ibid.,* Principles 6.3.8 & 6.5.6
34 *Ibid*., Principles 6.2 & 6.5.11.
35 NCCG 2016, Principle 6.6.1.
36 *Ibid.*, Principle 6.6.2.
37 *Ibid*., Principle 6.6.3.
38 *Ibid*., Principle 6.6.4.

nises some corporate actors as "insiders"[39] makes it relevant to investigate how the Code addresses their relationship with the corporate "outsiders". The "insiders" may not always behave well, which makes the protection of the company and the "outsiders" imperative to build public trust and confidence in the Nigerian company.

According to the NCCG 2016, "[t]he main purpose of independent non-executive directors is to bring a desired degree of objectivity that sustains investors' trust and confidence by representing a strong independent voice on the board".[40] Apart from the fact that an INED is required to be independent in character and judgement, he must be a non-executive director who "[i]s not a substantial shareholder of the company (that is, one whose shareholding, directly or indirectly, does not exceed 0.1% of the company's paid up capital) or a nominee of a substantial shareholder".[41]

To ensure accountability, and thus public confidence, the major committees of the board are required to be peopled by a majority of INEDs. Except for the Risk Management Committee which shall be composed of majority of non-executive directors with at least one of which must be an independent non-executive director,[42] other committees are required to have more INEDs. For example, the Nomination and Governance Committee[43] and the Remuneration Committee[44] are required to be composed of at least three members who shall be NEDs, with a majority as INEDs.

It is noteworthy that the INEDs are to appoint one among themselves as the lead independent non-executive[45] because of the vital role of that the lead INED and other NEDs play in the relationship between the board and shareholders. First, the lead INED is to preside at the exclusive meetings of NEDs and separate meetings of INEDs.[46] Secondly, the lead INED is to provide a sounding board for the chairman and to serve as an intermediary for the other directors where necessary.[47] Thirdly, "[t]he lead independent non-executive director shall be available to shareholders if they have concerns which contact through the channels of chairman, chief executive or other executive directors has failed to resolve or for which such contact is inappropriate."[48]

39 The 2016 NCCG classifies a director of the company or a related person, an officer of the company, an employer, any shareholder of the company who owns 5 per cent or more of any class of securities or any person who is or can be deemed to have any relationship with the company or member. See NCCG 2016, Principle 40.1,9.

40 *Ibid*., Principle 6.7.1.

41 *Ibid*., Principle 6.7.3.

42 NCCG 206, Principle 8.15.

43 *Ibid*., Principle 8.12.

44 *Ibid*., Principle 8.13.

45 *Ibid.*, Principle 6.2.1.

46 *Ibid*., Principle 6.2.3.

47 *Ibid.,* Principle 6.2.1.

48 INCCG 2016, Principle 6.2.2.

The Code specifically provides for a role for NEDs and particularly for the lead INED in interactions of the board with shareholders. The Code requires the board to establish a system of constant dialogue with shareholders, majority and minority, based on mutual understanding of the objectives of the company. The responsibility of ensuring that this dialogue takes place is that of the board as a whole.[49] It is the responsibility of the Chairman or the lead INED (where appointed) to ensure that the views of shareholders are to the board as a whole.[50] NEDs may also attend meetings with majority and minority shareholders if requested.[51]

According to Principle 20.4, "[t]he lead independent non-executive director (where appointed) may attend meetings with a range of shareholders to listen to the views in order to help develop a balanced understanding of the issues and concerns of shareholders"[52] The board is mandated to state in the "annual report the steps it has taken to ensure that the members of the board, and in particular the INEDs,[53] develop an understanding of the views of all shareholders about the company.[54] The addition in Principle 22.2 that [i]t is the responsibility of the board to ensure that minority shareholders are treated fairly at all times and adequately protected from abusive actions by controlling shareholder" underscores the focus of the Steering Committee on addressing the peculiarity of the Nigerian corporate environment.

To ensure that the management comply with the principles articulated in the 2016 Code, the Code provides for sanctions for non-compliance. The next section will discuss the principles articulated in the 2018 Nigerian Code of Corporate Governance to identify the weaknesses in the 2016 Code that the 2018 Code seeks to address. This is important because its urgent review suggests that it may not have adequately addressed the challenges in the Nigerian corporate environment.

III. The Nigerian Code of Corporate Governance 2018 (NGGC 2018)

The Nigerian Financial Reporting Council issued a new corporate governance code in 2018 to replace the suspended NGGC 2016.[55] The reasons for the suspension of the 2016 Code

49 *Ibid*., 2016, Principle 20.1.

50 *Ibid.*, Principle 20.2.

51 *Ibid.*, Principle 20.3.

52 *Ibid*., Principle 20.4.

53 Emphasis added.

54 NCGC, Principle 20.5.

55 The NCCG 2016 was suspended in the same year for reasons not directly related to the issues addressed in this essay. See The Nigerian Stock Exchange "Circular on the of the Financial Reporting Council of Nigeria's National Code of Corporate Governance for the Private Section" NSE/LARD/LED/CIR10/16/10/20, dated 20 October 2016 at http//www.nse.com.ng/Listings-site/corporate-disclosure-site/Document/Circular%20on%20Suspension%20of20the%FRC20. Accessed 17th June 2019.

are not related to the issues addressed in this essay but it suffices to state here that issuing a new code to replace the 2016 Code implies a deficiency in the Code that is sought to be replaced. This section will review the Principles articulated in the 2018 Code to identify the improvements made on the 2016 Code, and how those improvements aim to promote corporate accountability by protecting the most vulnerable groups against insider opportunism.

This is especially important given that the stated aim of the 2018 Code is to promote corporate accountability and business prosperity by institutionalising corporate governance best practices in Nigerian companies and promoting public awareness of essential corporate values and ethical practices that will enhance the integrity of the business.[56] To achieve this aim the Code adopts a principle-based approach that puts the implementation of the Code in the hands of the board of directors (the Board). It is the responsibility of the board to apply the principles of the Code and explain how the principles are applied. This is known as the "Apply and Explain" approach.

The Code recognises the board as the highest governing body in a company and their central role in corporate governance.[57] It is in view of this that the Code provides copiously for a board structure and its composition as well as for the responsibilities of the different classes of board members. There are three classes of directors provided for under the Code – executive directors (EDs), non-executive directors (NEDs) and independent non-executive directors (INEDs). The leadership of the company is drawn from these groups.

Amongst the things that the board is required to consider is that its composition reflects the appropriate mix of executive, non-executive and independent non-executive directors such that the majority of the board are non-executive directors, and most of them independent non-executive directors.[58] The board is required to promote diversity in its membership across a variety of attributes such that no individual or small group of individuals should dominate the board's decision-making.[59]

The board is headed by a Chairman.[60] The Code provides that the chairman should be a non-executive director who should not be involved in the day-to-day running of the business.[61] It is perhaps important to discuss the roles of the different classes of directors here so as to better understand the positions of certain officers on the board, such as the position of the Chairman and that of the Managing Director/Chief Executive Officer (MD/CEO. First is that EDs support the MD/CEO in the day-to-day management of the company.[62] EDs hold service contracts and their responsibilities and authority are required to be clearly

56 NCCG 2018, at iv.
57 NCCG 2018, Principle 1.
58 *Ibid.*, Principle 2.3.
59 *Ibid*., Principles 2.4 & 2.6.
60 *Ibid*., Principle 3.
61 *Ibid*., Principle 3.2.
62 *Ibid*., Principle 5.

set out in their contract of employment.[63] The NEDs on the other hand, are people chosen on the basis of their wide experience, knowledge and personal qualities who are expected to bring those qualities to bear on the company's business.[64] NEDs do not hold service contracts and they are not involved in the day-to-day management of the company.[65]

Finally, INEDs are NEDs according to Principle 7.2, who are required to represent a strong independent voice on the Board, in addition to being independent in character and judgement.[66] It is for this reason that Independent Non-Executive Directors are required to be persons who do "not possess a shareholding in the Company the value of which is material to the holder such as will impair his independence or in excess of 0.01% of the paid up capital of the Company".[67] Amongst the many restrictions[68] is that the INED must not be a representative of a shareholder that has the ability to control or significantly influence management.[69]

Thus, the chairman who leads the board is a non-executive director who should not be involved in the day-to-day running of the company which is the primary responsibility of the MD/CEO and the EDs.[70] As a result, the MD/CEO and the EDs should not go on to become the Chairman except under very exceptional circumstances as specified in Principle 3.3. The MD/CEO is the head of the management and his primary functions and responsibilities include the day-to-day management of the company, promoting and protecting the interest of the company amongst many others enumerated in Principle 4.4.

To avoid conflicts of interest, the Chairman is prohibited from serving as chairman or member of any Board Committee, and the position of the Chairman and the MD/CEO of the company are required to be separated so that no one person can combine the two positions. For the same reason, the MD/CEO or an Executive Director is not permitted to serve as the chairman of any Board Committee. In addition, the MD/CEO is not permitted to be a member of the committees responsible for remuneration, audit, or nomination and governance.[71]

Principle 1 of the Code provides that a successful company is headed by an effective board which is responsible for providing entrepreneurial and strategic leadership, and as the link between stakeholders and the company, the Board is required to exercise oversight and control to ensure that management act in the best interest of the shareholders and other

63 *Ibid*., Principle 5.6.

64 *Ibid*., Principle 6.1.

65 *Ibid*., Principle 6.3.

66 *Ibid.*, Principle 7.1.

67 NCCG 2018, Principle 7.2.1.

68 See the broad range of restrictions for the appointment to the board as an INED is Principle 7.2 generally.

69 *Ibid*., Principle 7.2.2.

70 *Ibid*., Principle 3.2.

71 *Ibid*., Principle 4.7.

stakeholders. To be able to ensure efficiency and effectiveness in the discharge of their responsibilities, the Code provides for the board to delegate some of its functions, duties and responsibilities to well-structured committees, without abdicating those responsibilities.[72]

The Committees provided for under the Code are: Committee responsible for Nomination and Governance,[73] Committee responsible for Remuneration,[74] Committee responsible for Audit,[75] and the Committee responsible for Risk Management.[76] Apart from the Committee responsible for Risk Management which is required to comprise of EDs and NEDs with a majority of them being NEDs, all the other Committees should be comprised exclusively of NEDs and INEDs with majority of the members being INEDs.[77]

The NCCG 2018 identifies certain corporate participants as "insiders". The "insiders" according to the Code include directors and "any shareholder of the Company who owns five percent (5%) or more of any class of securities".[78] The dominance of these corporate "insiders" in the control of a corporation and the fact that this could be exploited at the expense of minority shareholders is also recognised by current corporate law scholarship.[79] It is for this reason that we argue that the "insiders" who normally have inside knowledge of a company's operations are able to look after their own interest. Therefore, for the purposes of accountability and business prosperity corporate codes should normally focus on those relationships that are susceptible to abuse by the corporate "insiders". A review of the provisions of the 2018 Code dedicated to shareholders protection is undertaken below to show how the Code addresses relationships with the most vulnerable groups.

Part C of NCCG 2018 is dedicated to the relationship of the Board with shareholders. The Code attaches great significance to company's meetings especially general meetings.[80] According to Principle 21, "[g]eneral meetings are important platforms for the Board to engage shareholders to facilitate greater understanding of the Company's business, governance and performance". Therefore, general meetings should be conducted in an open manner allowing for free discussion on all issues on the agenda.[81] In addition to the requirement that chairmen of all board committees and Statutory Audit Committee should be present at general meetings to respond to shareholders' inquiries, the venue of the general meeting must also be accessible to shareholders amongst other requirements under Principle 21.

72 NCCG 2018, Principle 11.
73 *Ibid*., Principle 11.2.
74 *Ibid*., Principle 11.3.
75 *Ibid*., Principle 11.4.
76 *Ibid*., Principle 11.5.
77 *Ibid.*, Principles 11.2, 11.3, and 11.4.
78 *Ibid*., Principle 29.1.15 (iv).
79 *Enriques, Hansmann, Kraakman,* and *Pargendler*, note 16 at 79.
80 NCCG 2018, Principle 21.
81 NCCG 2018, Principle 21.1.

Principle 22 provides for shareholder engagement. It requires [t]he establishment of a system of regular dialogue with shareholders balances their need (sic), interests and expectations with the objective of the company". As a result, the board is required under Principle 22.1 to develop a policy that ensures appropriate engagement with shareholders that should be hosted on the company's website. The Code also provides for the protection of shareholder rights in Principle 23. In this regard, equitable treatment of shareholders and the protection of their statutory rights and general rights, particularly those of minority shareholders is required to promote good governance.[82] To achieve this, the board is mandated to ensure that minority shareholders are adequately protected from abusive actions by controlling shareholders.[83] Finally the directors are required under Principle 23.2 to [a]t all times act in good faith and with integrity in the best interest of shareholders, and provide adequate information to shareholders to facilitate their investment decisions.

The next section will critique the NCCG 2018 with a view to understanding how far the principles articulated in the code meet the objective of driving accountability by minimizing "insider" opportunism against the company and the minority shareholders. A major aspect of this criticism will involve a comparative review of the NCCG 2016 and the 2018 Code. It will also make references to corporate governance regulations in other countries, especially the UK to underscore the weaknesses in corporate governance regulation and practice in Nigeria. This will provide a basis to suggest the reform necessary to promote corporate accountability in Nigeria.

IV. Critique of the Nigerian Corporate Governance Code 2018

To achieve the major aim of this critique, a good starting point will be to understand what corporate governance is, and why good corporate governance is necessary. To explain corporate governance, this paper adopts the definition of the concept offered in the first version of the UK Corporate Governance Code (the Code) published in 1992 by the Cadbury Committee. The Committee did not only define corporate governance but also explains the groups responsible for the governance of a company as follows: corporate governance is "the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies".[84]

This definition by the Cadbury Committee raises a fundamental question about the beneficiaries of directors' responsibility. The Nigerian CAMA answers this question in section 283 which provides that "[d[irectors are trustees of the company's moneys, properties …, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interests". The focus on company's shareholders is generally associated with the UK and the US corporate governance system that is high-

82 *Ibid*., Principle 23.

83 *Ibid.*, Principle 23.1.3.

84 See the introduction to the UK Corporate Governance Code 2018 at 1.

lighted by the separation of ownership and control of the company. This model is commonly referred to as the shareholder primacy model.

Separation of ownership and control created the potential for shareholder and managerial interest to diverge[85] thereby creating the imperative for managerial control otherwise referred to as corporate governance. Even though the separation of ownership and control is fundamental to issues about corporate governance, it is the importance of the company itself as the major driver of economic activities that has made the concept a topical issue in international and national socio-political and economic discourse since the 1990s. Companies are no doubt of great consequence in the world today[86] as successful and sustainable businesses underpin nearly all the national economies and societies by providing employment and creating prosperity.[87]

It is in view of the above that company law legislation provides for a number of legal/regulatory controls that seek to ensure that directors and managers act within their powers and run the company efficiently. Thus, even though the management of the company is in the hand of the Board,[88] shareholders have the power of oversight and discipline over directors,[89] including the power to dismiss a recalcitrant board.[90] However, the power granted the shareholders under the Act is usually exercised by the majority.[91] The implication is that the Board and majority shareholders are the only group that exercise the power of oversight and control, and thus the only group that can have effective influence on the board and management of a company.

Therefore, the corporate accountability which the corporate governance code seeks to drive should aim to prevent misconduct by the Board and majority shareholders against the company and the minority shareholders. The fact that the Code in seeking equitable treatment for all shareholders, and requires the board to ensure that "minority shareholders are adequately protected from abusive actions by controlling shareholders",[92] underscores the influence of majority shareholders and the need to protect minority shareholders. It is on this basis that the NCCG 2018 is examined below to show how, and to what extent the principles articulated in the code meet the objective of driving accountability by minimizing "insider" opportunism against the company and the minority shareholders.

The NCCG 2018 puts the responsibility of leading a company on the Board, but the day-to-day management is the exclusive responsibility of the MD/CEO who should be sup-

85 *Berle and Means*, note 4.

86 *Andrew Keay*, The Enlightened Shareholder Value Principle and Corporate Governance (Routledge 2014) at 3.

87 The UK Corporate Governance Code 2018 at 1.

88 See CAMA ss 63 (3) & 244.

89 CAMA, 63 (5).

90 *Ibid*., 262.

91 *Ibid.*, 233, provides for company resolutions, which may be ordinary resolutions (by simple majority) or special resolutions (by super majority).

92 *Ibid.,* Principle 23.1.3.

ported by the EDs.[93] The Code specifies that the Board is the highest governing body of a company in Principle 1. The Code provides for meetings as the vehicle for the Board to conduct its business and successfully fulfil the strategic objectives of the company.[94] The board is required to meet at least once every quarter to effectively perform its oversight function and monitor management's performance,[95] This means that the quarterly meetings of the Board is for them to review the activities and programs of management. Recognising that quarterly meetings may not be sufficient to effectively monitor management, the Code provides that the "Board delegates some of its functions, duties and responsibilities to well-structured committees",[96] that will comprise only directors.[97]

The MD/CEO and the EDs being involved the day-today management of the company have access to the internal operations. To balance their position with those of the NEDs the Code requires that NEDs (not being part of the day-to-day management of the company) "should be provided in a timely manner, with reasonable support as well as quality and comprehensive information relating to the management of the Company and all Board matters".[98] This is not specifically provided for INEDs (but being part of NEDs themselves) it is expected that they would also be provided with adequate information concerning the management of the company and all Board matters too, for them to be able to bring a high degree of objectivity to the Board as required under Principle 7.

The question therefore is, how the Code has provided for the assessment of the performance of the Board as a means to ensure that the Board is serving the interests of the company and the shareholders and not their personal interests. One way that the Code tries to address this is through the work of Board Committees that will help to facilitate adequate oversight over Board activities and other matters that deal with the interests of the Board and management. The committees in this category are the committees responsible for nomination and governance, remuneration, audit and risk management.[99]

In addition, the Code also provides for internal audit function[100] as part of a comprehensive corporate architecture for promoting accountability to ensure that the Board serves the best interest of shareholders and other stakeholders while sustaining the prosperity of the company. The problem is that despite this seeming comprehensive corporate governance architecture, the authority responsible for ensuring an annual corporate governance

93 *Ibid*., Principle 4.4. & 5.2.
94 *Ibid*., Principle 10.
95 *Ibid*., Principle 10.1.
96 *Ibid*., Principle 11.
97 *Ibid*., Principle 11.1.2.
98 NCCG 2018, Principle 6.5.
99 *Ibid*., Principle 11.1.6.
100 *Ibid*., Principle 18.

evaluation and the extent of application of the Code is the same Board of Directors[101] that is responsible for operating the corporate governance architecture.

There is no doubt that the Code tries to address this concern of the dominant powers of the Board over the affairs of the company and evaluating the extent of the application of the Code (self assessment). Addressing this concern is the main purpose of Principle 23 that provides for the "[e]quitable treatment of shareholders and the protection of statutory and general rights, particularly the interest of minority shareholders, promote (sic) good corporate governance". It is instructive that Principle 15.2 of NCCG 2018 mandates the inclusion of the summary of the annual corporate governance in Company's annual report under the NCCG 2018. The requirement of annual report is to give shareholders the opportunity to access the company's activity for the year.

It is perhaps important to briefly discuss the basis and purpose of annual report as a statutory requirement under CAMA here because of its fundamentality to Board's accountability. One major statutory right of shareholders is their right under CAMA to review the activities of the Board. This is the means by which they can ensure that directors focus on promoting their interest. To achieve this aim, companies are mandated by s 331 CAMA to keep accounting records to show and explain the transactions of the company. In addition, directors are required to prepare "Director report" under s 342, 'containing a fair view of the development of the business of the company'.[102]

These records are the basis for the annual accounts (Financial statements for each year)[103] that directors are required to prepare as provided under s 334 CAMA. The aim is to 'enable the directors to ensure that any financial statements prepared under this Part (Part XI) comply with the requirements of this Act as to the form and content of the company's financial statements'.[104] Directors have a duty to lay and deliver financial statements before the company in general meeting,[105] and the Act grants shareholders right to obtain copies of financial statements.[106]

However, whether such annual reports are sufficient to properly inform all the shareholders is the main issue, especially for minority shareholders who do not share privileged 'insider' relationships.[107] The majority or controlling shareholders enjoy privileged 'insider' relationships as corporate insiders. They also have powers to discipline and even dismiss the entire Board.[108] CAMA recognises the power of majority rule under s 233 that provides that all decisions shall be made by a simple majority votes of members (ordinary

101 *Ibid*., Principle 15.
102 CAMA, 342 (1) (a).
103 *Ibid*., 334 (1).
104 Ibid., s. 331 (2) (b).
105 *Ibid*., 355.
106 *Ibid*., 349.
107 *Keay*, note 86 at 176.
108 CAMA, s 262.

resolution) or super majority (special resolution), and only a simple majority is required under s 262 CAMA to remove directors. As stated earlier, the NCCG 2018 also recognises majority shareholders and directors amongst others as corporate 'insiders'.[109] This probably explains why the Code requires the Board in Principle 23.1. to ensure that "minority shareholders are adequately protected from abusive actions by controlling shareholders".

Recognising the capacity of corporate 'insiders' to abuse minority shareholder rights, one would expect the NCCG 2018 to focus on protecting the company and minority shareholders against such abuses by corporate 'insiders' (controlling shareholders and the Board). Therefore, to what extent did the Code address the relationship with the vulnerable groups to offer the necessary protection against insider abuse?

Under the NCCG 2018, relationships between the Board and shareholders is addressed in Part C. Attendance at General Meetings is one of the ways that the Board is expected to engage with shareholders to facilitate greater understanding of the Company's business, governance and performance.[110] To achieve this purpose the Code provides that General Meetings should be conducted in an open manner allowing for free discussions on all issues on the agenda. It also requires the Board to ensure that the venue of General Meetings is accessible to shareholders as well as to ensure that decisions reached at the General Meetings are properly and fully implemented as governance directives, amongst many other recommended practices under Principle 21.

In addition, Principle 22 of the NCCG 2018 provides for shareholder engagement while Principle 23 provides for shareholders rights. With regard to shareholder engagement, the Code emphasises the need for the Board to develop a policy that ensures appropriate engagement with shareholders.[111] The protection of shareholder rights on the other hand means equitable treatment of shareholders and the protection of their statutory and general rights, particularly the interest of minority shareholders.[112] It is to ensure the protection of minority shareholders that the Code specifically requires that the Board ensure that minority shareholders are adequately protected from abusive actions by controlling shareholders.

The provisions for shareholder rights protection under Principle 23 shows a clear emphasis on the protection of not just all shareholders but particularly minority shareholders. There are two major problems with this shareholder protection rights, especially as it concerns minority shareholders under the NCCG 2018. First is that the same Board that is in charge of implementing the Code is the same body that is responsible for corporate governance evaluation. Secondly, the powers of oversight and discipline of the Board under CAMA can only be exercised by a majority of shareholders.[113] The implication is that the views of the minority may never count under the Nigerian corporate governance environ-

109 NCCG, Principle 29.1.15.
110 NCCG, Principle 21.
111 *Ibid*., Principle 22.
112 NCCG 2018, Principle 23.
113 CAMA, 262.

ment. This is of a great concern given that the NCCG 2016 has identified the dominant conflicts in the Nigerian corporate environment as ownership concentration between controlling shareholders and minorities.[114]

Having identified the peculiarity of the Nigerian corporate environment, the NCCG 2016 went to a great length to address minority protection. One way that the Code sought to address minority shareholder protection by giving specific responsibility to the INEDs under the Code to look after the interest of minority shareholders. For example, in addition to providing for the board to "establish a system of constant dialogue with shareholders, majority and minority",[115] "[t]he chairman or lead independent non-executive directors[116] shall ensure that the views of shareholders are communicated to the board as a whole".[117] The lead independent non-executive director (where appointed) may attend meetings with a range of shareholders to listen to their views in order to help develop a balanced understanding of the views of all shareholders about the company.[118]

The importance of the participation of lead independent non-executive director in interaction with shareholders under Principle 20 lies in his role concerning minority shareholder protection under Part F, especially with regard to the protection of minority shareholders under Principle 28. This is in addition to the requirement in Principle 20.5 that the board "state in the annual report the steps it has taken to ensure that the members of the board, and in particular the independent non-executive directors, develop an understanding of the views of all **119** shareholders about the company".

Thus, Principle 28.1 precludes insiders from engaging in transfers of assets and profits out of the company. A shareholder group holding not less than one per cent of a company's share is permitted to submit items for inclusion in the agenda of the annual general meeting of the company.[120] Principle 28.2 emphasises the fiduciary responsibility of controlling shareholders to minority shareholders. To be able to realise these rights especially for minority shareholders, the NCCG 2016 provides that "[t]he lead independent non-executive director shall be available to shareholders if they have concerns which contact through the normal channels of chairman, chief executive or other executive directors has failed to resolve or for which such contact is inappropriate".[121] This is instructive given that the only shareholder group that have no privileged access to the board, especially the chairman and the executive board are the minority shareholders.

114 NCCG 2016, at 5.
115 *Ibid*., Principle 20.1; emphasis added.
116 Emphasis added.
117 NCCG 2016, Principle 20.2.
118 *Ibid*., Principle 20.5.
119 Emphasis added.
120 NCCG 2016, Principle 28.2.
121 NCCG 2016, Principle 6.2.2.

This paper considers all the efforts aimed at protecting the minority shareholders under the NCCG 2016 inadequate because they (minority shareholders) lack the power of control over the so-called independent non-executive directors who are supposed to address their concerns. Thus, one would expect the NCCG 2018 to improve on minority shareholder's rights and protection but this is not the case. The NCCG 2018 mostly provides for the rights and protection of all shareholders. Even though the board is required to ensure that minority shareholders are protected from abusive actions by controlling shareholders, there is no access provided under the Code for the members to reach the executive management to address their concern. It is inexplicable that a Corporate Governance Code that recognises the power of controlling shareholders and their proclivity for abuse of such powers as well as the need to prevent the abuse,[122] did not specifically provide for how to prevent such abuse or how it could be addressed.

The NCCG 2016 did not only provide access (for shareholders) to the independent non-executive directors to voice their concerns, compliance with the provisions of the Code is also mandatory. As a strategy towards promoting compliance with the provisions of the Code, Part J provides for enforcement and sanctions for non-compliance. This is not the case with the 2018 Code. It would appear that the NCCG 2018 expects that annual reports and accounts will provide all shareholders with all the information they need to access company performance. Where the shareholders, especially the minority shareholders are not satisfied with the operations of the board there is no channel provided for them to voice their concerns. It is argued that relying on corporate board of Nigerian companies to promote good corporate governance is a defective approach to promoting good corporate governance in the country.

Discussion so far shows that the NCCG 2018 focuses on supporting the interests of shareholders as a class. This is in order because as some commentators have noted, "[t]he corporate governance system principally supports the interests of shareholders as a class".[123] However, the same authors have argued that "corporate law can – and to some degree must – also address the agency conflicts jeopardizing the interests of minority shareholders".[124] This is the main concern in this essay, especially given the fact that the Steering Committee of the 2016 Code has identified the conflict between majority shareholders and minority shareholders as the major agency problem in the Nigerian corporate environment.Thus, to mitigate minority shareholder agency problems will require a governance regime that constrains the power of the majority shareholders.[125] This is the major problem with the focus of the NCCG 2018 on all shareholders.

122 NCCG 2018, 23.1.

123 *Luca Enriques, Henry Hansmann, Reinier Kraakman,* and *Mariana Pargendler*, "The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies" in *Renier Kraakman et al*., *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed., Oxford University Press 2017) 79.

124 *Ibid.*

125 *Ibid.*

Although this essay is not about legal/regulatory regimes on corporate governance generally, it suffices to mention that the regulation of a corporate governance system is not exclusive to corporate governance codes. Therefore, statutory and regulatory approach could be adopted to ensure adequate protection for minority shareholders and corporate accountability. One way to protect minority shareholders, as some commentators have suggested, "is by granting them the right to appoint one or more directors".[126] However, this will require a review corporate law to enhance minority appointment rights. Some jurisdictions already mandates board representation for minority shareholders. For example, Italy mandates board representation for minority shareholders in listed companies.[127] Other jurisdictions have similar provisions aimed at minority protection.[128] However, since the focus here is on corporate governance code, a review of Nigerian corporate governance code is suggested to properly focus the responsibilities of INEDs on the interest of minority shareholders.

Another major deficiency of the NCCG 2018 is that it is not connected to any rule or statute to promote mandatory compliance. This is unlike in the UK where the corporate governance code is connected to the listing rules of the London Stock Exchange thereby making it mandatory for premium listed companies in the UK to report on how they have complied with the standards in the code or explain where they have not and the reasons for non-compliance.[129] This is in addition to the fact that unlike the NCCG 2016 the NCCG 2018 did not provide for mandatory compliance with its principle or sanctions for non-compliance.

V. Conclusion

Discussions on the Nigerian 2018 Corporate Governance show a focus of the code on all shareholders. This is at variance with the agency problem of conflicts between the controlling shareholders and minorities identified in the Nigerian corporate environment by the Steering Committee for the NCCG 2016. The lack of consideration for a role for minority shareholders under the NCCG 2018 or for the independent non-executive directors to have a role that specifically addresses the interest of minority shareholders exposes not only minority shareholders but also Nigerian companies to corporate 'insider' (majority shareholders and directors) abuse. Thus, the 2018 Code is incapable of promoting good corporate governance in Nigeria.

Since the very essence of a corporate governance code is to promote good corporate governance and accountability, any corporate governance Code for Nigeria must address the peculiarity of the Nigerian corporate environment for it to be able to achieve this pur-

126 *Ibid*.

127 Art. 147 Consolidate Act on Financial Intermediation.

128 Art. 141 Lei das Sociedades por Ações.

129 Listing Rule (LR) 9.8.6 r (6).

pose. Thus, an amendment of the NCCG 2018 is proposed to specifically address the interest of minority shareholders. This will require the appointment of a class of directors (especially INEDs) dedicated to promoting the interest of minority shareholders. However, to ensure that the INEDs effectively represent the minority shareholders, the minority shareholders would have to be granted some powers to participate in their appointment and discipline. This may require an amendment of the CAMA. However, since the focus here is on the corporate governance code, a review of the NCCG 2018 Code to provide for INEDs to look after the interest of minority shareholders will be an important first step towards providing access to the board for minority shareholders. This will significantly address the peculiar corporate governance challenges in the Nigerian corporate environment.