SHAREHOLDERS' POWERS AND RESPONSIBILITIES IN THE PRACTICE OF GOOD CORPORATE GOVERNANCE IN NIGERIAN BANKS

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ABSTRACT

This paper looks at the heady issue of shareholders' powers and responsibilities in the practice of good governance with particular reference to Nigerian banks. It examines bank governance and the peculiar nature of risk faced by banks and the limited scope of both bondholders and depositors to engage in risk monitoring of banks. It rationalises that it is the shareholder who is in a better position to monitor managers of banks and looks into the various rights/powers donated to the shareholders to achieve success in that regard. It contends that the responsibilities attached to the rights given to the shareholders if it has been well discharged remains a sore point. It argues that if shareholders are to take their rights seriously and discharge their responsibilities diligently effective monitoring of the banks can be achieved to the betterment of all the stakeholders in the banking enterprise.

Keywords: Shareholders, powers, responsibilities good corporate governance.

1. INTRODUCTION

Placing the business of governance of a company's affairs solely with the management without any form of interference from the shareholders, when occasion demands, may not guarantee sound corporate governance. The principle of checks and balances which operates in government circles can be applied to the governance of a company and the arm of the company that is best suited for performing this role of checking the excesses of the directors is the shareholders. This is because ultimate powers of control lie in the shareholders. Besides, the brunt or benefit of the governance of a company will ultimately be borne by the shareholders.[2] According to agency theory, as the owners of the corporation, shareholders must constrain inefficient or self-serving corporate managers by engaging in monitoring and providing incentives. Shareholders, therefore, must be empowered to protect their interests and ownership stakes, as well as to remind corporate managers that they

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[2] Fabian Ajogwu 'Shareholders Activism: Any Added Value to Governance?' *Journal of Corporate Governance Vol.8 No.1 August 2016, 1688*

cannot neglect shareholder interests with impunity.[3] The rise in corporate scandals and the dawning of the great recession motivated frustrated shareholders to seek greater power in order to influence the actions of the firms in which they own equity.[4] The Company and Allied Matters Act (CAMA) and the various codes of corporate governance have invested in the shareholders certain powers and responsibilities to ensuring that companies are well governed. In other words, shareholder activists have the power and assets to correct and improve company performance. The question is how much of such powers have been exercised by the shareholders in discharge of the onerous responsibilities of effective monitoring of the managers to ensure effective governance of banks. This what the paper seeks to do in the discourse that now follows.

2. CORPORATE GOVERNANCE AND BANKS

Corporate governance is a crucial issue for the management of banks, which can be viewed from two dimensions. One is the transparency in the corporate functions, thus protecting the investors' interest (reference to agency problem), while the other is concerned with having a sound risk management system in place (special reference to banks).[5]

The Basel Committee on Banking Supervision states that from a banking industry perspective, corporate governance involves the manner in which the business and affairs of individual institutions are governed by their boards of directors and senior management. This thus affect how banks:

- set corporate objectives (including generating economic returns to owners);
- run the day-to-day operations of the business;
- consider the interest of recognised stakeholders;
- align corporate activities and behaviours with the expectation that banks will operate in safe and sound manner, and in compliance

[3] Maria Goranova and Lori Verstegen Ryan 'Shareholder Empowerment: An Introduction' in Maria Goranova and Lori Verstegen Ryan (eds) *Shareholder Empowerment: A New Era in Corporate Governance* (Hampshire: Palgrave Macmillan, 2015), 3-4.

[4] Ann K. Buchholtz and Jill A. Brown 'Shareholder Democracy as Misbegotten Metaphor' in Maria Goranova and Lori Verstegen Ryan (eds) *Shareholder Empowerment: A New Era in Corporate Governance, 81.*

[5] Emilios Avgouleas 'The global financial crisis and the disclosure paradigm in European financial regulation: The case for reform' *(2009) 6 European Company and Financial Law Review 440* cited in Adreas Kokinnis Andreas Kokkinis 'A Primer on Corporate Governance in Banks and Financial Institutions: Are Banks Special?' H-Y Chiu I. (ed) *The Law on Corporate Governance in Banks* (Edward Elgar Publishing, Cheltenham, 2015) 31.

with applicable laws and regulations; and protect the interests of depositors.[6]

It is not a disputed fact that banks are crucial element to any economy; this therefore demands that they have strong and good corporate governance if their positive effects were to be achieved.[7] It is in acknowledgement of this fact that the apex regulatory bank the CBN has curtailed the tenure of chief executive officers (CEO) of banks to a maximum of ten years and further directed that any person who has served as CEO for the maximum tenure in a bank should not qualify for appointment in his former bank or subsidiaries in any capacity until after a period of three years after the expiration of his tenure as CEO.[8] This is aimed at checkmating abuse of the near absolute and total powers of management of banks by directors.[9]

King and Levine[10] and Levine[11] emphasized the importance of corporate governance of banks in developing economies and observed that: first, banks have an overwhelmingly dominant position in the financial system of a developing economy and are extremely important engines of economic growth. Secondly, as financial markets are usually underdeveloped, banks in developing economies are typically the most important source of finances for majority of firms. Third, as well as providing a generally accepted means of payment, banks in developing countries are usually the main depository for the economy's savings.

Banking supervision cannot function if these does not exist what Hettes[12] calls "correct corporate governance" since experience emphasizes the need for an appropriate level of responsibility, control and balance of competences in each bank. Hettes explained further on this by observing that correct corporate governance simplifies the work of banking supervision and contributes towards co-operations between the management of a bank and the banking supervision authority. Thus,

[6] ibid

[7] Basel Committee on Banking Supervision: Sound Practices for the Management and Supervision of Operational Risk. Bank for International Settlement. Basel, February, 2003.

[8] See CBN Guidelines for tenure of managing Directors of Deposit Money Banks and related matters available online at https://www.cbn.gov.ng last visited on 3/7/21.

[9] See Odutola Holdings Ltd v. Ladejobi (2006) 5 S.C. (Pt.1) 83.

[10] Robert G. King and Ross Levine 'Finance, Entrepreneurship and Growth Theory and Evidence' (1993) *Journal of Monetary Economics*, Vol.32, 513-522.

[11] Ross Levine, 'A Financial Development and Economic Growth: Views and Agenda' (1997) *Journal of Economic Literature* Vol. 35, 688-706.

[12] Frantisek Hettes, 'Corporate Governance in the Banking Act: National Bank of Slovakia' (2002) *BLATEC* Vol. 5, 42-60.

corporate governance of banks refers to the various methods by which bank owners attempt to induce managers to implement value-maximizing policies.[13]

3. THE UNIQUE BUSINESS RISKS FACED BY BANKS

Due to the maturity mismatch between on the one hand, deposits, that are typically payable on demand, and, on the other, loans, that are to be repaid after a fixed period, it follows that no bank can meet a significant fraction of its liabilities at any given time. Banks cannot even do so relatively quickly, as their assets are illiquid and cannot therefore be sold *en masse* at short notice, other than at very low prices. If a large number of depositors are persuaded that their bank is in a precarious position and rush to draw their funds, they will cause the collapse of the bank, no matter how healthy it is. In other words, the inability of rational depositors to coordinate their actions can lead to a creditors' run, if the reputation of a bank is damaged.[14] A run reduces depositors' aggregate wealth in a classic collective action problem situation. Therefore, any retail bank is constantly dependent on the confidence of its depositors and can at any time be diminished to cash flow insolvency merely as a result of a crisis of confidence. This is a feature of banks that distinguishes them from ordinary companies whose assets are usually more easily realisable and whose liabilities such as term loans and bonds mature over a relatively long and predictable period of time.

4. SYSTEMIC RISK

The major feature of the banking industry which renders financial stability a public good is systemic risk. So far it has been explained why individual banks face specific risks that are not faced (at the same extent) by other companies. However, if the failure on one bank left its competitors strengthened and the system intact, as is the case in most other industries, the problem of safeguarding financial stability would not arise. On the contrary, the failure of a relatively large bank has spill over effects on the entire system. Other major banks suffer and a series of failures may be triggered. Problems in one bank can thus infect the whole of the financial system and lead to a serious banking crisis as happened in Nigeria in 2009.

This phenomenon is due to the very high interconnection and interdependence of banks, which conduct a major part of their business

[13] Rafel Crespi and others 'Governance Mechanisms in Spanish Financial Intermediaries' (2002) *Universitat Autonoma de Barcelona*- 28-02.

[14]Maria Christina Ungureanu 'Banks: Regulation and Corporate Governance Framework' (2008) *5 Journal of Corporate Ownership and Control 449, 450-51.*

with other banks.[15] Banks, for instance, rely on the inter-bank lending market to ensure that they have adequate liquidity to meet their liabilities. They borrow large sums for short periods of time from other banks to respond to frequent shortages of liquidity due to various reasons such as an increase in the withdrawals of deposits. Another component of systemic risk is the reputational one. The failure of an important bank may cause a crisis of confidence in the system as a whole and depositors' runs may affect other banks, or at least an increase in deposit withdrawals may occur. Finally, the opacity of the sector is a cause of systemic risk. The inability of other banks to value the assets of an ailing bank precipitates the collapse of the latter. In parallel, the inability of financial markets to distinguish between sound and unsound banks in times of crisis can paralyse inter-bank lending, and makes it more difficult for banks to raise additional equity capital in times of crisis. Similarly, the general inability of depositors to distinguish between sound and unsound banks precipitates a widespread crisis of confidence once a major bank collapses.[16]

5. THE LIMITS OF BONDHOLDER MONITORING OF RISK TAKING BY BANKS

Bonds are debt securities issued by banks that are traded on a regulated market. For regulatory purposes, it is common practice for bonds to be subordinated to the ordinary creditors of banks (depositors) so that they can serve as loss absorbing capital. Bondholders have a rational incentive to monitor risk-taking by banks and to demand higher interest rates to compensate for increased risk-taking. Bondholders' attitudes to risk is markedly different than that of the shareholders, as creditors risk losing their investment in the event of failure, but have nothing to gain if a bank does exceptionally well. Faith in bondholders' governance is reinforced by the fact that investors in bonds are usually professional funds manager with reasonable level of expertise and a substantial investment size that allows for monitoring expenditure. If risk-taking by banks was accurately reflected in the interest rates they paid on bonds (and on the prices at which bonds trade on the secondary market), banks,

[15] Peter Mulbert 'Corporate Governance of Banks after the Financial Crisis-Theory, Evidence, Reforms' (2010) *ECGI Working Paper No 151/2010 11*-12 available at:< http://papers.ssrn.com/sol3/papers.crm? Abstract id=1448118>, accessed 15-04-2016.

[16] Una Okonkwo Osili and Anna Paulson 'Bank Crises and Investor Confidence: An empirical investigation' (2008*) Federal Reserve Bank of Chicago Working Paper No. 2008-17*, available at: <http://www. Chicagofed.org/webpages/publications/policy_discussion_papers/2009/pdp9.cfm,> accessed 15-04-16.

would be discouraged from taking excessive risks, and a clear signal would be given to regulators at once that a bank was perceived by the market as highly risky.[17]

The bond market provides a degree of discipline and reflects available information on banks' riskiness. However, as is the case with shareholder the information on the quality of bank assets is more difficult to process and verify, and banks tend to withhold relevant information in times of crisis. Bank opacity thus diminishes the disciplinary effect of the bond market especially with regard to bond issues where credit ratings agencies produce split ratings.[18]

Furthermore, risk monitoring by bondholders is weakened as a result of the perception of an implied government guarantee in the case of bonds issued by large banks. Although bonds are not protected by deposit insurance schemes, the market may perceive very big banks as being 'too-big-to-fail' and thus expect that they will be rescued by the government if they face financial difficulties. In sum bondholders are not fully capable of monitoring risk taking by banks, and are not in the same position as bank managers to access and process relevant information due to bank opacity.

6. THE VERY LIMITED RISK-MONITORING BY DEPOSITORS

The depositors of banks cannot be relied upon to perform an effective risk-monitoring function because of the combined effect of three factors. First, depositors lack the necessary expertise to process relevant information on the level of risk taken by banks. Retail depositors, especially, are in a very weak position to process relevant information as they are unsophisticated individuals who have inadequate understanding of the banking sector and of financial reporting.[19] Large companies are in a slightly better position than individuals and small businesses, but still evaluating the credit worthiness of a bank falls outside the ability of most corporate officers. In addition, companies seek to raise loans from banks, and hence the willingness of banks to advance credit is the major

[17] Julia Black 'Paradoxes and failures: New governance techniques and the financial crisis' (2012) *75 Modern Law Review 1037* cited in Andreas Kokinnis op cit, 26.

[18] Donald P. Morgan and Kelvin J. Stiroh 'Bond market discipline of banks: Is the market tough enough?' *(1999) Federal Reserve Bank of New York Staff Report 95/1999*, 13-14, available at<:http://www.newyorkfed.org/research/staff_reports/sr.95.html>, accessed 15-04-16.

[19] Joao A. C. Santos 'Bank capital regulation in contemporary banking theory: A review of the literature' *(2001) 10 Financial Markets, Institutions & Instruments 41, 46-52* cited in Andreas Kokinnis, 29.

determinant of their choice of the main bank of a company, rather than the assessment of the bank's soundness.

Second, depositors are in a relatively weak bargaining position vis-à-vis banks and therefore it is difficult for them to demand a higher interest rate if they think that a bank is more risk prone. The third and most decisive factor that neutralises depositor monitoring is deposit insurance. Given the immunity of most depositors from bank failures, it follows that their incentives to monitor banks are very weak, especially if it is taken into account that processing the relevant information is costly and time consuming. Even depositors who hold large deposits can still structure their portfolio so as to be fully covered. In addition, given that depositors need not worry about the credit worthiness of banks, they face a perverse incentive to place their funds with riskier banks, which can pay higher interest rates (as they are more profitable), rather than with prudent banks.[20]

It follows that depositors and bondholders cannot effectively monitor risk taking by banks because the obvious shortcomings highlighted above. The other investors in the bank governance that may be in a stronger position to do effective monitoring is the shareholders.

7. SHAREHOLDERS AND BANK'S GOVERNANCE

A shareholder is the proportionate owner of the company but he does not own the company's assets, which belong to the company, as a separate independent legal entity.[21] When an individual or a group of persons purchase shares in a company, they become shareholders of that particular company. In Nigeria, there are over twenty million shareholders who own shares in public and private companies.[22] A shareholder is a part owner of a company and is entitled to take part in making decisions for the running of the company. He is entitled to access information regarding the performance or otherwise of the company as contained in its annual report at the end of every year. He can vote on company issues at shareholders' Annual General Meetings (AGMs) and other meetings.

Voting is an essential component of the package of shareholder rights. Corporate statutes generally precondition many important corporate acts

[20] Ibid.

[21] Olu Awolowo 'Shareholders Associations and promotion of good corporate governance in Nigeria' *Journal of Corporate Governance Vol. 4 No 1 February 2012,*489.

[22] ibid

upon approval by a majority of the shares entitled to vote. Additionally, shareholders have long been given the right to air their views to management, even if the power to act on the matter in question is solely vested in the board of directors.[23]

A shareholder benefits immensely whenever the company is doing well, then his shares would be worth more than when he bought them, and he may receive an income called dividend; as well as participate in the rights issued by the company.[24] The potential problems in a relationship between a company board and its shareholders arise largely from their different interests and perceptions. The executive directors are mainly full-time professionals, whose main source of income could well be the company itself. Many have a long-term personal involvement in their company. The shareholders in contrast are a mixture of investors, who can be grouped into the following categories:[25]Institutional shareholders; small private shareholders; large private shareholders and corporate shareholders.

Institutional shareholders are organizations that have large amounts of funds to invest, and put much of these funds into company shares. Such institutional funds include pension funds, insurance companies and collective investment institutions such as unit trust funds and open-ended investment companies. Institutional investors do not confine themselves to holding shares in domestic companies.[26]

Small private shareholders are some individuals own shares directly in the company.[27] In general, private shareholders hold only small numbers of shares and have very little communication with the company, other than through formal communications from the company. A large proportion of the shares in a company are held by private shareholders. For example, in a company floating its shares on the stock market for the first time, a large proportion of the shares might be held by individuals who were shareholders when the company was private, and who might still be executive directors.

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[23]Thomas Lee Hazen 'Silencing the Shareholders' Voice' *80 N.C.L. Rev 1897 2001-2002* available online in <www.heinonline.org> last visited on 2/2/17,1909

[24] Dorothy Nelson 'The Dilemma of the Shareholders under the Nigerian Company Law' *Journal of Law, Policy and Globalization Vol.37, 2015* available on www.iiste.org last visited on 16/07/16.

[25] Olu Awolowo op cit.490

[26] C. Brian *The ICSA Study Text in Corporate Governance* (London: ICSA Information &Training Ltd, 6th edn. s 2009) 117.

[27] ibid

Family shareholders are another example in companies of which, although listed on a stock market, the original family owners continue to hold a position of influence. Ford is a notable example. A significant shareholder in a public company could be another company. Shareholdings by one company in another could be either welcome or a source of concern and mistrust. In some cases, two companies might have cross-shareholdings, so that each holds a block of shares in the other. When cross-shareholdings exist, the companies might have some form of strategic alliance or mutual understanding. In other cases, one company might hold a block of shares in another, possibly with a view to using the investment as a potential base for launching a takeover bid in the future.

8. REGULATORY REQUIREMENTS FOR SHAREHOLDER INVOLVEMENT IN CORPORATE GOVERNANCE

Nigerian company law like the English law gives the shareholder some responsibilities and allows them to be mandatorily involved in decision making in the company. There are a number of situations where legislation requires shareholder approval of the board's decision and sometimes allows the shareholder to initiate a decision.[28] According to Davies[29] the main categories of such cases is where decision is likely to have an impact upon the shareholders' legal or contractual rights, even if the practical impact of that change on the member in a particular case is small. The point is that all corporate decisions invariably have an impact on the shareholders and the company whether small or not, and this is the reason why not only the board is enjoined to keep the shareholders informed but must seek and obtain their approval in the following cases amongst others,

- Alterations to the company's memorandum and articles[30]
- Alterations of the type of company, for example from private to public or vice versa[31]
- Increase[32] and reduction of share capital.[33]
- Alterations to change rights attached to shares[34]

[28] S. Gallion and L. Stakes 2000 'Corporate governance and shareholder activism. The role of institutional investors.' *Journal of Financial Economics. 57.275-305.*

[29] P. Davies *Gower and Davies principles of modern company law* (2008, 8th ed..London: Sweet and Maxwell) 375

[30] ibid s 53

[31] ibid s 56

[32] ibid s 127

[33] ibid s.131

- Adoption of schemes of arrangement[35]
- Appointment of directors[36] and their removal[37]
- The above are some of the important areas where shareholder participation is required by legislation. However, in many other circumstances where the law is silent, the codes requires that the shareholders have a right to participate in and to be sufficiently informed on, decisions concerning fundamental corporate changes.[38] It is not enough for the shareholders to be given opportunity to perform their legislative functions, but ought to be given the underlying information and requisite knowledge of the basis for the shareholder approval being sought. The problem with most companies in Nigeria is that while the board recognizes the important role of shareholder in corporate governance, the requisite flow of information is never given, and the shareholders are most often than not always prevailed upon to approve of actions and decisions blindly.[39]

9. MACHINERY FOR ENFORCING SHAREHOLDER RIGHTS IN CORPORATE GOVERNANCE.

Let us now examine both legislative and practical means and strategies for enforcing avalanche of rights that are statutorily vested on the shareholder.[40]

9.1 Meetings

There are three main types of meeting that may be convened by every public company in Nigeria, these are;

a) Statutory meeting[41].
b) General meeting[42] and
c) Extra ordinary general meeting[43].

Statutory meeting

Statutory meeting must be held by every public company within six

[34] ibid s.166
[35] Part XII Investment and Securities Act Cap 124, LFN 2004.
[36] Section 273 CAMA.
[37] Section 288 CAMA.
[38] OECD Code, Section II B.
[39] Kunle Aina 'Strategies for Enforcing Shareholders Rights in Corporate Governance in Nigeria' available at <www. academia. edu >accessed 08/08/16. See *also Journal of Corporate Governance vol. 6 No.2 August 2014, 1129-1151.*
[40] Such rights to attend general meeting of the company etc.
[41] CAMA 2020 s 235
[42] ibid s 237
[43] ibid s. 239

months of its incorporation. The members must always endeavour to attend this very important meeting as all preliminary issues will not only be presented for ratification and they are likely to be ratified if there is no objection. The law allows members present at the statutory meeting to discuss any matter arising relating to the formation of the company and its commencement of business.[44]

Any member is allowed to forward any resolution on any matter arising out of the statutory report, the member may give a twenty-one days' notice of resolution in which case the member gives notice before the statutory meetings, the resolution may be taken or it may be adjoined further to accommodate enough notice to be given.

General meeting

Every company must hold a general meeting called Annual General Meeting (AGM) within fifteen months of its incorporation.[45] Where the company defaults in holding the AGM. Any member may complain to the Corporate Affairs Commission, (CAC) and the CAC may give directions on the calling of the meeting or consequential directions as the commission thinks expedient. The Commission may also give directions that such member should apply to the Court for necessary orders.[46] The initial penalty for default in disobeying the instructions or directions of the Commission is a fine of five hundred naira only against the officer or officers who refuse to comply. There is no provision as to who or which authority will impose the fine; can the Commission decide to prosecute the directors for failure to hold an AGM? And if that is done, is a fine of five hundred naira adequate to reflect the seriousness of the offence? In England, section 336(4)(b) of the Companies Act 2006 UK specifically stated that a person guilty of an offence under this section is liable on summary conviction to a fine not exceeding the statutory maximum.[47] The CAMA by adding that a member may be directed to file an action in court under the section for the courts' direction seems to have gone further to assure the member of an opportunity to compel the directors through the court to call the AGM. The mere imposition of fine may not be adequate without a concomitant power to compel the calling of the meeting.

[44] ibid s. 235 (8)

[45] Section 237(1)(b) CAMA 2020.The company may apply to the Corporate Affairs Commission if unable to hold within eighteen months of its incorporation for extension of not more than three months.

[46] Section 237 (2) of CAMA 2020.

[47] The previous provision contained in the Companies Act 1985 to the effect that an application of any member to call or direct the calling of a meeting has been removed in the 2006 Act.

Notice of meeting is to be given to every member of the company. In this regard, the CBN Code specifically require that Notice of general meetings should be as prescribed by the Companies and Allied Matters Act (CAMA) 1990.[48] The Board is to ensure that the venue of a general meeting is convenient and easily accessible to the majority of shareholders.[49] The CBN Code also mandate the Board to ensure that unrelated issues for consideration are not lumped together at general meetings. Statutory business should be clearly and separately set out. Separate resolutions are expected to be proposed and voted on each substantial issue as well.[50] Resolutions reached at general meeting are only useful if they are implemented hence the requirement of the CBN Code that the Board is to ensure that decisions reached at general meetings are properly and fully implemented.[51]

There is no limit to the type of business that may be transacted at the AGM. The law simply states that all businesses transacted at the annual general meetings shall be deemed special business except declaration of dividend, the presentation of the financial statements and the reports of the directors, the election of the directors in the place of those retiring, the appointment, and the fixing of the remuneration of the auditors and the appointment of the members of the audit committee which shall be ordinary business[52]. The ordinary business is the usual business that are generally transacted, it need to be noted that there is no limitation to the type or kind of business or resolution that may be tabled for discussion. The English Combined Code encouraged all listed companies that 'boards should use the AGM to communicate with private investors and encourage their participation.[53]

The general meeting is therefore an organ for the shareholders to access the progress and problems of the company. It is the place where they have the opportunity to question the directors on the affairs of the company particularly on company's accounts; directors' report and the company's financial position and prospects among others. The general meeting therefore presents an opportunity for the exercise of shareholders' only real power over the board. That is, the power to re-elect or dismiss the

[48] Now CAMA 2020. See section 3.4.1 CBN Code.
[49] Section 3.4.2 CBN Code.
[50] Section 3.4.3 CBN Code.
[51] Section 3.4.4 CBN Code.
[52] Section 238 of CAMA 2020.
[53] Para.D.2 the Code envisage that the relationship and dialogue between the company and institutional investors is a continuous one.

board. The general meeting also affords the shareholders an opportunity of moving their own resolution. The AGM is a good opportunity for the members to practically participate in the running of their company.[54] The general meeting is therefore an organ for the shareholders to access the progress and problems of the company. It is the place where they have the opportunity to question the directors on the affairs of the company particularly on company's accounts; directors' report and the company's financial position and prospects among others.[55] However, shareholders' power of control may be eroded and rendered futile for example in situations where the meeting is unable to proceed to or cannot continue with the business slated for a general meeting.

The CAMA made provisions for the rights of members to attend and participate at a meeting of the company and provide for a remedy for situations where quorum is maliciously reduced by member(s) withdrawing from the meeting. Thus section 256 (3) provides that:

> Where a member or members withdraw from the meeting for what appears to the chairman to be insufficient reasons and for the purpose of reducing the quorum, and in fact the quorum is no longer present the meeting may continue with the number present, and their decision shall bind all the shareholders and where there is only one member, he may seek the direction of the court to take decision.

This provision appears to leave too much to the discretion of the chairman who may be an insider along with the directors to the detriment of the minorities. It is submitted that a better provision appears to be one requiring the chairman to adjourn the meeting and if the situation persists on the adjourned date he should seek the direction of the court.

In Malaysia for example, the model Articles of Association for companies annexed to the Companies Act, 1965, gives discretion to the chairman to decide when to adjourn a meeting and this does not require shareholders' approval[56]. However, the caveat is that the discretion must be exercised in good faith and in the best interests of the company. Thus,

[54] Abdul-Hamid Oba Yusuf 'Issues in shareholder participation in corporate decision making in Nigeria' *Journal of Corporate Governance Vol.7 No 2 November 2015, 1531.*
[55] ibid
[56] ibid

the chairman as a director is required to observe the principle of good faith relating to directors' duties. Furthermore, the court is given authority under s.150 of the Malaysian Companies Act 1965 to declare that a one-man meeting is a valid meeting.[57]

The UK Companies Act 2006 does not have the equivalent of section 262 (4) of CAMA. However, the UK Charity Commission observed in respect of charity companies that if a meeting does not have a quorum, it cannot make any decisions. The governing document may say whether the quorum must be maintained throughout the meeting for the effective transaction of business, or whether it is sufficient that a quorum be present at the start of the meeting. If it does not the charity trustees will need to establish the position through the making of a suitable rule. It recommends that the quorum be maintained throughout the meeting so as to ensure that each item of business is considered by an adequately representative group of people.[58]

Extraordinary general meeting

The board may commence an extraordinary general meeting at any time and where there are no sufficient numbers of directors within Nigeria, a director may convene an extraordinary general meeting. The individual members may also requisition an extraordinary general meeting where any member or members holding not less than one tenth of the paid-up capital of the company[59] at the date of the deposit carrying the right to vote makes a requisition for an extra ordinary general meeting. Upon the receipt of the requisition documents the directors must immediately convene the meeting notwithstanding anything contrary in the articles of association[60].

The requisitionists must state the general nature of the business to be dealt with at the meeting. It may include the text of the resolution intended to be moved at the meeting. This is a very important document as it will clearly state the intentions of the requisitionists and also give other members and the board opportunity to prepare adequately either to oppose or support the motion or resolution. The legislative limitations placed on the requisition of meeting are rather restrictive and hinders

[57] ibid

[58] ibid

[59] s 239 (2) CAMA.

[60] In the case of company not having a share capital the rule is that the member of the company representing not less than one tenth of the total voting rights of all members having at the said date a right to vote at the general meeting of the company. See also section 303 Companies Act 2006 UK.

good and proper shareholder participation in corporate governance. The one-tenth limits may not be easily achieved and has the effect of shutting out members who may have genuine and important matters to discuss; it becomes impossible for them to contribute to the progress of their company.

The position is the same in England.[61] However, in Australia, section 249D of the Australian Corporations Act allows members representing only 5 percent of the votes that may be cast at the general meeting to requisition for a meeting. The Corporation Act also provided for an alternative of at least 100 members who are entitled to vote at the general meeting. The 100-member option in Australia has also been criticised as a very expensive provision and most difficult to comply with.[62]

Though the position in Nigeria does not include 100-member rule, but the law may be reformed by reducing the percentage of members who may bring a requisition to only one tenth and introduce the alternative provision by allowing not less than twenty members of the company to requisition for a meeting. One may argue that this may lead to proliferation of requisitions but as we shall see below, there are other obstacles to presenting the requisition, which will serve as check on useless requisitions.[63]

9.2 Shareholder resolution

In recent years, there has been increasing tendency for shareholders to request that resolution drafted by them should be included in the business of a general meeting usually the AGM. Some institutional shareholders encourage the use of shareholder resolutions; one of such is the voting guideline for *West Midlands Metropolitan Authorities Pension Fund Company,*[64] which states as follows:

> Shareholders resolution is an integral part of the corporate governance process. They enable shareholders to take the initiative on issues which directors may be unwilling to address or where directors may face a conflict of

[61] Section 303 (3) Companies Act 2006 U.K.

[62] See the report of the Companies and Securities, Advisory Committee in its final reports, shareholder participation in the modern Publicly Listed Company July 2000 cited in Kunle Aina op cit 9

[63] ibid

[64] West Midland Metropolitan Authorities Pension Fund Company Voting Guideline 2004 available at; <http://wmpfonline.com/NR/rd cited in Kunle Aina ibid

> interest... Shareholders resolutions are not seen as a no-confidence vote on the board (unless that is specified) but should be adjudged on the merits of the specific issues addressed. Resolution will be supported that are evaluated as being in the medium to long-term interests of the fund.

The Companies and Allied Act 2020 (CAMA) preserves and enhances the ability of shareholders under certain circumstances to propose resolutions at the AGM.[65]
Members representing not less than one twentieth (20%) of the total voting rights of all members with a right to vote on the resolution or not less than one hundred members holding shares in the company which is paid up an average sum of not less than five hundred naira. If the company is given notice of a resolution under the section, the resolution must be considered at the next general meeting. The copy of the requisition signed by the requisitionists must be deposited at the company's head office at least six weeks before the meeting.[66] The company must give members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way as it gives notice of a meeting.[67]

The company need not give notice of the resolution to members if it is needless publicity of defamatory matters.[68] If the resolution is vague or that it cannot be easily implemented, the directors may refuse to circulate such resolution. Directors may also refuse to place a resolution under the section on the agenda of the general meeting if its object could not be lawfully achieved, for example if it intruded on matters exclusively vested in the directors[69]. Again, this can be avoided by drafting the resolution as one to alter the company's constitution to require directors to take that object into account or to remove a director who opposes the policies, which shareholder activists seek to promote.

Also, where the court is satisfied that the right conferred by the section are being abused to secure needless publicity, or is for a defamatory matter, the court may order that the cost of the application may be paid by the requisitionists. We must note that the section 260 (5) CAMA

[65] CAMA 2020 s. 260
[66] ibid s. 260 (4)
[67] ibid
[68] ibid s. 260 (5).
[69] See also section 338 Company Act 2006 UK, on the English provision on shareholder resolution which is very similar to the Nigerian provision

2020 is so badly drafted that the meaning or implication is very vague.[70] Who makes application under the section? When should such application be made? And for what purpose? The only way to interpret this section is to assume the company directors may decide to apply to court to prevent the resolution from being taken and the ground of abuse of the process will be a valid ground for refusal to allow the resolution for being tabled at the general meeting.[71]

Shareholders may vote for resolution of this kind in order to achieve ecological, socio, or political outcome either because they considered passage of those resolutions is favourable to the economic return on their share, or because they are committed to the wider ecological, socio or political objectives[72]. The use of resolution by shareholders is a simpler and more effective means by the shareholder activists to achieve their objectives. Institutional investors may also use this avenue to perfect important changes in the strategic plans of the company. It helps to make other shareholders become aware of the issues affecting their company. This also helps to improve shareholders' participation in the corporate governance of the company.[73]

9.3 Shareholder statement to general meeting

As we have seen above, it is a common practice for directors who wish to table a resolution at the AGM of a company to accompany it with a statement explaining why the members should vote in favour of their resolution. The Act also gives the shareholders opportunity in section 260 (1) to also bring their own resolution and accompanying statement. This is because it is not enough for the shareholders to have their resolution circulated in advance of the AGM[74]. It will have much more effect if it is accompanied by a statement from the proposers' setting out its merits and why it should be supported. The circulation of the statement and the resolution will be at the expense of the proposers.

The law also makes provision for circulation of only shareholder statements without any resolution. The advantage of having the company circulate the shareholder's statements is that the companies will not incur any extra cost, as it will only circulate the statements with its own papers and notice of meeting. The directors must ensure that the

[70] The section is almost ipsisima verba of s.235(5) of CAMA,1990, Cap C20 LFN, 2004.
[71] Kunle Aina. op cit.12
[72]Davis P. op cit. 443.
[73] ibid
[74] ibid

statements are also circulated if;

- The requisitionists have deposited or tendered sum reasonably sufficient to meet the company expenses in giving effect to the statement.
- The statement must have been deposited at least six weeks before the general meeting.
- The condition of 20 per cent of the member or not less than hundred members requisitioning will still apply to statements[75].
- The company may apply to the court for an order to refuse to circulate the statement if the statement is being abused in order to secure needless publicity or that it is defamatory.
- The court may also apart from giving the directors backing to refuse to circulate the statement, order that the cost of the application be borne by the requisitionists[76]
- It is obvious that the Nigerian law will not assist any minority shareholder to express their views in opposition to any director's proposals and resolutions. The conditions attached are so stringent that the statements are not likely to see the light of the day even if any shareholder attempts to deposit any statements contrary to these very tough conditions. We may contrast with the position in England. Section 314 of the Companies Act 2006 UK also makes provision for the member's power to require circulation of member's statement. The English provision permits only five percent of the members to present a statement for discussion at the meeting while the Nigerian provision provided for twenty percent of the members who have "a right to vote at the meeting to which the requisitions relate".

The Nigerian provisions also provided that the statement must be submitted to the company not less than six weeks before the meeting while the English provision stipulates that the statement must be received at least one week before the meeting to which its relates. Under English law[77], the requisitionists must also deposit or tender some amount of money in respect of expenses for circulation of the statement[78]. However, the payment is only made if the requested circulation of the statement is not in respect of an annual general meeting of a public company and the request is not received before the

[75] Section 314(2) companies Act 2006 UK
[76] Section 314(2) companies Act 2006 UK
[77] Section 314(2) Companies Act 2006 UK.
[78] Section 316 Companies Act 2006 UK.

end of the financial year preceding the meeting.[79] Like the Nigerian provision, there is opportunity for the company to file an action in court in order to avoid circulating the statements. However, while the Nigerian provision is so badly drafted and confused, the English provisions amply stated the only condition for court intervention is only if the procedure is being abused. The Nigerian law on the point need to tag along with it English counterpart by removing every unnecessary obstacle and allow more members opportunity to take more active role in the governance of the company and also allow them to scrutinise the actions of the directors. Though, seldom utilized, the use of section 260 (3) is a veritable procedure to checkmate the excesses of the directors and management.

9.4 Right to adequate information

The Combined Code[80], main principle D.I (dialogue with institutional shareholders) states that there should be a dialogue with shareholder based on mutual understanding of objectives. The board as a whole has responsibilities for ensuring that a satisfactory dialogue with shareholders takes place. The supporting principles to that main principle states; whilst recognising that most shareholder contact is with the chief executive and finance director, the chairman (and the senior independent director and other directors as appropriate) should maintain sufficient contact with major shareholders to understand their issues and concerns.

The Nigerian Corporate Governance Code, 2018 also made some provisions along this line[81] though not exactly the same wording as that of the English provisions. The Board is expected to develop a policy that ensures appropriate engagement with shareholders. The policy should be hosted on the website of the Company. The Chairman of the Board, or other designated persons as specified in the policy may interact with shareholders in order to help develop a balanced understanding of shareholder issues and ensure that their views are communicated to the Board.[82] Vital information disclosure by the directors is the only way shareholders may judge for themselves whether to attend the meeting

[79] Part C. Section 2.1 of the SEC Code.

[80] UK Combined Code available at http: //www.ecgi.org/codes/ documents/ combined_code.pdf accessed 11/11/2021

[81] Principle 22 of the Code, section 21.2 of the SEC Code provides that shareholders are to be treated fairly and given equal access to the company information whilst section 3.1.1 of the CBN Code provides that shareholders shall have a right to obtain relevant material information from the bank on a timely and regular basis.

[82] See principle 22.1 and 22.2 of the recommended practice of the Code.

and vote for or against the proposal or whether to leave the matter to be determined by the majority attending and voting at the meeting.

Though the CAMA is silent on the level of information to be made available to the shareholder or the type of dialogue or interaction that should go on between the shareholders and the director, the Nigerian Corporate Governance Code is quite clear, that the Chairman of the board or any other designated person ought to be involved in the dialogue and should be available to interact with the shareholders and ensure that their views are communicated to the Board.[83]With specific reference to banks, shareholders are donated the right to obtain relevant and material information from the bank on a timely and regular basis.[84] Furthermore, In addition to the traditional means of communication, banks are required to have a website and are encouraged to communicate with shareholders via the website. Such information should include major developments in the bank, risk management practices, executive compensation, local and offshore branch expansion, establishment of investment in subsidiaries and associates, Board and top management appointments, sustainability initiatives and practices, among others.[85]

9.5 Questions at Annual General Meeting

The least instinctual form of shareholders' activities is for shareholders to exercise their right to raise question at the annual general meeting in order to highlight particular issues. The chairman must allow a reasonable opportunity for every member to ask questions about or make comments on the company management. There is no specific provision on the right of the shareholder to ask questions in the meeting but section 235 (8) CAMA, on statutory General meeting provided that the members of the company present at the meeting shall be at the liberty to discuss any matter relating to the formations of the company, and its commencement of business or arising out of the statutory report.

9.6 Removal of directors

The role, duties, functions and importance of directors to the company cannot be over emphasized. They are accountable and responsible for the performance and management of the company. The Board defines the company's strategic goals and ensure that its human and financial resources are effectively deployed towards attaining those goals.[86] The

[83] Principle 22.2 of the Nigerian Code
[84] section 3.1.1 of the CBN Code.
[85] section 3.1.3 of the CBN Code.
[86] Section 2.1 of the SEC Code, section 2.1.1 of the CBN Code and principle 1 of the Nigerian Code.

Code also re- emphasized that the most important role of the board is to ensure that the company is properly managed.[87] The board is to accordingly ensure that the company carries on its business in accordance with its articles and Memorandum of Association and in conformity with the laws of the country, observing the highest ethical standards and on an environmentally sustainable basis. Where the board or individual directors cannot live up to expectation or becomes impediment to good corporate governance practices, the only option is for such director to be removed.

Generally, the shareholder play very minimal role in the choice of directors' appointment. Directors are appointed under the Articles of Association. Accountability of the Directors to shareholders would have been enhanced if the shareholders have an input in the choice and appointment of directors apart from the official role of ratifying the director's appointment. However, the Act gives power to remove the directors by ordinary resolution at any time[88] even before the expiration of his term of office notwithstanding anything in its articles or in any agreement between it and him.

The power of removal of directors is an important shareholder power that must be exercised by the shareholders for the proper management and progress of the company.[89] There must be a proper notice served on the director sought to be removed, such notice must be a special notice.[90] On the receipt of the intended resolution to remove the director, the director also has a right to respond and allowed to speak in his own defense at the AGM even if he is not a member of the company.[91] His representations must also be circulated, or if it was too late to be circulated, he has the right to read his representation before the resolution is taken. Though, the director may have been appointed for a term which generally is for four years though this depends on the Articles of Association, or fixed by contract, this does not hinder the shareholders from removing him.[92] The director may be entitled to compensation if he has a contract of employment with the company, the compensation is determined based on his rights under the contract of

[87] Principle 1.1 of the Nigerian Code, section 2.1.4 of the CBN Code and 2.2 of the SEC Code

[88] *Longe v. First Bank of Nigeria Plc. (2010) 2-3S.C. (Pt. III) 61*

[89] principle 23.1.1 of the Nigerian Code

[90] S. 288 (2) of CAMA.

[91] S. 288 (2) CAMA.

[92] S. 288 (1) CAMA

service.[93]

The shareholders exercise of power to remove director is a clear indication that they are not mere pawns in the hands of the board, and that company law has placed in their hands ultimate power of control over the affairs of the board. This power must be exercised with utmost sense of responsibility in order to ensure good corporate governance and good practices, and to ensure that recalcitrant and unproductive directors need not continue to be retained in a company.

9.7 Shareholders' Powers to Alter the Articles of Association

The articles of association constitute the rule for conduct and regulation of the internal affairs and management of the company. Articles provide the rule book of association of members and have to deal with variety of situations and relations.[94] An important implication of the articles is that its provisions amount to a public notice, known as constructive notice, to all those who deal with the company. The articles bind the company by constituting a contract between the Company and members inter se. It binds all the members present and future.[95]

The content of Articles of Association is provided for in sections 33 and 34 of CAMA, 2020. The power to alter the Articles of Association is a legislative authority. Shareholders having the mandatory majority can amend articles of association. The articles once altered in accordance with the Act become the articles of associations of the company, and is binding on all the members.[96] The Articles of Association can only be altered[97] in accordance with the provisions of the Act, and by special resolution.[98] Any alteration must be lawful, bona fide and not intended to give the majority an advantage over the minority shareholders.

10. RESPONSIBILITIES OF SHAREHOLDERS

Shareholders should take the attendance of annual general meetings as one of their major responsibilities as this is where they can effectively exercise their rights. Another main responsibility of the shareholders is in taking interest in the implementation of the code of corporate

[93] *Read v Astoria Garage (Streatham) (1952) Ch. 357, Southern Foundries v Shirlaw (1940) A.C 701, Shindler v Northern Raincoat Ltd. (1960) 1W.L.R. 1038.*
[94] S. 32 of CAMA 2020.
[95] N. Kapur 'Can shareholders' power to amend the Article of Association at a future date be taken away by amending the Articles of Association?' (ALG India Law Offices: India, nd) cited in D. Nelson op cit.
[96] ibid
[97] CAMA 2020, s. 53
[98] ibid s. 53(2)

governance, thus acting as watchdogs over the managers of their companies, to avoid misfortunes and to safeguard their investments.[99] The following under-listed are issues that shareholders have responsibilities of ensuring:

10.1 Resolutions

A resolution is an ordinary resolution when it has been passed by a simple majority of votes cast by such members of the company, as being entitled to do so, voting in person or by proxy at a general meeting.[100]A resolution is a special resolution when it has been passed by not less than three fourth of the vote cast by such members of the company. Also vote in person or by proxy at a general meeting of which 21days notice, specifying the intention to propose the resolution as a special resolution, has been duly given.

10.2 Quorum of meeting

Every shareholder is entitled to attend any general meeting of a company. Shareholders have the right to participate actively and vote in general meetings[101]. A quorum for a meeting is the minimum number of persons who are entitled to attend the meeting who must be present to validly transact the business of the meeting. No business unless otherwise provided in the articles, shall be transacted at any general meeting unless a quorum of members[102] is present at the time when the meeting proceeds to business and throughout the meeting.[103] The quorum for the meeting of a company is one-third of the total number of members of the company or 25 members (whichever is less) present in person or by proxy, provided that where the number of members is not multiple of three, then the number nearest to one third, and where the number of members is 6 or less, the quorum shall be two members. For the purpose of determining a quorum, all members or their proxies shall be counted.[104]

Every meeting needs a person to act as chairman to control and see the smooth conduct of the meeting; and he or she shall preside at every general meeting of the company except if he/she is not present at the meeting or not present within one hour after the time appointed for

[99] D. Nelson 'The Dilemma of the Shareholders under the Nigerian Company Law' *Journal of Law, Policy and Globalization vol.37, 2015* available online at< www.iiste.org >last visited on 23/11/2016.
[100] CAMA s. 258 (1) & (2).
[101] section 3.1.2 CBN Code.
[102] i.e. shareholders
[103] S.256 (1) & (2) of CAMA
[104] D. Nelson op cit. 6

holding the meeting, the members present are to choose one of the members to be the chairman of the meeting.

The duties and powers of the chairman include: preservation of order and power to take such measures as one reasonably necessary to do so, ensure that proceedings are conducted in an accepted manner, ensure that the true intention of the meeting is carried out in resolving any issue that arises before it, ensure that all questions that arise are promptly decided and act bona fide in the interest of the company. The chairman shall cast his vote bona fide in the interest of the company as a whole, provided that he/she is also a shareholder; he may cast it in his own interest and is also empowered to adjourn a meeting.[105]

10.3 Voting rights and other issues

As owners of the company, shareholders have a unique relationship to the board and management. Unlike other groups that do business with the corporation[106], ordinary shareholders do not and cannot have contractual protection of their interests. Instead, they must rely on the board of directors, whom they elect, and on their right to vote as shareholders who have responsibility to monitor the conduct of the board of directors and exercise their voting rights by casting thoughtful and informed proxy votes that enhance the financial interests of their investors. In view of the importance of the board of directors, shareholders should withhold votes from unopposed directors where the individual or the board as a whole has acted contrary to legitimate shareholder concerns.[107]

Although the proxy vote is the key mechanism by which shareholders play a role in the governance of the corporation, it is appropriate for institutional investors and other shareholders that are entrusted with the investment funds of others to be active shareholders and promote more effective corporate governance in the companies in which they invest. Each Director represents all shareholders. Shareholders should have the right to expect that each director is acting in the interest of all shareholders and not the interest of a dominant shareholder or a particular stakeholder and to a vote in proportion to their economic stake in the company. Each share of ordinary stock should have one vote.[108]

Shareholders should be able to cast proxy votes in a confidential manner

[105] S. 265 (4) of CAMA

[106] E.g. customers, suppliers, lenders and labour

[107] D. Nelson op cit.6

[108] ibid

independent of management, except in circumstances of a contest for control. Confidential voting protects shareholders from undue influence in making voting decisions.[109]

Shareholders should have the right to approve matters submitted for their consideration with a simple majority of the shares voted. The board should not impose super majority voting requirements, except if necessary to protect the interest of minority stockholders where there is a single dominant shareholder and votes cast 'for' or 'against' a proposal should be the only votes counted, except for purposes of determining whether a quorum requirement is met. They should have the right to approve increases in the authorized number of ordinary shares and should ensure that such increases are intended for a valid corporate shareholder interests.[110]

Shareholders should have the right to approve any action, which alters the fundamental relationship between the shareholders and the board and should have the ability to communicate effectively with the board of directors. Formal procedures should be created to enable shareholders to communicate their views and concerns directly to board members. The board of directors is responsible for representing shareholders' interest. When the board fails to fulfill its governance responsibilities, shareholders should consider other means to ensure board carried out their responsibilities, including challenges to the current board.[111]

11. **CONCLUSION**

The problem of shareholders ineffectively playing their role in the good governance of corporation is because many shareholders are in general ignorant of their rights and responsibilities, and even when they become aware they often adopt passive and green approach particularly due to lack of established good corporate governance practices. Even when they decide to take an action, they are not familiar with their rights, alternative and the suitable approaches to put forth their complaints. The general meeting provides a veritable avenue for the shareholders to hold managers accountable to all stakeholders but since very few shareholders turn up at general meetings, the board is consequentially the most powerful organ in the company's management structure. This position is not helped by the dichotomy between the majority shareholders and that of minority shareholders and the consequent dearth of information which

[109] ibid
[110] ibid
[111] ibid

are material to enable the shareholder to determine which course of action to take. If the shareholders are able to overcome these shortcomings there is no doubt that they stand in a good stead to monitor managers and enthrone effective governance in Nigerian banking industry.