AN EXAMINATION OF THE IMPACT OF FRAUD ON CORPORATE GOVERNANCE IN NIGERIAN BANKS

BY

EZE, EUGENE IKECHUKWU
MAT. NO. PG/12/13/214839

FACULTY OF LAW
DELTA STATE UNIVERSITY
ABRAKA

DECEMBER, 2015

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BEING A DISSERTATION SUBMITTED TO THE POST GRADUATE SCHOOL IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS (LL.M) DEGREE

FACULTY OF LAW, DELTA STATE UNIVERSITY, ABRAKA

SUPERVISOR: PROF. D. F. TOM

DECEMBER, 2015

APPROVAL

This work has been read and approved as meeting the requirements of the Delta State University, for the award of Master of Laws (LL.M) Degree.

.....	.....
Professor David F. Tom	**Signature and Date**
Supervisor	

CERTIFICATION

I, Eze, Eugene Ikechukwu, hereby certify that apart from references to other works and Law reports which have been duly acknowledged herein, this dissertation is a product of my personal research and same has not been presented in part or in whole elsewhere.

.....

Signature

DEDICATION

This work is dedicated to God who is the King of kings and Lord of lords for His mercies, protection and provisions.

Also, to my dear wife, Joy ChiagozieEzekwesili and my lovely children.

ACKNOWLEDGEMENT

Many people contributed immensely to the success of my post-graduate programme, and to them, I say a big THANK YOU.

First, I give all glory, honour and adoration to God almighty who stirred the ship successfully to the end. May His name be praised forever.

May I respectfully express my sincere appreciation to my Supervisor, Prof. David F. Tom a man of great wit and wisdom, for his numerous contributions and for painstakingly reading through my work without which this work would not have been possible.

My special appreciation goes to our erudite professor, an academic guru and Dean, faculty of Law, Prof. M. O. U. Gasiokwu for his benevolence, care and encouragement during the course of this programme.

A big thank you also goes to all lecturers in the Masters Programme, especially to Dr. Peter IkechukwuGasiokwu, Dr. Beauty OboraghwareAlloh, I also appreciate the efforts of members of staff of the Post-Graduate School, Oleh Campus, particularly, Mr. Lucky Amos Enanuga for his encouragement and support during this programme.

I owe an indebt gratitude to Mrs. Vivian Gasiokwu who constantly gave me valuable advice and ensured that I did not stand alone during this programme. Mother, you are truly a woman of virtue. May the Lord bless you immensely.

The success of this work is also owed to my friends who made the platform available to me during the course of the programme, they are IkechukwuEzechukwu, SAN, Elder O. J. Nwodo, AtuegwuOkafor Esq., UcheMoka Esq., Engr. ChinenyeOkoroand my brother Charles TochukwuEzekwesili, who made his contributions from diaspora.

May I also thank the following learned colleagues and classmates, Whisky Abraham Esq., Famous Izobo Esq., Miss. OgidiakaUfuoma Esq., Mrs. Ede Osume Esq., and

Miss. AkpodavanIroro Esq., for their invaluable inspiration and cooperation during the course of the programme.

May I further extol the following persons for their spiritual contribution towards the success of the thesis, they are, Apostle IzunnaNwobi, Senior Pastor Obi and Deacon Simon Uzo.

But for lack of space, there are many more whom I would have loved to also appreciate for their assistance in the course of the programme. To them, I say thank you and may the almighty God reward you accordingly.

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LIST OF ABBREVIATIONS

ABC	African Banking Corporation
AGM	Annual General Meeting
AMCON	Asset Management Company of Nigeria
ANLR	All Nigeria Law Report
BBWA	Bank of British West Africa
BDC	Bureau De Change
BEA	Bill of Exchange Act
BIS	Bank for International Settlement
BOFIA	Banks and Other Financial Institution Act
CAC	Corporate Affairs Commission
CAMA	Company and Allied Matters Act
CBN	Central Bank of Nigeria
CH	Chancery
CH.D	Chancery Division
DFI	Development Finance Institution
E.R.	English Report
FBN	First Bank of Nigeria
FBTLR	Failed Bank Tribunal Law Report
FMB	Federal Mortgage Bank
FSCC	The Financial Service Coordinating Commission
FSRCC	Financial Service Regulatory Coordinating commission
IPO	Initial Public Offering
ISA	Investment and Security Act
KB	Kings Bench
L.R.N	Law Report of Nigeria
LFN	Law of the Federation of Nigeria
LPO	Local Purchasing Banks
MFB	Micro-Finance Banks
NACB	Nigeria Agricultural Co-operative Bank
NBCI	Nigeria Bank for Commerce and Industry
NBS	Nigeria Building Society
NDIC	Nigeria Deposit Insurance Corporation
NEPA	Nigeria Enterprise Promotion Acts
NIC	National Insurance Commission

NNLR	Northern Nigeria Law Report
NSE	Nigerian Stock Exchange
OECD	Organization for Economic Corporation and Development
PMB	Primary Mortgage Banks
Q.B.	Queens Bench
SAP	Structural Adjustment Programme
SC	Supreme Court
SEC	Security and Exchange Commission
UBA	United Bank for Africa
UGPL	Union Global Partners Limited

ABSTRACT

In Nigeria, the banking institution constitutes the life blood of the economy because of its strategic position. The performance of this institution is central to the health of the economy. Consequently, the failure of the institution is a manifestation of the failure of the economy. Lack of proper corporate governance and manifest fraud and fraudulent activities, in banks, coupled with directors' negligence to observe due diligence and acceptable standard practices, resulted to total collapse and failure of many banks. These necessitated the interest of the writer in dealing with the study. The study examines the impact of fraud on corporate governance in Nigeria banks. It aims at determining the extent to which poor corporate governance has affected the Nigeria banking sector and the role of the Central Bank of Nigeria (CBN) in the regulation and supervision of banks in Nigeria. In order to achieve the objective of this study, the doctrinal method was adopted. Consequently, the study relies mainly on both primary and secondary materials. The primary sources collected include statutes like the Central Bank of Nigeria Act (CBN Act), Bank and Other Financial Institution Act (BOFIA), Nigerian Deposit Insurance Corporation Act (NDIC Act), Companies and Allied Matters Act (CAMA) and case law etc. The secondary sources include text books by learned authors, journals, Magazines, Newspapers, Internet Materials, Periodic Articles, Published and Unpublished Works. The dissertation discusses fraud and the unethical conduct of bank directors which has impacted negatively on corporate governance in Nigeria and resulted in bank failures and distress. This study finds out that the governance of banks ordinarily rests on the board of directors, the board, in so many instances have not lived up to its expectation in discharging this responsibilities. Even where the responsibilities of the board are clearly spelt out, most banks do not comply with all legal requirements and regulatory standards. This dissertation therefore recommends that the Code of Corporate Governance for Banks in Nigeria Post Consolidation, issued by the CBN in 2006 be complied with strictly and that men of proven integrity, transparency and honesty with proper and adequate qualifications be appointed as directors of banks. The benefit of the dissertation is that the dissertation will be of value in improving the performance of banks in Nigeria. In addition for good and credible corporate governance, the Board of Directors or the Management should not be involved in unsecured loans at the expense of depositors, but should build credibility, ensure transparency and accountability as well as maintain effective channels of information disclosure that will foster good corporate governance.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

In Nigeria, the financial sector constitutes the life blood of the economy because of its strategic position. It provides finance for individuals and corporations, and facilitates the transmission of funds across payment systems. It performs an important role in promoting and sustaining economic growth and development. The performance of the financial sector is central to the health of the economy. It is infact, a reflection of the efficient functioning of the entire economy. Consequently, the failure of the financial sector, basically, due to fraud and poor corporate governance, is a manifestation of the failure of the economy. Thus, the issue of fraud and poor corporate governance in the banking system are part of the major problems in Nigeria.

In Nigeria, the issue of corporate governance in banks has been given the front burner by all sectors of the economy, for instance, the bankers' committee set up a sub-committee on corporate governance for banks and other financial institutions in Nigeria. This is in recognition of the critical role of corporate governance in the success or failure of banks.

However, to boast public confidence and ensure efficient and effective functioning of the banking system, the Central Bank of Nigeria (CBN) in July 2004, under the leadership of Charles Soludo, unveiled new banking guidelines designed to consolidate and restructure the sector through mergers

and acquisition. This was to make Nigeria banks more competitive and be able to play in the global market.

Therefore, the management of banks has implications for corporate, as well as national prosperity. This, in turn, highlights the importance and central function of good governance in banks. It is self-evident then, that corporate governance in banks must be robust, effective, adaptable to changing circumstances and fit for its purpose.

1.1.1 Corporate Governance Defined

Corporate governance has been defined as the sum of the processes, structures and information used for directing and overseeing the management of an organization[1].

There are many definitions of corporate governance. Dr. Medhar Mehra[2] defined it as:

The system of law, regulations and practices which will promote enterprise, ensure accountability and accelerate performance. It aims to improve the effectiveness of the decision making in company boards. The effectiveness has been interpreted to mean that business is run in a manner that investors receive a fair return.

According to Wikipedia[3], the free encyclopedia, corporate governance is the set of process, custom, policies, laws and institutions affecting the way a

[1] Mayer, F. "Corporate Governance and Performance in Enterprise and Community:" New Directors in Corporate Governance. (1999) Blackwell Publishers, Oxford, UK.

[2] Dr. Medhar Mehra "Corproate Governance Key to Sustainable Wealth Creation "retrieved from www. Wcfcg.net/articles.htm, 23rd October, 2014

Corporation is directed, administered or controlled. Corporate governance also include the relationships among the many players involved (stakeholders) and the goals for which the corporation is governed.

Gabrielle O. Donovan[4] Conceived Corporate governance as:

> **An internal system encompassing policies, Processes and people, which served the needs of shareholders, management activities with good business savvy, objectivity and integrity.**
>
> **Sound corporate governance is reliant on external market place commitment and legislation, plus a healthy board culture which safeguards polices and process.**

Mallam Musa Al-Faki[5] Former Director- General of Securities and Exchange Commission described it as those mechanisms at work within a company that conform with the principles of transparency, fairness, accountability and responsibility. Corporate governance is about promoting corporate fairness, transparency and accountability. It is concern with how a company is structured and controlled internally to ensure that the business is run lawfully and ethically with due regard to all stakeholders.

To **Onuoha Reginald Akujobi**[6], corporate governance is the process by which corporate entities particularly limited liability companies are governed. It is the exercise of power over the enterprise, direction, the supervision and

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[3]Wikipedia, the free encyclopedia "Corporate Governance" from http://en.wikipedia.org/wiki/Corproate governance.p.1of 14. retrieved on 23rd October, 2014

[4] "A Board Culture of Corporate Governance" cited in Wikipedia, the free encyclopedia "Corporate Governance"retrieved from http"/en.Wikipedia.org/wiki/corporategovernance p.2 of 14. On 23rd October, 2014

[5] Mallam Musa Alfaki "Corporate Governance: An Essential Ingredient for Value Creation". The Guardian Newspaper of Wednesday Sept. 6th 2006. P. 80

[6]"The Need for Investor' Vigilance in Corporate Governance" The Guardian Newspaper of Wednesday June 21st, 2006 p.15.

control of enterprise actions, the concern for effect of the enterprise of other parties, the acceptance of a duty to be accountable and self-regulation of corruption within the status and jurisdiction of the Federal Republic of Nigeria.

From the definitions stated above, we can define corporate governance as those external and internal mechanisms at work in a corporation created by the collaborative action of diverse stakeholders such as shareholders, directors, creditors, executives, employees etc. in setting or influencing the process by which activities of large corporate entities are directed, controlled or monitored to ensure effective performance for the benefit of all stakeholders in general and investors in particular. It is the means by which the society ensures that large corporate bodies are well run institutions into which investors can confidently commit their money.

In the banking industry, corporate governance refers to the manner in which the business and strategy of the institution are governed by the firm's board and senior management. An accurate and succinct description of it is given by the Bank for Internationals Settlement[7], which describes the mechanics of bank corporate governance as;

a. Setting the bank's objectives, including target rate of return for shareholders.

b. Setting the control framework that oversees the daily operations of the banks.

c. Protecting customer deposits

d. Setting strategy that accounts for the interests of all stakeholders, includingshareholders, employee, customers and suppliers.

[7] Bank for International Settlements, Enhancing Corporate Governance for Banking Organizations, Working Paper, (September 1999)

e. Maintaining the bank as a going concern irrespective of economic conditions and through the business cycle.

A banking crisis highlights the failure of bank corporate governance with great effect.

The financial crash and economic recession of 2007-2009 resulted in the demise of a number of banks of varying size and systematic importance, especially in United States of America and Europe. The evidence from the crash is that corporate governance at many banks failed completely.

Corporate governance therefore, is about building credibility, ensuring transparency and accountability as well as maintaining an effective channel of information disclosure that will foster good corporate performance in banks.

1.1.2 Fraud As A Clogg In Good Governance In Banks

Fraud could be seen as the intentional misrepresentation, concealment or omission of the truth for the purpose of deception or manipulation, to the financial detriment of an individual or an organization (such as a bank), which also includes embezzlement, theft or any attempt to steal or unlawfully obtain, misappropriate or harm the asset of the banks[8].

Fraud, literarily, means a conscious and deliberate action by a person or group of persons with the intention of altering the truth or fact for selfish personal gain. It is now the single most veritable threat to the entire banking industry[9]

[8] Adeduro, A.A. (1998): "An Investigation into Frauds in Banks", An unpublished thesis of University of Lagos.
[9] Olasanmi, O.O (2010) Computer Crime and Counter Measures in the Nigeria Banking Sector. Journal of Internet Banking and Commerce, 15 (1): -1-10.

Fraud has been identified as major cause of bank distress and eventual failurein the Nigeria banking sector. It is a universal phenomenon that has been in existence for so long. Itsmagnitude cannot be known for sure, because much of it is undetected and not all that is detected is published. It is known fact that no area of banking system is immune to fraudsters, not even the security designed to prevent it[10].

Fraud on corporate governance has been the precipating factors in the distress of banks, and as much as various measures have been taken tominimize the incidence of fraud, it still rises by the day because fraudsters always device tactical ways of committing fraud. This has become a point of great attention in the banking sectors as well as every organization in Nigeria. Although, this phenomenon is not unique to the banking industry or peculiar to Nigeria alone, the high incidence of fraud within the banking sector has become a problem to which solutions must be provided in view of the large sums of money involved and its adverse implications on the economy.

Fraud in its effects, reduces the assets and increases the liability of any company. In the case of banks, this may result in the loss of potential customersor crises of confidence of banking public and in the long run, end up in another failed bank situation.

It is instructive to know that many banking operatives have different reasons for joining various banks. Many have the intention of working for a very short time in the bank, get whatever they could and find another job that is less demanding. Some are in the sector because of their love for banking and all it

[10]Adewunmi, W. (1986) Fraud in Banks, Nigerian Institute of Bankers, Land Mark Publications, Lagos.

stands for. While majority are to enrich themselves by fraudulent means. Due to the upsurge of great viability in the banking sector, its dynamic and fast expending level of activities, banks are faced with different kinds of challenges, that are trying to prevent various fraudulent intentions of both staff and customers. This research goes on to examine the impact of fraud on corporate governance in Nigeria banks.

1.2 STATEMENT OF THE PROBLEM

Banks and other financial institutions are at the heart of the world's recent financial crisis. The deterioration of their asset portfolios, largely due to distorted credit management, was one of the main structural sources of the crisis[11].

To a large extent, this problem was the result of poor corporate governance in the countries' banking institutions and industrial group. This poor corporate governance, in turn, was very much attributable to the relationships among the government, bank and big businesses as well as the organizational structure of businesses.

The Central Bank of Nigeria (CBN) in July 2004 unveiled new banking guidelines designed to consolidate and restructure the industry through mergers and acquisition. This was to make Nigerian banks more competitive to banking and be able to successfully operate in the global market.

However, the successful operation in the global market requires accountability, transparency, and respect for the rule of law. In section 1 of the Code of

[11] Sanusi .L.S "The Nigeria Banking Industry: What Went Wrong and the way forward," A lecture at Bayero University, retrieved from www. Cenbank.org/out/speeches/2010. On 23rd October, 2014

Corporate Governance for Banks in Nigerian Post Consolidation, it was stated that the consolidation of the industries poses additional corporate governance challenges arising from integration processes, information technology, and culture. The code further indicates that two-thirds of mergers worldwide failed due to inability to integrate personnel and systems and also as a result of the irreconcilable differences in corporate culture and management, resulting in board of management problems.

In the immediate past two decades, the financial services industry has experienced fluctuating fortunes leading to high profile cases of corporate failure and consequent near loss of public confidence. The implication of this on our tottering economy is obviously negative. The industry's problems are consequences (directly or indirectly) of bad corporate governance[12].

Although the governance of banks ordinarily rests with the board of directors, the boards, however, do not live up to their expectation in discharging' theirresponsibilities. Even where the responsibilities of the board are clearly spelt out, banks do not comply with all legal requirements and regulatory standards. Banking business is not conducted with high ethical standard. There are gross insider abuses as granting insider related credits resulting in large quantum of non- performing credits. The internal control and operation procedures are often not followed thus rendering the system very weak and allowing fraudulent and self- serving practices among members of the board, management and staff.

[12] Chukwudire, U. (2014) Corporate Governance in the Nigerian Financial Services Industry, The Nigerian Banker July- December Edition: 15-20.

Lack of transparency has obscured the way many financial and economic activities are conducted and has contributed to the alarming proportion of economic/financial crimes in the financial industry[13].

Trust and fiduciary principles, which was the corners stone of banking, has been completely jettisoned as banks now engage in all forms of sharp practices. Some of these sharp practices involve the deliberate manipulation or distortion of records to conceal the correct and true statement of affairs. These records, which form the bedrock of supervisory oversight by the regulatory authorities in monitoring the soundness of the system, has thus been undermined.

Charles Soludo, in 2004, stated that a good corporate governance practice in the banking industry is imperative, if the industry is to effectively play a key role in the overall development of Nigeria.

It is in the light of the above problems that this research work onExamination of the Impact of Fraud on Corporate Governance in Nigerian banks is embarked upon.

1.3 AIMS AND OBJECTIVE OF THE STUDY

The research objectives are as follows

- Determine the extent to which poor corporate governance has affected the Nigeria banking sector.
- Investigate the impact of fraud on the performance of banks in Nigeria.

[13] Anya, O.A. (2003), Corporate Governance as an Effective tool for combating financial and Economic Crimes: the Nigeria, Banker, October- December Edition 32-36.

- ❖ Determine the various means employed in defrauding banks.
- ❖ Investigate the extent to which the Central Bank of Nigeria has promoted the prevention of fraud.

1.4 SIGNIFICANCE OF THE STUDY

This study is of great significance to banks, investors academics and other relevant stakeholders. This study provides a picture of where banks stand in relation to the codes and principles on corporate governance introduced by the Central Bank of Nigeria. It exposes the effect of fraud on corporate governance. It further provides an insight into understanding the degree to which the banks that are reporting on their corporate governance have been compliant with different sections of the code of best practice and where they are experiencing difficulties. Board of directors will find the information of value in benchmarking the performance of their banks, against that of their peers. The result of this study will also serve as a data base for further researches in this field of research.

1.5 RESEARCH METHOD

The research method to be employed shall be doctrinal method. The study is going to rely mainly on secondary data.

In the process of conducting this research, all the sources of data collection, shall be secondary and documentation in nature, derived through the review of relevant literature such as magazines, newspapers, textbook, journals, Internet materials, periodical articles, published and unpublished works.

1.6 LITERATURE REVIEW:

Having had a calm view of several related literature or this topic, **the examination of the impact of fraud on corporate governance in Nigerian banks**, it is very glaring that it is one that little has been written about.

However, it leaves the writer a lot work to do, having to consider several primary source material, case laws, newspapers/ websites publications and even moreso consider one's personal experience which is regarded to as, or termed a teleological approach.

1.6.1 Theoretical Review

The banking sector in any country plays a fundamental role in increasing the level of economic activity. As intermediaries to both suppliers and users of fund, banks are effectively situated in a continuum that determines the pulse of the economy. Worldwide, the ability or inability of banks to successfully fulfill their role as intermediaries has been a central issue in some of the financial crisis that has been witnessed so far[14].

It is stated that a special feature of banking activities is to act as delegated monitors of borrowers on behalf of the ultimate lenders (depositors).[15] In this special relationship with depositors and borrowers, banks need to secure the trust and confidence of their numerous clients.

[14] Idolor Joseph Eseoghene, "African Journal of Accounting, economics, Finance and Banking Research, Vol. 6, No. 6, 2010 retrived from globip.com/articles/African-vol.6-articesl 5. 23rd October, 2014

[1515] Diamond, D.W. "Financial Intermediation and Delegated Monitoring" Review of Economic Statistics, Volume 51, Number 10, 1984.

1.6.2 **Nature of Fraud**

The concept of fraud is itself chaotic. But scholars vary significantly in their expressions about fraud.

Fraud is a universal phenomenon which has been in existence for so long. Its magnitude cannot be known for sure, because much of it is undiscovered or undetected and not all that is detected is published.

Fraud assumes so many different degrees and forms that courts are compelled to content themselves with only few general rules for its discovery and defeat.

Fraud is a generic term and embraces all the multifarious means which human ingenuity can devise, which are resorted to by one individual to get advantage over another in false representation[16]

Fraud can also be said to be an act or course of deception deliberately practiced to gain un-fare advantage such deception directed to the detriment of another. [17]

Fraud may be categorized into three groups, namely, internal, external and mixed fraud. Internal fraud relates to those frauds committed by members of staff and directors of banks while external fraud is committed by persons not connected with the banks e.g. customers or friends of staff, and mixed fraud involves outsiders colluding with the staff and directors of the bank. These shall be discussed in detail in the course of this work.

[16] Okafor, B. Strategic "Approach to Reduction of Employee, that fraud and Embezzlement, Niger Account" 37 (4), 3-5, 2004.
[17] Anyanwu, J.C. "Monetary Economic: Theory, Policy and Institutions (Hybrid Publishers, Onitsha, 1993)

1.6.3 The Concept of Corporate Governance

In any organization, corporate governance is one of the key factors that determine the health of the system and its ability to survive economic shock. It can be said to mean the sum of the processes, structures and information used for directing and overseeing the management of an organization.[18]

The Organization for Economic Corporation and Development (OECD)[19]has defined corporate governance as a system on the basis of which companies are directed and managed. It is upon this system that specifications are given for the division of competencies and responsibilities between the parties i.e. board of directors, the management and shareholders, and rules and procedures are formulated for adopting decisions on corporate matters.

There is a consensus, however that the broader view of Corporate Governance should be adopted in the case of banking institution because of the peculiar contractual form of banking which demands that Corporate Governance mechanisms for banks should capture depositors as well as shareholders.[20] It is also viewed that there should be government intervention in order to restrain the behavior of bank management. It is further stated that unique nature of the banking firm, whether in the developed or developing world, requires that a broad view of corporate governance which encapsulates both shareholders and depositors, be adopted for banks. By so doing, fraud in banks can be minimized or completely eradicated. Hence, corporate governance is a crucial issue for the management of banks.

[18] Mayer .F. "Corporate Governance and Performance in Enterprise and Community: New Directors in Corporate Governance, (Blackwell Publishers, Oxford, Uk, 1999)

[19] www.oecd.org retrieved 6th December, 2014

[20] Macy, J and O'Harg, M. "The Corporate Governance of Banks" FRBNY Economic Policy Review, April, 2001, pp. 97-107.

It is stated that from a banking industry perspective, corporate governance involves the manner in which the business affairs of individual institutions are governed by the board of directors and senior management. The board of directors performs the pivotal role in any system of corporate governance. It is accountable to the stakeholders, directs and controls the management. It stewards the company, sets its strategic aim and financial goal, and oversees their implementation, puts in place adequate internal controls and periodically reports of the activities and progress of the company in a transparent manner to the stakeholders[21]

It has been agreed at all levels that the quality of leadership provided by the board of directors is a critical factor in fraud prevention and management. The ethical tone of the organization is set by the board of directors. The value of any bank must emphasis integrity, culture of hard-work and merit in appointment and promotion of staff.

The relationship of directors to the company i.e. bank, is of a fiducially nature and a director is bound to observe utmost good faith both in the transaction with the company and on the company's behalf. Companies and Allied Matters Act[22] states that the personal interest of a director shall not conflict with any of his duties as a director.

According to **Ogbuanya Nelson** in his work, **"Essentials of Corporate Law Practice in Nigeria"**[23] he admits that the directors are the alter ego of the company. Thus, they are said to be the mind and brain behind company's

[21] Ogbechie Chris and Koufodpoules N.D.' "Corporate Governance and Board Practices in the Nigeria Banking Industry" retrieved from www.ibs.edu.ng. 6th December, 2014
[22] Section 280 (1) CAMA, 2004.
[23] Ogbuanya C.S. "Essential Corporate Law Practice in Nigeria." (Lagos Bi-Fantasy, 2010) PP 324-394.

activities and constitute the policy making, as well as the executive organs of the company.

He states further that the following types of directors are recognized under the Nigerian Corporate Law Practice, Thus

i. Executive Directors
ii. Managing Directors
iii. Chairman of Board of Directors
iv. Alternative Directors
v. Shadow Directors
vi. Representative/ Nominee directors
vii. Life Director

The above shall be fully discussed in the course of this work.

It is evident therefore, that any subsisting bank must have persons who fall under the above category for the bank to function optimally.

According to **A.T. Akume** in his work **"Directors Secret Profit in Banks"**[24] he states that the duty not to make profit and exploits corporate assets and opportunities creates onerous obligations on directors of Nigerian Companies. Perhaps this is the most challenging obligation of directors. This rule against secret profit and necessary benefits is wide and covers three aspects namely;

(a) Bribery and Corruption

(b) Abuse of confidential information

(c) Competition based on **multi-directorship.**

[24] Akume A.T., "Directors Secret Profit in Banks" Published at Vol. 4 No.1, Ahmadu Bello University Journal of Commercial Law, 2008-2009.

J.O. Odion in his work "Test Applied by Courts to determine directors Exploitation of Banks"[25] he states that courts have devised various test to determine the liability of directors in respect of making profit and exploiting corporate opportunities. However, the failure Odion's work has is that he did not relate it to the Banking Sector. He mainly concentrated on company generally.

A further review of literatures in company law shows that there are no previous works on the supervisory roles of the Central Bank of Nigeria (CBN) over banks in Nigeria. In Emiola's Law and Practices of Banking[26], he dealt with the general principles of company law practice and did not distinguish between these principles from peculiar provisions for banking formation, management and winding up in Nigeria. The actions of CBN in its latest reforms were a deviation from the general principle of CAMA.

Chianu in his book law of Banking [27] dealt with disciplinary measures to bank employees who are involved in unethical conducts or banking malpractice. He did not address issues related to the supervisory powers of the Central Bank of Nigeria over other banks but merely examined punitive measures for offending banks employees.

Company and Allied Matters Act, (CAMA) 2004 does not provide for insider training. No reasons were adduced for its non-inclusion, although it was provided for in sections 614- 624 of CAMA 1990.

[25] Odion, J.O. "Test Applied by Courts to determine directors Exploitation of Banks" published by Ahamdu Bello University Journal of Commercial Law, 2007.
[26] Emiola, A, "Nigeria Company Law (Ogbomosho: Emiola Publishers, 2001)
[27] Chianu, E., Law of Banking, Text: Cases: Comments (Benin City: ENSLEE Books, 1995) P. 524-546

In as much as no reason was advanced for its non-inclusion, one can only guess, may be insider trading may be seen as more duplication of a fiduciary duty of a director. Now that it is not included, does it mean that a director or any officer of the company is free to deal on insider trading?

Even though that the Investment and Securities Act, (ISA) 2007, Laws of the Federation of Nigeria, makes provisions for insider Trading, my view is that same provision be made under CAMA, 2004 LFN, which is the ground norm in Nigerian Corporate Practice. We intend to look at these provisions in details in the course of the work.

The Central Bank of Nigeria Code[28] issued in March 1st 2006, with an effective date on April 3rd 2006, is an industry specific code applicable to all money deposit banks operating in Nigeria. Since the CBN code came into force, a lot has happened in the banking sector. There are some practices which are beneficial in strengthening corporate governance not provided for in the CBN Code. From the findings on the recent banking crisis in Nigeria, it is still obvious that Nigeria banks are still faced with corporate governance challenges in spite of the existence of the 2006 CBN Code, issued to address the corporate governance challenges that Nigeria banks would encounter post-consolidation. It is our intention to treat in detail the challenges facing the corporate governance in Nigeria in the course of this work.

[28] The Code of Corporate Governance in Banks in Nigeria Post- Consolidation 2006

CHAPTER TWO

INSTITUTIONAL AND LEGAL FRAMEWORK FOR THE ESTABLISHMENT OF BANKS IN NIGERIA

2.1 MEANING OF BANK

It is important to point out that the term "Bank and Banker" are often interchangeably used when describing the concept of banking. However, the two words convey the same meaning. The term bank has been subjected to several statutory and judicial definitions.

For one to fully appreciate the meaning of "banking", he must first understand the meaning of "bank".

Bank is defined as an establishment authorized by a government to accept deposits, pay interest, clear cheques, make loans, act as an intermediary in financial transactions and provide other financial services to its customers.[29]

According to Oxford English Dictionary, 6th edition, a bank is an organization that provides various financial services, such as keeping and lending money.

Concised Oxford English Dictionary, 11th edition defines it as, a financial establishment that uses money deposited by customers for investment, pays it out when required, makes loans at interest and changes currency.

Black's Law Dictionary, 8th edition defines a bank as financial establishment for the deposit, loan exchange or issue of money and for transaction of funds.

[29]Retrieved from www. Businessdictionary.com/definition/bank.html, 3rd February, 2015

To Dr. Hart, [30]

> ***A bank is a person or company on business of receiving monies and collecting drafts of customers subject to the obligation of honouringcheques drawn upon them from time to time by customers to the extent of the amount available on their current account.***

Sir J. Paget[31] sees bank as "a corporation or person(s) who accept money on current account, collect cheques for customers and pay cheques drawn upon such accounts on demand. That if such minimum services are afforded to all and sundry without restriction of any kind, the business is banking, whether or not other business is undertaken at the same time".

Sheldon[32] following earlier quoted pattern of definition, contended that a banker's business is to receive money from his customers and to collect instruments representing money from his customers on the understanding that he will refund all money received or collected either on demand or at some definite date agreed upon between him and his customer.

From the above quoted attempts at defining banks, it can be seen that emphasis has often been placed on the function of a bank in trying to understand what a bank is.

[30] Hart H.L., "Law of Banking" Vol. 1 (London: Sweet & Maxwell, 4th ed. 1931) p.1
[31] Maurice Magreh Paget "Law of Banking" (London: Butterworths, 7th ed. 1961) p.12
[32] Drover C.B. and Bostey R.W.B: Sheldon's Practice of Law of Banking, (London Macdonald and Evans, 10th ed, 1972) P. 162

The Courts have always attempted to ensure certainty of the Law. Therefore in **United Dominion Trust Ltd V Kirkwood,[33] Lord Denning M. R.** stated that;

> **"There are therefore, two characteristics usually found in bankers today: (1) They accept money from collect cheques for, their customers and place them to their credit; (2) They honourcheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them also a third, namely; (3) They keep current accounts or something of that nature, in their books in which the credits and debits are entered".**

The Supreme Court, in **Wema Bank Plc V Osilaru[34]** defined a bank as;

> **"A quasipublic institution, for the custody and Loan of money, the exchange and transmission of same by means of bills and drafts and issuance of its own promissory notes (cheques) payable to bearer, as currency, or for the exercise of one or more of these functions, not always necessary chartered but sometimes so, created to serve the public ends. It is a financial institution regulated by law. A bank is wholly the creation of statute to do business (for profit) by legislative grace, and the right to carry on business through the agency of a corporation is a franchise which is depended on a grant of corporate powers by the state".**

[33] (1966) 2Q.B. 431, CA, cited in Mwenda, K. K., Banking Supervision and Systemic Bank Restructuring: An International and Comparative Legal Perspective (London: Cavendish Publishing Limited, 2000) P.4
[34] (2008) 10 NWLR (Pt. 1094) 150 at 182

Statutes have tried in defining a bank and a banker. The Bankers Act 1856 provides inter-alia

> **"in the construction of this Act, the word "Banker "shall include any person or persons, corporation or Joint stock or other company acting as a banker or bankers".**

Section 2 of the Bills of Exchange Act[35] also provides "Bankers include a body of person whether incorporate or not who carry on the business of banking". Similarly, section 43(1) of the Banking Act[36] defines a bank as any person who carries on banking business and includes a commercial bank, and acceptance house, discount house, financial institution and merchant bank.

Section 66 of BOFIA[37], provides inter-alia "Bank means a bank licensed under this Act". The Act, however goes ahead to define banking business to mean;

> **"the business of receiving deposits on current account, savings account or other similar account, paying in or collecting cheques, drawn by or paid in by customers or such other business as the Governor of the Central Bank may, by order, publish in the Gazette, designated as banking business."**

This definition was adopted by the Central Bank of Nigeria Act[38].

On the whole, a bank may be defined as a body of persons registered by law and authorized to carry on the business of receiving of moneys from outside sources

[35] Bills of Exchange Act, Cap 35, LFN 1990
[36] Banking Act, Cap 28, LFN 1990
[37] Bank and other financial Institution Act 19991 (as amended in 1997, 19999 & 2002).
[38] Section 60 CBN Act, Chapter C4 Laws of the Federation of Nigeria, 2004, Now S.60 of the Central Bank of Nigeria Act, 2007, (CBN Act).

as deposits irrespective of the payment of interest and payable on demand and the granting of money loans and acceptance of credits or the purchase of bills and cheques or the purchase and sale of securities for account of others or the incurring of the obligation to acquire claims in respect of loans prior to assumption of guarantees and other warranties for others or the effecting of transfers and clearing and such other transaction as they may by regulation be authorized to carry on.

2.2 DEVELOPMENT OF BANKING IN NIGERIA

Prior to the 17th century, rudimentary banking activities have become wide-spread in several parts of the world. Banking activities in Nigeria evolved to serve the interest of the colonial government, especially in the distribution of sterling coins. However, with the influence of European trading activities and the presence of colonial government, the Africa Bartering gradually gave way to the use of currency to facilitate exchange[39]

Commercial banking activities commenced in Nigeria in 1892 when African Banking Corporation (ABC) started business in Lagos. In 1894, the Bank of British West Africa (BBWA) which later changed to Standard Bank and is now known as First Bank of Nigeria Plc replaced African Banking Corporation and monopolized the banking scene. The Barclay's Bank opened a branch in 1917. Before then, Bank of Nigeria (formerly Anglo African Bank), which was established in 1905 had been sold out to Bank of British West Africa (BBWA), while the British and French Bank, now United Bank for Africa (UBA) became

[39]Ogunleye, G.A. "The Regulatory Imperatives of Implementing the Universal Banking Concept", 1999, Lagos NDIC Quarterly Journal, Vol. 8.

the third expatriate bank to commence the business of banking in Nigeria in 1949.

The indigenous banks, failed due to the peculiar features that characterized banking scene in the free banking era that extended to the period of independence.

These features comprise of the following;

1. Foreign bank's domination of deposit base and credit availability
2. Bank service tailored to the needs of the expatriates
3. Indigenous bank boom and failures resulting from undercapitalization and poor management quality.
4. Lack of banking control and direction, as there was no regulatory framework

This development notwithstanding, real banking regulation and surveillance did not commence until the establishment of the Central Bank of Nigeria (CBN) in 1959.

In 1986, the Structural Adjustment Programme (SAP) was introduced which had as its arrowhead the "deregulation of the financial and economic systems". This brought about the liberation of banking hence the elimination of other discriminatory practices that inhibited both the free entry into the market or the scope and manner of its operation.

It also brought about the privatization of a number of government – owned banks.

During this period, banking became very competitive, as banks has to be innovative and aggressive in order to survive, especially with the establishment of non-bank financial institution, mortgage institutions and the urban Development Bank[40].

Prior to the adoption of the concept of universal banking in the country, the merchant bank operators were complaining stridently that the playing field was skewed in favour of commercial banks. Not only were commercial banks allowed to participate in what was thought the exclusive preserve of merchant banks such as leasing and related fee-based services, commercial banks in addition enjoyed the advantages of stability, particularly when mobilized in large volumes and relatively inexpensive pool of funds.

However, following the CBN approval-in-principle of the adoption of Universal Banking (UB) in Nigeria, and the subsequent ratification of the report of the committee on the preparation of guidelines for same, the Governor of Central Bank, in the exercise of the power conferred on him by the provisions of section 66 of Banks and Other Financial Institution Act (BOFIA) 1991 (as amended), has approved the issuance of guidelines for the implementation of universal banking in Nigeria.

With effect from January 1, 2001, the CBN adopted Universal Banking in the

Country. Under the arrangement, banks were no longer categorized as commercial or merchant but were issued a uniform license with each bank determining the market in which it intends to operate.

[40]Oke, B.A. "An overview of the shift from direct to indirect approach to monetary and credit control in Nigeria, (1993) Lagos. CBN Economic and Financial Review, 31 (4): 296-320

The Universal banking policy has removed discrimination in the implementation of policies in the industry as uniform policies are now adopted and implemented across the country.

2.3**CLASSES OF BANKS IN NIGERIA**

In Nigeria, different types of banking institutions carry on business. The type of banking institution depend on the law establishing same and its functions though to a large extent, the functions of the different types of banks do overlap. The different types of banks operating in Nigeria are as follows;

a. Central Bank

b. Commercial Bank

c. Merchant Bank

d. Development Bank

e. Peoples Bank

f. Community Bank

2.3.1 Central Bank

The Central Bank of Nigeria (hereinafter referred to as CBN) is the apex bank. Every free enterprise economy owns a Central Bank which is different both in organization and function from other banking institutions. The CBN was established by the Central Bank of Nigeria Act 1958 and went into operation on 1st July 1959 with all its capital subscribed and held by the Federal Government of Nigeria. It is government owned bank and acts mainly as banker to the government. It has authority to grant and withdraw banking licenses and controls the banking sector of the economy, advising the government on monetary policies and implementing the policies on behalf on the government.

The CBN acts as a regulatory and prudential supervisory institution to all other types of banks and financial institutions and also controls the nation's money supply, and credit conditions.

The Banks and other financial institutions supervised by CBN are categorized as follows;

1. Bureau De Change (BDC's)
2. Commercial Banks
3. Development Finance Institution (DFI's)
4. Discount Houses
5. Financial Companies (FC's)
6. Merchant Banks

7. Micro-Finance Banks (MFB's)

8. Non-Interest Banks

9. Primary Mortgage Banks (PMB's)

The CBN also performs four (4) essential roles in the monetary system as follows;[41]

a. To issue the national currency

b. To conduct monetary policy

c. To act as lender of last resort and

d. To manage the exchange rate

2.3.2 Commercial Banks

Section 66 of BOFIA[42] defines a commercial bank to mean any bank in Nigeria whose business includes the acceptance of deposit drawable by cheques. Commercial banks basically engage in retail banking. They receive money on savings, current and deposit account payable on demand and acts as authorized dealers in foreign exchange. They also grant credit facilities such as loans, long and short term overdrafts. They finance international trade such as import and export from which they earn the bulk of their income by way of commission and bank charges. They also finance Local Purchasing Orders (LPO), issue travelers cheques, Bank Draft and recently introduced funds repatriation service from overseas.

[41] Ekezie E.S., Element of Banking, "African Publishers Ltd (1997), p.70
[42] Bank and Other Financial Institutions Act 1991 (as amended).

Commercial banks are owned by shareholders who appoint directors to the board who in turn appoint the management team. Because of this, profit maximization is their main goal as the shareholders are entitled to dividends on their shares.

Examples of the Commercial Banks operating in Nigeria are listed below;

i. First Bank of Nigeria Plc

ii. Access Bank of Nigeria Plc

iii. Union Bank of Nigeria Plc

iv. Fidelity Bank of Nigeria Plc

v. Ecobank Nigeria Plc

vi. Guaranty Trust Bank Nigeria Plc

vii. United Bank of Africa Plc

viii. Zenith Bank Nigeria Plc

ix. First City Monument Bank Plc

x. Wema Bank Nigeria Plc

xi. Unity Bank Nigeria Plc

xii. Skye Bank Plc

xiii. Savannah Bank Plc

2.3.3 Merchant Banks

Section 66 of BOFIA[43] defines a merchant bank to mean a bank whose business includes receiving deposit on deposit account, provision of finance consultancy and advising services relating to corporate and investment matters, making or arranging investments on behalf of any person. From the definition, it can be seen that a merchant bank engages in wholesale banking and takes on deposit or other person's money and invest the money for its live-hood. It provides finance in the form of acceptance credit, short term and medium term loans, documentary import and export credits and also deals in foreign exchange.

In corporate finance share, its most distinguishing feature is that it acts as an issuing house, advises on capital structures of companies amalgamation, mergers and arranges loans syndications. It also arranges large loans through issuing of bonds placed internationally and undertakes prospectus work in all its facets[44].

Examples of the Merchant Banks operating in Nigeria are FSDH Merchant Bank and Rand Merchant Bank Nig. Ltd.

2.3.4 Development Banks

The idea of development bank was conceived by the CBN in order to supplement the gap left by the inability of the Commercial bank to cater for the development needs of the economy.

[43] Ibid
[44] See Ogundipe, The Bullion 20th Anniversary, ed. Central Bank of Nigeria Home Magazine, p.33-38.

Development banks are engaged mainly in development banking to stimulate priority sectors of the economy and are concerned with the promotion and finance of enterprises by the provision of long terms and intermediate term finance. The first development bank, the Nigerian Industrial Development Bank (NIDB) was established in 1964 to provide long term capital for manufacturing enterprises.

Other examples of development banking are;

i. The Nigerian Bank for Commerce and Industry (NBCI) established in 1973 to provide loans for commerce and industry oriented business and provision of consultancy service in the area of identification of viable projects, preparation of feasibility study and guidance on appropriate way of achieving returns on investments.

ii. The Nigeria Agricultural Co-operative Bank (NACB) set up in 1973 by the Federal Government to assist in the implementation of its long term objectives which was to enhance the level and quality of agricultural production, animal husbandry, horticulture poultry, farming, pig breeding, fisheries, forestry and timber production and any other type of farming as well as storage and securing of such product in Nigeria within the framework of the government.

iii. The Federal Mortgage Bank which evolved from the main Nigeria Building Society (NBS) in 1977 with the aim of engaging in property development banking. It grants loans for building projects to civil servants and other private citizens to enable them acquire house of their own. These loans are granted at very minimum interest rates with

or without collateral securities. The government uses this bank for the implementation of its staff housing scheme.

2.3.5 The Peoples Bank

This type of bank was established by Decree No. 22 of 1990 now known as People's Bank Act, Cap P7, LFN, 2004 and has as its main aim, the granting of short term credit facilities for underprivileged Nigerians who are engaged in legitimate economic activities in both urban and rural areas who cannot normally benefit from the services of the orthodox banking system due to their inability to provide collateral security.

2.3.6 Community Banks

Community banking came as a policy in the fiscal budget of 1990. The banks carry out most regular banking business of purely local level. Their role in the economy is to provide effective banking services for the economics of rural areas as well as micro- enterprises in the urban centres.

It is a unit bank aimed primarily to assist grass-root developments of its community by harnessing the natural resources that are found in that area.

2.3.7 Microfinance Banks

The Government of Nigeria tried to maintain a stronghold on financial activities by enacting a number of initiatives dedicated to rural development beginning in the 1970s. In particular, the National Agricultural and Cooperative Bank (NACB) and the Rural Banking Scheme (RBS) were founded in order to facilitate financial access to farmers. Subsequently, an

Agricultural Credit Scheme Fund was developed to provide a financial cushion for farmers facing risk from natural disasters.

Despite these measures, it became increasingly evidence that such governmental policies failed to grant financial access to those most in need (i.e. the rural poor) and that the programs were largely unsustainable. In 1989, the programs promulgated in the 1970s were abolished in favour of the establishment of the Peoples Bank, with a mandate to lend to the poor. When this also failed, Community banks were established to provide non-sophisticated loans to rural areas.

Eventually, the Central Bank of Nigeria (CBN) released the "Microfinance Policy, Regulatory Framework for Nigeria". This policy encouraged many of the Community banks to reconstitute themselves as MFI^{s} and led to a marked increase in non-bank institutions (i.e. Microfinance NGO).

Therefore, Microfinance can be said to mean financial services for the poor and low income clients offered by different types of service provider.

The term is often used more narrowly to refer to Loans and other services from providers that identify themselves as **"Microfinance Institutions (MFI^{s})**. These institutions commonly lend to use new method developed over the last 30 years to deliver very small loans to unsalaried borrowers, taking little or no collateral.

These methods include group lending and liability, pre-loan saving requirements, gradually increasing loan sizes, and an implicit guarantee greedy access to future Loans if present loans are repaid fully and promptly.

2.4 THE HISTORICAL DEVELOPMENT OF BANKS IN NIGERIA

The historical development of some of the commercial banks enumerated above are hereby stated;

2.4.1 First Bank of Nigeria Plc (FBN)

FBN is founded in 1894 by Sir Alfred Jones, a shipping magnate from Liverpool. The Bank started out as a small operation in the office of Elder Dempster& Company, Lagos.

The Bank was incorporated as a Limited Liability Company on 31st March 1894, with head office in Liverpool. It began trading under the corporate name of the Bank for British West Africa (BBWA) with a paid-up capital £12,000, after absorbing its predecessor, the African Banking Corporation, which had been established earlier, in 1892.[45]

BBWA went on to establish a leading position in the banking industry in West Africa. A branch of the bank was opened in Accra, gold coast (now Ghana) in 1896 and another in Freetown, Sierra Leone in 1898. A second Nigerian branch was opened in the old Calabar in 1900, services were extended to Northern Nigeria two years later.

In 1957, the bank changed its name from bank for British West Africa to Bank of West Africa. In 1969, it was incorporated locally as the Standard Bank of Nigeria Limited in line with the Companies' Decree of 1968. In March 1971, the Bank obtained a listing on the Nigerian Stock Exchange.

[45] www.fbnbank.co.uk/about_us/air_history.php - retrieved in the 28/08/15

The bank changed its corporate name to First Bank of Nigeria Limited in 1979 and then First Bank of Nigeria Plc. in 1991. But a decentralized structure was introduced in the bank with five regional administrations. This decentralization was configured in 1992 to enhance efficiency.

In 2005 FBN Plc acquired two banks namely, MBC International Bank Ltd and FBN (Merchant Bankers) Ltd.[46]

Today, FGN has diversified into wide range of banking activities and services. These include corporate and retail banking, registrarship, pension fund custodianship, trusteeship and insurance brokerage.

2.4.2 Wema Bank Plc

Wema Bank Plc is incorporated in 1945 as a Private Limited Liability Company (under the old name of Agbomagbe Bank Limited and commenced banking operations in Nigeria the same year. The bank was later transformed into Public Limited Company (Plc) in April 1987 and was listed on the floor of the Nigerian Stock Exchange (NSE) in January 1990. In February 5, 2005, Wema Bank Plc was granted a universal banking licence by the Central Bank of Nigeria (CBN), thus allowing the Bank provide the Nigeria public with diverse financial and business advisory services.

Widely reputed as the longest surviving and most resilient indigenous Nigerian bank, Wema Bank Plc has over the years, diligently offered a full-fledged range of value-adding banking and financial advisory services to the Nigerian public.

[46] www.firstbanknigeria.com/about_us/ourhistory - retrieved on 28/08/15

However, in 2009, the bank underwent a strategic repositioning exercise spearheaded by a new management team that have seen its profile rise considerably which finally culminated into its taking a sound strategic decision to operate as a commercial bank with regional scope, in South-South Nigeria, South-West Nigeria, Lagos and Abuja in 2011.

The banks services include commercial banking, corporate finance, institutional banking, retail banking and trade finance[47].

2.4.3 Union Bank of Nigeria Plc[48]

The history of Union Bank of Nigeria can be traced to 1917 when it was first established as colonial bank in 1925, the bank became known as Barclays Bank DCO (Dominion, Colonial and Overseas) resulting from its acquisition by Barclays Bank. Following, Nigeria's independence and the enactment of the companies act of 1968, the bank was incorporated as Barclays Bank of Nigeria Limited (BBNL, established in 1969).

Between 1971 and 1979, the bank went through a series of changes including its listing on Nigerian Stock Exchange (NSE) and share acquisition /transfers driven by the Nigeria Enterprise Promotion Acts (1972 and 1977), this resulted in its evolution into a new wholly Nigerian-owned entity. To reflect the new ownership structure and in compliance with the Companies and Allied Matters act of 1990, it assumed the name Union Bank of Nigeria Plc.

In 1993, in line with its privatization /commercialization drive, the federal government divested by selling its controlling shares (51.67%) to private

[47] www.wemabank.com/about-us/corporate-profile/ourhistory - retrieved on 31/08/15
[48] www.unionbankng.com/who-we-are/our-history - retrieved on 31/08/15

investors. Thus, Union Bank became fully owned by Nigerian citizens and organizations all within the private sector. During the Central Bank of Nigeria's banking sector consolidation policy, Union Bank of Nigeria plc acquired the former Universal Trust Bank Plc and Broad Bank Limited, and absorbed its one-time subsidiary, Union Merchant Bank Ltd.

On the 14th of august, 2009, the Central Bank of Nigeria (CBN) intervened in the management of the bank by replacing the executive management team with a five-man interim management team to stabilize and recapitalize the Bank. Full recapitalization of the bank was achieved in December 2011 with the injection of $500,000 into Union Bank by Union Global Partners Limited (UGPL) after the Asset Management Company of Nigeria (AMCON) had provided capital in the sum of N46.93billion to bring the bank's net assets value to zero.

2.4.4 United Bank for African Plc (UBA)[49]

UBA has more than 65years of providing uninterrupted banking operations dating back to 1948 when the British and French Bank Limited ("BFB") commenced business in Nigeria. BFB was a subsidiary of BangueNationale De Credit (BNCI), pans, which transformed its London branch, into a separate subsidiary called the British and gender bank, with shares held by BangueNationale De Credit and two British investment firms, S.G. Warburg and company. A year later, BFB opened its offices in Nigeria to break the monopoly of the two existing British owned banks in Nigeria then.

[49] www.ubagroup.com/group/history - retrieved 31st August, 2015

Following Nigerian independence from Britain, UBA was incorporated on the 23rd of February 1961 to take over the business of BFB. UBA eventually listed its shares on the Nigeria Stock Exchange (NSE), in 1970 and became the first Nigerian bank to subsequently undertake an Initial Public Offering (IPO). UBA became the First Sub-Saharan Bank to take its banking business to North America when it opened its New York office (U.S.A) in 1984 to offer banking services to Africans in Diaspora.

Todays UBA emerged from the merger of then dynamic and fast growing Standard Trust Bank, incorporated in 1990. The merger was consummated in August 1, 2005. It was one of the biggest mergers done on the Nigeria Stock Exchange (NSE). Following the merger, UBA subsequently went ahead to acquire Continental Trust Bank in the same year. It subsequently acquired Trade Bank in 2006 which was under liquidation by Central Bank of Nigeria (CBN).

UBA made further banking acquisitions of three liquidated banks after another successful combined public offering and rights issue in 2007 the banks are; City Express, Metropolitan Bank and African Express Bank. The bank also acquired Afrinvest UK, rebranding it UBA Capital UK.

The quest to build a strong domestic and African brand intensified in 2008 when UBA made further acquisition of two liquidated banks, Gulf Bank and Liberty Bank while at the same time intensifying the African footprint with the establishment of UBA Cameroon, UBA Ivory Coast, UBA Uganda, UBA Sierra Leone and UBA Liberia.

On the 13th of December, 2012, the shareholders of UBA Plc. unanimously voted forthe bank to restructure into a mono line Commercial Banking Model in order for it to fully comply with the new CBN guidelines for commercial banks in Nigeria, which repealed the erstwhile universal banking regime.

Under the mono line business structure, UBA Plc. remains the parent company for all of the Group's commercial banking activities in Nigeria, Africa and the rest of the world. UBA Plc. is also the parent company for UBA Pension Custodian Limited, UBA Capital (UK) and UBA FX Mart Limited.

2.5 INCORPORATION AND LICENSING OF BANK IN NIGERIA

In Nigeria, the procedure for incorporation and licensing of banks is contained in one or more statutes. These procedure and requirement can be found in the Company and Allied Matters Act[50] and Banks and other Financial Institutions Act[51]. Further to requirement that may be provided under these two enactments, the CBN as the regulatory institution also imposes conditions which must be satisfied for the commencement of a banking business.

2.5.1 Incorporation

Bank and other Financial Institution Act 2004[52] stipulates as follows;

"No person shall carry on any banking business in Nigeria except it is a Company duly incorporated in Nigeria and holds a valid banking license

[50] Cap C20, Laws of the Federation of Nigeria, 2004
[51] Cap B3, Laws of the Federation of Nigeria, 2004
[52] Section 2(1) of BOFIA, 2004

issued under the Act. In other words, a bank must be a corporate body permitted to carry on banking business"[53].

The effect of this provision is that a bank must first attain the status of an incorporated body authorized to carry on banking business as one of its object before it can be licensed.

In Incorporating a bank, Companies and Allied Matters Act (CAMA) requires the following documents to be delivered to the Corporate Affairs Commission;[54]

i. The Memorandum and Article of Association which one of the clauses of the Memorandum must be banking.
ii. Notice of the Registered Office and head office, it different, must be in Nigeria.
iii. A statement in a prescribed form of the particulars of First directors of the company.
iv. A statement of the authorized share capital signed by at least one director.
v. Statement of declaration of compliance with the Act.

On registration, the company becomes a corporate body with all attributes of legal personality.[55]

It must be noted that it is not all corporate bodies that can carry on banking business or in other words certain types of companies cannot apply for and be granted a license. This is because CAMA provides that a private company cannot unless authorized by Law invite the public to deposit money for fixed periods or payable at call, whether or not bearing interest.[56] A banking license can only be granted to a Public Limited Liability Company.

[53] See Oyinlola V. C. O. P. (1975) NNLR 36
[54] Section 35 (2) CAMA, 2004
[55] Section 35(2) CAMA, 2004
[56] Section 22(5) CAMA, 2004

2.5.2 **Licensing**

A person can only carry on banking business as an Incorporated Public Company which has applied for and has been issued a valid banking license by the Central Bank of Nigeria.[57] The Act[58] states further inter alia:

> **"Any person who transacts banking business without a valid license under this Act is guilty of an offence and liable on conviction to a term of imprisonment not exceeding 10 years or a fine not exceeding N2,000,000.00 or both such imprisonment and fine".**

The aim of the above section is to control the number and participants in the banking industry. To obtain a license, an application in writing shall be made to the Governor of the CBN accompanied with the following;

i. A feasibility report of the proposed bank

ii. A draft copy of the Memorandum and Article of Association of the proposed bank.

iii. A least of shareholders, directors and principal officers of the proposed bank.

iv. The prescribed application fee.

v. Such other information, documents and report as the bank may from time to time specify.[59]

[57] Section 2(1) Opcit
[58] Section 2(2) Ibid
[59] Section 3(1) Ibid

The CBN reserves the power to revoke or vary a license and can also impose fresh or additional condition to the grant of a license. Where the grant of a license is subject to the fulfillment of certain conditions, this must be satisfied within the period required by CBN. Failure to comply within the stipulated period attracts a fine of N50,000 for each day of default.[60]

2.6 HISTORICAL EVOLUTION OF BANKING LEGISLATION IN NIGERIA

This predates the nations' independence. It began with the activities of Elder Dempester and Company Limited of Liverpool, United Kingdom in 1892. Other notable organizations in the early times include the Nigeria Mercantile Bank Limited, Nigerian Farmers and Commercial Bank Limited, British and French Bank (which transformed to UBA) to the era of Agbonmagbe Bank in 1945, which later transformed to Wema Bank and African Continental Bank.[61]

However, most of the banks which has operated in Nigeria prior to independence were plagued by the challenges of poor capital base, incompetent management, staff competition from foreign competitors and the recession of the 1930s. One of the important factors which led to such massive bank failures was absence of regulatory framework thus between 1929-1952 has been described as era of "Free Banking".

However, the period from 1952-1959 was that of legislation and regulation of banks. The majority of the banks that existed before this era failed. This failure caused considerable hardship and loss, not only to the indigenous

[60] Section 5(1),(2) and (3) Opcit
[61] See the Evolution of Banking Industry in Nigeria,
retrieved from www.nigeriacommentaries.blogspot.com/2011/02/banking-industry, 13th July, 2014

depositors, but also to foreign banks and business people who has employed the services of some of these banks in financing shipment to Nigeria.[62]

It was as a result of these problems and financial mishap that the 1952 banking ordinance was promulgated. The Ordinance was a fruit of the Patton's Commission of inquiring set by the Colonial government in 1948; to look into the impact of lack of confidence shown to banking business by the public.

The Ordinance[63] comprised of 16 Section and 2 schedules which substantially provided for banking license and other rules of supervision and control of banks. The 1952 Ordinance was repealed by the 1958 banking ordinance and set banking license as a condition precedent to transacting banking business in Nigeria.

After the repeal of 1952 ordinance by Banking Ordinance of 1958, a period of meaningful legislation followed. This laid the foundation for the establishment of Banking and other Financial Institution in Nigeria. The Central Bank of Nigeria (CBN) was not only established in 1959 but the foundation of the Nigeria money and capital market was laid in the same year.

The establishment of the Central Bank of Nigeria marked the turning point in the government efforts to harness the activities of Banks and other Financial Institution's for national development and sustenance. Four years later, government's control over the activities of banks was further strengthened by the promulgation of the Banking (amendment) Act of 1962 (Cap 19). This

[62] retrieved from www.legacytechnologies.com.ng, 10th August, 2014
[63] Banking Ordinance, 1952.

Act,in many ways tried to remove the ambiguities and loopholes in the original formation of the previous banking statute. It also increased the investment of monetary control in the disposal of the CBN. The enactment of the Companies Decrees, No.51 of 1968 now known as Company and Allied Matters Act, 2004, made it obligatory on all Companies, including banks operating in Nigeria, to be incorporated in Nigeria.

All these as they relate to banking operations, were further codified in the Banking Decree No.1 of 1969, now known as Banking Act, Cap 28, LFN 1990. The enactment of Nigeria Enterprises Promotion Decree of 1972 to 1977, which was repealed in 1989, completed the host of banking and other institutions legislation which had far reaching effects on the operations of the banking industry in the first decade.

After more than a decade and a half of banking legislation, a more comprehensive legislative framework of banking operations was conceived and executed under the Banks and Other Financial Institutions Decree No. 25 of 1991 (BOFID) now known as Bank and Other Financial Institutions Act 1991, as amended (BOFIA).

The legal framework and strategies for operating banking business in Nigeria continued to evolve with more pragmatic changes in recent times. There were some major amendments to the BOFIA, as amended, and the CBN Acts, as amended in 1997.

Further amendments to the both legislative instruments were effected in 1998 and 1999 respectively. The amendment gave the CBN autonomy to

implement policies. It ensures that the banks perform its function with minimal interference from the federal government.

2.7 BANKING INSTITUTIONS AND THEIR ROLES IN NIGERIA

2.7.1 The Central Bank of Nigeria (CBN)

Earlier especially between 1960 and 1965, the supervision of banks was a shared responsibility between the CBN and the Federal Ministry of Finance (FMF). While the Bank handled off- site supervision, the Federal Ministry of Finance was in charge of on-site supervision. Also, prior to promulgation of the Banks and other Financial Institutions Act (No.25) in 1991 (BOFIA) as amended, the ministry was the approving authority of bank licenses on the recommendation of the CBN.[64]

However, the entire responsibility of bank licensing was, reverted to CBN from 1991 since the promulgation of BOFIA, as amended. This brought the activities of banks and other financial institutions under the CBN. The Act empowers the CBN to do the following;

a. Issue guidelines to any person and any institution that engages in the provision of financial services.

b. Formulate the operating rules and code of conduct.

c. Undertake special investigations of these institutions, if the Governor considers it necessary.

[64]Olorunshola Job A. Financial System Regulation in Nigeria: Theoretical Framework and Institutional Arrangements, retrieved from www. Cbn.gov.ng/OUT/publications/guideline/PID/2004/SURVEILANCE. PDF 10th February, 2015

These provisions of the BOFIA and the CBN Acts therefore, give the CBN clear and substantial powers to regulate the activities of banks & other financial institutions operating in Nigeria. Consistent with this mandate, the CBN is charged with the responsibility of administering the BOFIA, as amended, which aim at ensuring high standard of banking practice and financial stability through its surveillance activities and the promotion of an efficient payment and clearing system[65].

According to CBN Act 2007, Section 2 provides that the principal objects of the bank shall be;[66]

a. Ensure monetary and price stability

b. Issue legal tender currency in Nigeria

c. Maintain external reserve to safeguard the international values of the legal tender currency

d. Promote a sound financial system in Nigeria

e. Act as banker and provide economic and financial advice to the federal government.

2.7.2 **The Nigerian Deposit Insurance Corporation (NDIC)**

The Nigeria Deposit Insurance Scheme of 1988 was introduced to give depositors confidence in banks by protecting them against the bank failures. The NDIC is an independence agency of the Federal Government of Nigeria. The purpose of the deposit insurance system is to protect depositors and

[65] Retrieved from www. Legacytechnologies.com.ng 10th February, 2015
[66] Ibid

guarantee the settlement of insured funds when a deposit- taking financial institution can no longer repair their deposits, thereby helping to maintain financial system stability[67]

Deposit insurance is a system established by the government to protect depositors against the loss of their insured deposit placed with member institutions in the event a member institution is unable to meet its obligations to depositors.

Banking supervision seeks to reduce the potential risk of failure and ensure that unsafe and unsound banking practice do not go unchecked. It also provides the oversight functions required to preserve the integrity of and promote public confidence in the banking system. The corporation is empowered to provide financial and technical assistance to failing or distressed banks in the interest of depositors. The financial assistance can take the form of loans, guarantee for loan taken by the bank or acceptance of accommodation bill.

The corporation is now governed by the NDIC Act, 2006. To this end, the NDIC is empowered to examine the books and affairs of insured banks and other deposit- taking financial institutions.

2.7.3 **The Federal Mortgage Bank of Nigeria (FMBN)**

The Federal Mortgage Bank of Nigeria took over the assets and liabilities of the Nigerian building society. It provides banking and advisory services and undertakes research activities pertaining to housing. It acts as the apex regulatory body for the mortgage finance and industry. Federal mortgage Bank

[67] …….op.cit

of Nigeria was set up by Decree No.7 1977, as amended. The adoption of National Housing Policy in 1990 and subsequently promulgation of Decree No.7 of 1991, as amended, empowered the bank to license and regulate Primary Mortgage Institution's in Nigeria (PMI).

2.7.4 **National Board for Community Banks**

The board was established by government as apex regulatory body with the responsibility of licencing and supervising the activities of the community banks in Nigeria. It was established in 1992 to accept and process applications from interested communities, provide guidelines for operations and ensuring compliance. The board is expected to monitor, inspect and supervise the operations of Community Bank and applies sanctions when necessary.

It also carries out promotional activities for enlightenment purposes. Most of the above functions are now vested in the CBN and the Board is presently hamstrung to perform them due to this fact. Efforts are still being made to resolve the conflict arising from this duplication of regulatory functions.

2.7.5 **The Financial Service Coordinating Commission (FSCC)**

The Central Bank of Nigeria (CBN) in April 1994, undertook to facilitate a formal framework for the coordination of regulatory and supervisory activities in the Nigerian financial section by establishing the Financial Service Coordinating Commission (FSCC) to address more effectively, through consultations, and regular inter-agency meetings issues of common concern to regulatory and supervisory bodies.

The Commission is chaired by the Governor of Central Bank of Nigeria and it coordinates the activities of all regulatory institutions in the Nigeria financial system. The name of the Commission was subsequently changed to Financial Service Regulatory Co-coordinating Committee (FSRCC). Although the committee has been in existence since 1994, it was only accorded legal status by the 1998 amendment to Section 38 of CBN Act 1991 and formally inaugurated by the Governor in May, 1999.

The Commission has the following memberships;

a. Central Bank of Nigeria (CBN)

b. Securities and Exchange Commission (SEC)

c. National Insurance Commission (NIC)

d. Corporate Affairs Commission (CAC)

e. Federal Ministry of Finance (FMF)

In order to enhance the effectiveness of the committee, the Nigeria Deposit Insurance Corporation (NDIC), the Nigeria Stock Exchange (NSE), and National Board for Community Banks were co-opted as observers.

2.8 CURRENT LEGISLATIONS ON BANKING BUSINESS IN NIGERIA.

The legislations regulating banking business in Nigeria are as follows;

a. The Central Bank of Nigeria Act, as amended in 2007

b. Banking and other Financial Institution's Act of 1991, as amended in 1997, 1998 and 1999. (Cap B3, Laws of the Federation of Nigeria 2004)

c. The Nigerian Deposit Insurance Corporation Act, 1990 as amended in 2004 (Cap N102 LFN, 2004)

d. The Companies and Allied Matters Act (CAMA), 1991, as amended in 2004 (Cap C20,LFN,2004)

e. Other Subsidiary Legislations.

f. Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act (Failed Banks Act)

2.8.1 The Central Bank of Nigeria Act, 2007 (CBN ACT)

The CBN Act, 2007[68], provides for the establishment of the Central Bank of Nigeria.

The Act[69] also provides as follows

> ***"In other to facilitate the achievement of its mandate under the Act and the Banks and other financial Institutions Act and in line with the objective of promoting stability and continuity in economic management, the Bank shall be independent body in the discharge of the functions"***

The principle objective of the Central Bank of Nigeria is stated as follows;[70]

a. Ensure monetary and price stability

b. Issue legal tender currency in Nigeria

[68] Section 1, CBN Act, 2007.
[69] Section 1 (3), CBN Act, 2007
[70] Section 2, CBN Act, 2007

c. Maintain external reserves to safeguard the international value of the legal tender currency

d. Promote a sound financial system in Nigeria

e. Act as banker and provide economic and financial advice to the Federal Government.

The Central Bank of Nigeria (CBN) is to the money market what Securities and Exchange Commission is to the capital market. It is the apex regulatory body of the nation is money market.

The Act[71] gives the CBN powers to issue guidelines to the financial services industry. Failure to comply with any guidelines is also punishable under the Act[72]

Under the Act[73], the CBN is empowered to act as banker to other banks and to seek the cooperation of and cooperation with other banks and to issue directives as cash reserves.

Based on the above, the CBN, by the provision of the Act, has overwhelming powers over banks and indeed the entire economy.

2.8.2 **The Banks and Other Financial Institution Act, (BOFIA) NO. 25, 1991.**

The Bank and Other Financial Institution Act (BOFIA) 1991, as amended, is a compelling instrument, comprehensive, elaborate and wide reaching. The

[71] Section 33 (1) (b), CBN Act, 2007
[72] Section 33 (5), CBN Act, 2007
[73] Section 41, CBN Act, 2007

BOFIA, 1991[74] as amended confers on the Central Bank of Nigeria functions, powers and duties.

Under the Act[75], banking business can only be carried out by an incorporated company which has been issues with a license by the Central Bank of Nigeria (CBN).

The CBN also has the power under the Act[76] to revoke such licenses or vary conditions of license.

The Act[77] provides that the Governor may, with the approval of the Board of Directors and by notice published in the Gazette, revoke any license granted under the Act if;

a. A bank ceases to carry out, in Nigeria, the type of banking business for which the license was issued for any continuous period of six months or any period aggregating six months during a continuous period of twelve months;

b. A bank goes into liquidation or is wound up or otherwise dissolved.

c. A bank fails to fulfill or comply with any condition subject to which the license was granted.

d. A bank has sufficient assets to meet its liabilities.

e. A bank fails to comply with any obligation imposed upon it by or under this Act or the CBN Act.

[74]Section 1, BOFIA, No. 25, 1991.
[75]Section 2 (!) BOFIA, No. 25 1991 as amended
[76] Section 5, Ibid
[77] Section 12, Ibid

Liquidity guidelines are obtained under the Act[78] which provides for the minimum holding of cash reserves, specified liquid assets, special deposit and stabilization securities. Also, restrictions are placed on some banking activities, like lending limits[79], while banks are required to send monthly statements showing assets and liabilities and advances and other assets[80]. It is also required that every bank shall submit information, documents, statistics or returns necessary for proper understanding of the statements supplied[81], non compliance of which punishment shall be meted[82].

The Act [83] also provides for the procedure to be applied for any failing bank. It provides steps to be taken when a bank is failing[84]. If those measures do not work, the Bank could assume control of the property and affairs of the bank. It could revoke a license or apply to a court for it, after which an application for winding up may be made to the Federal High Court[85].

2.8.3 **The Nigerian Deposit Insurance Corporation (NDIC) Act, 1990**

As Amended

Section 1 of the NDIC Act[86] established the Corporation as a corporate body with perpetual succession and a common seal.

The Act[87] provides the following as the functions of the Corporation;

[78] Section 13, ibid
[79] Section 20, ibid
[80] Section 25 (1), ibid
[81] Section 25 (2), ibid
[82] Section 25 (3), ibid
[83] Section 35, ibid
[84] Section 36- 39, BOFIA, 1991
[85] Section 40, ibid
[86] Section Cap. N102, LFN, 2004
[87] Section 5, NDIC Act, ibid

a. Insuring all deposit liabilities of licensed banks and such financial institutions operating in Nigeria, within the meaning of Section 20 and 26 of the Act so as to engender confidence in the Nigeria Banking System.

b. Giving assistance in the interest of depositors in case of imminent or actual financial difficulties of banks, particularly where suspension of payments is threatened and avoiding damage to public confidence in the banking system.

c. Guaranteeing payment to depositors in case of imminent or actual suspension of payments by insured banks or financial instructions up to the maximum amount as provide for in Section 26 of this Act.

d. Assisting monetary authorities in the formation and implementation of banking policy so as to ensure sound banking practice and fair competition among banks in Nigeria.

e. Pursuing any other measure necessary to achieve the functions of the corporation, provided such measures and actions are not repugnant to the functions of the corporation.

From the foregoing, it is clear that NDIC established by the Act is designed primarily to protect depositor of banks against loss of their deposits. Both the NDIC Act and the Banks and other Financial Institution's Act (BOFIA) [88]vests the corporation with various powers in dealing with matters affecting insured banks. The powers are as follows;

[88] Cap. B3 LFN 2004

a. The NDIC Act[89] provides that the board of the corporation shall have power to appoint officers to carry out examination of any insured bank or carry out special examination of any insured bank.

Essentially, examination is undertaken to determine the reliability of a banks claim through its returns to the regulatory authorizes. It is also carried out to determine the bank adherence to good corporate governance practices, laws and regulations as well as verify the quality of the bank's assets. Through examination and investigations, practices which could lead to distress in the bank are promptly detected.

The Act[90] provides that in conducting the examination, the examiner shall exercise reasonable care to prevent unreasonable hindrance to the day- to-day activities of the bank and confine the investigation to matter of fact and data deemed necessary for the examination.

Furthermore, specific penalties are prescribed for various offences that may be committed by the bank, its director or officers in the course of the examination[91]

b. The Act[92] empowers the corporation the approval of the CBN, to assume management of a failing bank until its financial position has substantially improved. The provision in BOFIA, No. 25 1991[93], as amended re-affirmed and strengthened this position when it states thus;

[89] Section 4 (e) NDIC Act, 2004
[90] Section 17 (1) NDIC Act, 2004
[91] Section 17 (2) NDIC Act, 2004
[92] Section 23 (3) (d) NDIC Act, 2004
[93] Section 36 BOFIA 'supra"

"If after taking such of the steps stipulated in section 35 of this Act or such other measures as in the opinion of the Bank may be appropriate in the circumstance, the state of the affairs of the bank does not improve, the bank may turn over the control and management of such bank to the Nigeria Deposit Insurance Corporation (hereinafter in this Act referred to as "the Corporation") on such terms and conditions as the Bank may stipulate from time to time".

The combine effect of the above provisions is that the Corporation has primary responsibility in the management of distress bank.

c. The Act[94] vests the Corporation with the power to serve notice of removal from office on any officer or director who has committed any violation of the law, rules or regulations of the corporation or has engaged in an unsound practice that may lead the bank to financial loss.

d. The Act enjoins insured banks to submit to the corporation such returns and information as may be required, from time to time, within the stipulated period[95]

e. The Act stipulates that insured banks are specially required to render returns on fraud and forgeries or outright theft occurring during such month in the bank[96]. They are also required to notify the Corporation of staff dismissed, terminated or adviced to retire on the ground of fraud[97].

[94] Section 4 (L) NDIC Act, 2004
[95] Section 41 NDIC Act, 2004
[96] Section 39, NDIC Act, 2004
[97] Section 40, NDIC Act, 2004

f. The Act provides that the corporation shall have power to prosecute any officer or director who has committed any serious violation of the provisions of the Act. This the corporation could prosecute any director or officer of any bank for false rendition, fraud, willful refusal to produce books, documents or information to examiner, failure to comply with directive, lack of care and diligence etc.

2.8.4 **The Company And Allied Matters Act (CAMA), 2004.**

The Company and Allied Matters Acts, (CAMA), 2004 which created the Corporate Affairs Commission (CAC), was enacted to respond to some problems which some companies easily use to defraud their customers or members as seen in the case of **Dr. NwuncheOdogwu&Ors V FRN** etc. Provisions relating to registration of companies, publicity of accounts, auditing, annual returns etc are all aimed at ensuring transparency and openness in the administration of corporate bodies in Nigeria.

According to Gower[98], company legislation has two main functions, thus enabling and regulatory functions. The enabling function empowers people to do what otherwise they could not achieve namely to relate a body with distinct legal personality. The regulatory function prescribed the conditions which have to be complied with to obtain incorporation and the rules that thereafter have to exist to protect members, creditors and the public against dangers inherent in such a body. In respect of the functions and particularly, the 2nd function, is the Company and Allied Matters Act, 2004. The bank, being a public company

[98] Gower, Principles of Modern Company Law, Paul L. Davies, 6th ed. 1997, Sweet & Maxwell, pg 7

must comply with the regulating function to be incorporated with the Corporate Affairs Commission.

The Act[99] provides as follows; there is hereby established under this Act, a body to be known as Corporate Affairs Commission. The Act[100] further provides that;

> ***" the commission shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name, and capable of acquiring, holding or disposing of any property, movable or immovable, for the purpose of carrying out its functions"***

The functions of the Commission are set out in the Act as follows[101],

a. Administration of the Act including the regulation and supervision of the formation, incorporation, registration, management and winding up of companies.

b. Establishment and maintenance of companies registry and offices in the state of the federation.

c. Conduct of investigation into the affairs of any company where the interest of the shareholders and the public demand.

d. Administration of the business names and incorporated trustees part of the Act.

[99] Section 1 (1) CAMA, 2004
[100] Section 1(2) CAMA, 2004
[101] Section 7 CAMA, 2004

From the functions of the Commission enumerated above, two are of focal importance here, thus;

1. The regulation and supervision of the formation, corporation, registration, management and winding up of companies.

2. Conduct of investigation in the affairs of the company where the interest of the shareholders and public so demand.

The various provisions in CAMA for the prevention and control of fraud in corporate bodies are no doubt, a manifestation of government's commitment to dealing with this societal malaise.

Some of the measures envisaged under Section 7 (a) and (c) of the Act are covered under sections 314 to 320 of CAMA, 2004.

To ensure proper administration and management of companies, the Corporate Affairs Commission (CAC) has been given some powers under the Act[102] .

The Commission may appoint one or more competent inspectors to investigate affairs of a company and report on them in such as it may direct[103].

The appointment may be made by the commission:

On the application of the company or its members

On the declaration of a court that a company may be investigated

On the commission's own motion

[102] Section 314- 340, CAMA, 2004
[103] Section 314 (1), CAMA, 2004

The circumstances under which such appointment is made are also stated under the Act[104]. The commission may make such an appointment if it appears to it that there are circumstances suggesting that;

i. The Company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some part of its members; or

ii. An actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial or that the company was formed for any fraudulent or unlawful purpose or;

iii. Persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members.

The Act is specific as to the matters to be disclosed in annual returns[105]. Statutory filings among others, include; registration of charges[106] , Registration of certain resolutions[107]. Returns of Allotment of shares.[108] . Returns on the alteration of share capital statements by banks, insurance companies etc[109] returns and winding up[110]. Penalties for default in making returns to the commission.[111]

[104]Section 315 (2) (a) to (d) of CAMA 2004.
[105] Section 370, CAMA, 2004
[106] Section 197 ibid
[107] Section 237 ibid
[108] Section 129 Ibid
[109] Section 107,102,106 and 109 ibid
[110] Section 636 ibid
[111] Section 357, 362 (2) ibid

2.8.5 **Other Subsidiary Legislations**

Further to the aforementioned legislations, section 57 of the BOFIA empowers the Governor of the Central Bank to make regulations and Rules to publish in the Federal Gazette.

These rules and regulations have the status of subsidiary legislation which derive their force and validity from the BOFIA. Some key Regulation's include[112]

- CBN Scope, condition and Minimum Standards for Merchant Banks Regulation No. 2 of 2010 ("Merchant Banks Regulation")
- Regulation on the scope of Banking Activities & Ancillary Matters No.3 of 2010 ("Banking Activities Regulation")
- Prudential guideline 2010
- Revised guidelines 2010
- Revised guidelines for prime mortgage bank in Nigeria (Prime Mortgage Bank Guidelines)
- Revised Regulatory and Supervisory Guideline for Microfinance Banks (MFBs) in Nigeria ("MF Regulation"), December 18, 2012.
- Code of corporate Governance for banks in Nigeria post consolidation 2006
- Assessment Criteria for Approval Person' Regulation for Financial Institutions 2011.

[112]Banking Regulation, First Edition.www.jacksonethiandedu.com/lawfirm/associates retrieved 13/07/2014

- Guidelines for Regulation and Supervision of Institutions offering non-interest Financial Services in Nigeria 2011 (Non- Interest Banking Regulations).

Given the repeal of the universal banking guidelines which enabled licensed bank to engage in non-core banking businesses and the advent of a new licensing regime, banking activities were hived in 3 (three) categories, i.e. commercial banks, merchant banks and specialized bank which include non-interest banks, micro-finance banks, development Banks and Mortgage banks[113]. The Commercial Banks Regulations further classified commercial banks into the following categories;

a. Regional commercial Banks which are entitled to carry on banking business minimum 12 (twelve) contiguous states in Nigeria lying with not more than 2 (two) geo-political zones in Nigeria as well as the Federal Capital Territory.

b. National Commercial banks entitled to carry on banking business in every state in Nigeria

c. International commercial banks entitled to carry on banking business in every state of Nigeria as well as establishing and maintaining offshore banking operations within jurisdiction.

The Non-interest Banking Regulations categorise non-interest banking into that based on Islamic commercial jurisprudence and that based on any other established non- interest principle.

[113]Regulation 4, Banking Activities Regulation. Supra, retrieved 13/07/2014

2.8.6 Failed Banks (Recovery of Debts) AndFinancial Malpractice In Banks Act (Failed Banks Act)[114]

An Act to provide for the speedy recovering of debts owed to failed banks arising in the course of business and which remains outstanding as at date the bank is closed or declared a failed bank and for the speedy trail of offences relating to financial malpractices in banks and other financial institutions as specified in the Act or such other offences relating to the business or operation of a bank under any enactment.

Pursuant to its statutory powers under the NDIC Act 2006, and as part of statutory obligations towards ensuring safe and sound banking practices, the corporation's efforts at sanitizing the banking sector is manifested in its implementation of the Failed Banks Acts.

2.8.6.1 Implementation of The Failed Bank Act

The Failed Bank Act was promulgated in November, 1994. The tribunals that were established under the Act, Commenced sitting in July, 1995. The promulgation and implementation of the Failed Bank Act was to ensure the quick dispensation of Justice. The twin objectives of the Act were to assist in resolving distress of failing banks through speedy recovery of their non-performance loans and to sanitize the banking sector through criminal prosecution and conviction of errant directors found guilty of banking malpractices.

[114] Nigeria Deposit Insurance Corporation, "protecting your bank deposit", retrieved from www.ndic.gov.ng/legistalation.htn. 13/07/2014

The implementation of the failed Banks Act by the NDIC and the Central Banks Act by the NDIC and the Central Bank of Nigeria was indeed a major plank in the resolve to contain distress and promote the soundness of the Nigerian banking system. The success achieved by the tribunals is widely acknowledge. Between 1994-1999, a period of 5 years, the 14 Tribunals tried and conclusively disposed of 45 criminal cases and 672 civil/debt recovery cases.

However, with the return to democratic rule in 1999 the tribunals were abolished by the tribunal,(consequential Repeal, etc) Act No.62 of 1999, which transferred jurisdiction to try civil and criminal cases pursuant to the Failed Banks Act to the Federal High Court. The Act, as amended, is now referred to as the Failed Bank (Recovery of Debts) and Financial Malpractices in Bank Act, Cap F2 Laws of the Federation of Nigeria, 2004.

The Act seeks to ensure safe and sound practices by punishing the bank directors, staff and customers who contributed in any manner to the collapse of any bank as well as recovery of debts owed failing / failed bank. Some bank executives and other officers are current facing criminal prosecution pursuant to the provisions of Failed Bank (Recovery of Debts) Financial Malpractices in Bank Act, Cap F2 Laws of the Federation of Nigeria, 2004 and some have actually been convicted. Amongst them is the high profile trial and conviction on October 9, 2010 of Mrs. Cecilia Ibru, the former managing director of Oceanic Bank Plc, who was convicted to six months in jail and ordered to forfeit over N150 billion in assets and cash. She was convicted under section 15(1)(b) of the Failed Bank (Recovery of Debtors) and Financial Malpractices in Banks Act Cap F2 laws of the federation of Nigeria, 2004 and punishable under section 16 (1) (a) of the same Act.

CHAPTER THREE

3.0 CORPORATE GOVERNANCE IN NIGERIA

Corporate governance is one of the most critical issues in the financial industry across the globe. Failure of the industry in the past has made it imperative to promote good corporate governance. Financial scandals around the world and the recent collapse of major corporate institutions have brought to fore the need for the practice of good corporate governance.

Poor corporate governance, on the other hand, was identified as one of the major factors in virtually all known instances of financial distress in the country. Good corporate governance makes for a more judicious use of resource, it serves the long-term interest of shareholders. It delights and attracts local and international investors.

Corporate governance must be seen as a vehicle that countries use to attract investors, both locally and foreign, and assure them that their investments will be secured and efficiently managed in a transparent and accountable manner.

Therefore by definition, corporate governance in bank can be said to mean surrendering the management of the said bank to certain persons who are referred to as the alter ego of the bank.

A bank is a commercial legal entity that is registered under the Company and Allied Matter Act (CAMA) 2004. Having been registered, the bank acquires a corporate entity, but yet cannot manage itself. Being a corporate entity, it is an artificial person which neither has hands to perform any function nor a mind

of its own to think of what to do and even go to the extent of thinking evil.[115] To this extent, the state of the mind of some of its organs are usually imputed to the company. This has to be done by recourse to what is called the alter ego doctrine propounded by **Viscount Haldane L.C. in Lennards Carrying Company Ltd V Asiatic Petroleum Company Ltd**.[116] He said;

> **"A corporation is an abstraction. It has no mind of its own anymore than it has body of its own. Its active and directing mind must consequently be sought in the person or somebody who for some purpose may be called an agent but who is really the directing mind and will of the corporation. That person may be under the direction of the shareholders in general meeting, that person may be the Board of Directors itself, or it may be and in some companies, it is so…"**

These persons, as discoursed above, upon whom the management of the bank is placed who are often referred to as alter ego or servant of the company are here under enumerated and discoursed. They are;

1. Board of Directors
2. General meeting
3. Secretaries
4. Auditors

[115] David Folorunsho Tom, "Company law in Nigeria " (Benin City, Union Publishers, 2009) pg 33
[116] (1975) AC 705

3.1 THE BOARD OF DIRECTORS (BOD)

BOD DEFINED

The question does not lend itself to a straight forward answer as the word can be seen from diverse angles, and can acquire variety of meaning, depending on the circumstance. The layman's idea of a director, for instance, is different from its judicial meaning and the latter is not exactly the same thing as statutory definition of the word.

The legislative definition is however a convenient point to start the discussion. The Company and Allied Matters Act, 2004, states *that a director is a person duly appointed by the company to direct and manage the business of the company*[117]. In addition, same Act further provides that;

> **"directors include any person occupying the position of a director by whatever name called; and includes any person in accordance with whose direction and instruction the directors of the company are accustomed to act".[118]**

No doubt that the above description of a director is based primarily on function. A person is a director if he does whatever a director normally does. The test for determining whether a person is a director or not from the foregoing are;

i. The person must be duly appointed.

ii. The purpose of the appointment is to manage and direct the business of the company. Once these two criteria are satisfied, that person shall be deemed a director irrespective of whatever name he is called. However, where a person not duly appointed as director acts as such

[117]Section 244, CAMA 2004.
[118]. Section 245, CAMA 2004.

on behalf of the company, his act shall not bind the company and he shall be personally liable for such action unless it is the company that holds him out as director[119]. Another obvious thing from the description is that it is extended to cover shadow director i.e. a person on whose direction and instruction the directors are accustomed to act.

The courts have also tried to give a judicial definition of the word, director. In a classical case of **Re-forest of Dean Coal Mining Co.[120]**In this case, **Jessel (M.R.) entones as follows:**

> ***Directors have sometime been called trustees and sometimes have been called managing partners. It does not matter what you call them so long as you understand what their true position is, which is that they are merely commercial men managing a trade concern for the benefit of themselves and all other shareholders in it.***

Similarly, in York &Nortmidland Railway V. Hudson[121], Romilly (M.R.) also described them as persons selected to manage the affairs of the company for the benefit of the shareholders.[122]

Generally, directors are not servants but officers and alter ego of a company. As had been observed earlier, a company is an abstraction and as such it has neither mind nor body of it own. Its activities, decisions and operations etc are carried out through human instruments that act as the directing mind and will of the company. As officers and alter ego, directors are the principal human

[119] Section 250, CAMA, 2004
[120] (1878) 10 CH. D. 450
[121] (1853), 16 Beav 486
[122] See the case of Olufosoye V. Fakorede (1993)1 NWLR (pt. 272) p. 747

instruments. Although director are not servants of the company, the managing director however, is a servant of the company. He is usually on a service contract with the company and he is entitled to a salary and other remunerations.[123]

The status of directors are therefore suijuris and in the exercise of management power, their status is procedurally akin to that of trustees, agents and managers.

Directors exercise management powers over the bank affairs as a board except where there has been a delegation of such powers to a managing director or a committee of directors[124].

3.1.1 **Types of Directors**

There are various types of directors. They include the following;

3.1.1.1 **Life Directors (Permanent Directors)**

Sometimes the Articles of a company, in this instance, the bank, may allow for the appointment of a person for life as a director. The importance of this is that it is not necessary for the person so appointed to put up himself for re-election as he is expressly excluded from the operation of the clauses relating to retirement. Life director is normally given wide powers of management and in practice, he will probably be a major shareholder of the bank. It should however not be through that he is truly permanent. He is like any other director, removable under section 262 of the CAMA, 2004.

[123] Yalaju- Amaye V. Associated Registered Engineering Contractors Ltd. (1990) 4 NWLR (pt. 145) 422; Trenco V. African Real Estate and Investment Co. Ltd (1978) ALL NLR 124.

[124] . See ACB Plc V. Hasten (Nig) Ltd (1997) NWLR (pt- 515) 11DCA.

3.1.1.2 **Executive Directors**

These are the directors who run the affairs of the company on a day to day basis e.g. managing director, and their powers are usually circumscribed by the Articles of the Company. They usually hold service contracts of the company and are servants of the Company.

3.1.1.3 **Managing Directors**

The office of the Managing Director constitutes a very important organ of management of the affairs of a company. The Act [125]provides thus;

> **"that the board of directors may from time to time appoint one or more of their body to the office of a managing director and may delegate all or any of their powers to such managing director. The managing director is therefore an executive officer of the bank with a seat on the board charged with the responsibility of the day to day administration of the bank, or as Karibi-whyte stated in Atewologun V. Metro Motors Ltd[126] "a managing director is only a director with powers of management conferred on him".**

The managing director may be appointed on the terms that he shall perform such duties as are assigned to him from time to time by the Board. He is to conform to the institution and supervision by the board which can curtail the range of his activities. Sometime, a managing director may be

[125] Section 64 (b) CAMA, 2004
[126] (1978) LRN 46

appointed under a contract of service, where such is the case, no term may be incorporated into the contract by implication from the articles so as to override an express term of the contract. Therefore, a contract appointing a person managing director for a prescribed term will prevail over a provision in the article empowering bank to revoke such an appointment.

In the day to day administration of the bank, the managing director has apparent authority to act on behalf of the board and the bank and can bind the bank contractually. This position was sanctioned in ***Spasco Vehicle and Plant Hire Co. Ltd V. Alraine Nig. Ltd,***[127] where it was stated;

> ***"A managing director of a company is generally invested with apparent authority to carry on the company's business in usual way and to do, act and enter into all contracts necessary for that purpose. Therefore, if a person is held out by a company to be a managing director of the company, anybody dealing with the company can assume that he has power which an agent of that kind normally has and the company is estopped from denying that this is so".***[128]
>
> Though this decision related to a company, it equally applies to banking institution since the position of a managing director in law is one irrespective whether it is a company or a bank.

[127] (1914)2 KB 770

[128] . See Adebayo V. John (1969) ALL NLR 176 at 192-193 per Coker JSC. It is important to note also that the law imposes a higher standard of duty on the Managing Director because of the special position occupied by him.

3.1.1.4 **Independent Directors**

These are persons who have or represent no financial stake in thebusiness of the company or bank, but appointed to the Board to ensure that the Board functions well and see that the business of banking is also well managed. The key role of the independent directors is to ensure that the board functions well. They are not there to manage the business, but to ensure that the business is well managed[129].

In Nigeria, the Independent Directors have not been appointed into the boards of corporate bodies until recently when the Central Bank of Nigeria (CBN) directed banks to appoint independent directors. The need for independent director, according to the CBN, arose from the desire to have on the board of banks, directors who will express expert and independent views on issues in order to enthrone best corporate governance practices.[130]

3.1.2 **Qualification and Mode of Appointment of Directors**

The statutory qualification for a director is wide ranging. They are both positive and negative. The first qualification for appointment is that the person to be appointed must not have been convicted to any offence in connection with the promotion, formation or management of a company or has been guilty, while an officer of the company, of fraud in relation to the company or of any breach of his duty to the company. Any person who is so guilty is barred from being appointed director for a period not exceeding ten years.[131]

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[129] . Mr. MadhavMehra, "Corporation Governance- A Road Map to achieve Corporate & Professional Excellence" retrieved from http://www.wcfcg.net/ Artices.htm. 30/10/2014

[130] . See Vanguard Newspaper Report of Friday, November 9, 2007 titled- "Bank Corporate Governance still weak – CBN", page 13.

[131] . Section 254, CAMA 2004

No doubt this provision is designed to ensure that person appointed directors are honest, loyal and of impeccable character. However, considering the high rate of corporate fraud, mis-governance and other delinquent by corporate directors, which have contributed substantially to the collapse of many companies in recent times, this provision, it would appear, is no longer adequate to deter or punish delinquent directors.

Another qualification a prospective director must possess is that he must not be an insolvent person i.e. he must be free of personal financial problems. This is to ensure that a director will be able to resist any temptation that may come his way in the process of governance. Stiff sanction is imposed on any person being an insolvent who act as a director of company. He is liable on conviction to a fine or imprisonment term[132]

Yet another qualification with respect to a public company is that, a prospective director must not have attained the age of 70 years and above[133]. The work of a company director is a rather demanding one. Even where he is not an "executive" or "staff director", he is still required to attend the meetings of the board of directors and perhaps serve on one or the other of its permanent or ad-hoc committees. A director must therefore, not only be mentally alert but physically active. For this reason, the law sets the biblical 70 years as the age limit for appointment of a director.[134]

[132] . Section 253 CAMA, 2004
[133] . Section 252 CAMA, 2004
[134] AkintundeEmiola: Nigerian Company Law (Ogbomosho: Emiola publishers; 2001) p. 266.

Beside the foregoing the Act [135]generally enumerates persons who shall not be directors. They include;

i. Infant, i.e. person under the age of 18 years

ii. A lunatic or person of unsound mind

iii. A person disqualified under section 253, 254 and 258 of CAMA, 2004, and

iv. A corporation other than its representatives appointed to the board for a given term.

This, by implication, means that apart from the above, any other person may be appointed a director.

The appointment of a director may occur through any of the three modes of appointment so described under the Act.

(a) A director may be named in the article or by majority of subscribers of the memorandum.[136] This method is usually adopted in the appointment of the first directors.

(b) This can be done through subsequent appointment by the members on Annual General Meeting (AGM). This mode usually gives members at the AGM an opportunity to elect or reject directors and appoint new ones to direct and manage the affairs of the company.[137]

(c) Appointment to fill casual vacancy by directors. This method occurs where vacancy occurs on the board through death, resignation, retirement, removal by order of court, etc. In that case, the board is empowered to

[135] Section 257, CAMA, 2004
[136] Section 247, CAMA, 2004
[137] . Section 247, CAMA, 2004

appoint a new one to replace him, pending the next AGM. The new director may be approved at the next AGM but if not approved, the person ceases to be a director.[138]

3.1.3 **Duties of Directors**

There are some statutory duties, which a director owes. The duties[139] of a director could therefore be broadly categorized into three, namely,[140]

a. fiduciary duties
b. duty of care and skill
c. statutory duties

3.1.3.1 Fiduciary Duties

Whether as a trustee or an employee, a director must exercise utmost good faith[141] while acting on behalf of the company even he is acting gratuitously. He must not put himself in a position where his interest will conflict with that of the company. He must not also make secret profit. A director must not misuse the company's money and property and must therefore account for all the moneys over which he exercises control[142] and shall refund any money improperly paid away and shall exercise his power honestly in the best interest of the company and all the shareholders and not in his own sectional interest.

[138] Section 63 (3) CAMA, 2004
[139] Hasten VACB (2002) 12 NWLR (pt.782) p. 623 SC
[140] See Section 299 CAMA, 2004
[141] Section 282, CAMA, 2004
[142] Tom D. Folorunsho, Supra p.62

In Federal Republic of Nigeria V Dr. NwochieOdogwu and Capital Merchant Bank[143], the defendant was sentenced to jail for incorporating a sham company through which he defrauded Capital Merchant Bank to which he was the Managing Director.

3.1.3.2 Duties of Skill, Care and Attention

A director must perform his duty with a degree of care, diligence and skill which a prudent reasonable director would exercise in similar circumstances.

CAMA[144] provides that a director shall exercise that degree of care, diligence and skill which reasonably prudent director would exercise in a comparable circumstance in accordance with Section 282 of the Act, and failure shall ground an action for negligence and breach of duty. Such standard of care and skill is expected of both executives and non- executive directors.[145]

Since the duty of a director is an agent like duty, the director must not delegate his duty. If he does, it would result in breach of duty except where there is provision that will enable him to delegate his functions.

3.1.3.3 Statutory Duties

There are some duties which statute imposes on directors and non-compliance with provisions of such statute would result in a breach of statutory duties. It is an offence for anyone to be appointed as a director where he is 70 years and above without him disclosing such age.[146] It is also

[143] (1997) IFBTLR 179
[144] Section 282 CAMA 2004
[145] BernanrdOjeijo Long V. First Bank Plc (2006) ICLRN
[146] Section 252 CAMA 2004

a statutory duty for a director to disclose his interest[147] in any contracts with the company particularly when payment or compensation is being made to a company in which the director has an interest.

The Company and Allied Matters Act[148]stipulates a director's duty to prepare annual account. It is also provided under CAMA[149] as follows;

> **"A director or member of a company who knows that a Company carries on business after the number of directors has fallen below two for more than 60 days shall be liable for all liabilities and debts incurred by the Company during that period when the Company so carried on business"**

3.1.4 Powers of The Board of Directors

The powers of the Board of Director include the following:

i. Power to manage the business of the company and exercise all suchpowers of the company as are not required to be exercise by the general meeting[150]

ii. Power to recommend all eligible persons for election to the office of director at any general meeting except a retiring director.[151]

The provision by this section appears to have given the board the power to determine who becomes a director at the expense of the members. From the wording of the provision, a member may nominate a person for

[147] Section 272 CAMA 2004
[148] Section 334 CAMA 2004
[149] Section 246 (3) CAMA 2004
[150] Section 63 (3) CAMA, 2004
[151] Section 259 (4) CAMA, 2004

election as a director by giving a 21 days' notice to the company and *"the would be"* director is also required to signify his intention to be a director in writing to the company.

It would appear from the provision that directors shall recommend to the AGM from the numerous nominations received by them from members. Invariably, members at AGM merely rubber stamp the nominees of the board.

iii. Power to appoint new directors to fill any casual vacancy arising fromdeath, resignation retirement etc. on the board and to increase thenumber of directors so long as the maximum number permitted by the Articles is not exceeded[152]

iv. Power to declare dividends and the discretion on whether or not to paydividend in any particular year and how much is to be paid.

v. Power to hire and fire corporate executives at any time.

vi. Power to delegate any of their powers to a managing director or committee consisting of such members of their body as they think fit.[153]

3.1.5 **The Role of Board of Directors In Corporate Governance**

The board of any bank is key to the adoption and implementation of corporate governance best practices. The board is the watch dog of other stakeholders' interests on the role of insiders who control the resources owned by investors.

[152] Section 249, CAMA, 2004
[153] Section 263 (5), CAMA, 2004

Therefore the role of the board must change from management support to organizational leadership.

To this end, the roles of the board must include the following;

i. Providing guidance for corporate strategy, major plans of action and risk policy

ii. Reviewing and approval of annual budgets and business plans

iii. Setting performance objectives and overseeing major capital expenditures, acquisitions and diversities.

iv. Monitoring the effectiveness of the corporate governance practices and making appropriate changes where necessary.

v. Ensure the integrity of the corporation's accounting and financial reporting systems.

vi. Overseeing the process of disclosure and communication with relevant government agencies.

vii. Monitor and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transaction.

viii. Ensuring a formal and transparent board nominations and election process.

ix. Developed and enforced, compliance with the policies, rules, regulation's guiding the business and operations of the bank.

x. Selecting, compensation, monitoring and when necessary, place key executives and overseeing succession plan.

xi. Aligning key executive and board remuneration and allowances with the long term interests of the corporation and its shareholders.

3.1.6 The Criminal Liabilities of Directors

The Board of Directors of a Company under section 63(3) and section 244(1) of the Companies and Allied Matters Act is empowered to manage the business of the Company. Such powers conferred on the Board of Directors are remnants of the powers exercised by the Company (through its owners, the shareholders) in general meeting. It follows therefore, that powers of management of a company are shared between the shareholders and directors.[154] In **Ejekam V Devon Industry Ltd,**[155] the issue before the court was, who has the authority to brief counsel to institute an action on behalf of a company. The court went further to state that;

> **"Nowadays, the Boards act through the Chief Executive Officers who are normally given umbrella powers. This extension of powers to Chief Executive Officers of a Company otherwise known as Managing Director is not extended to such officer as the Secretary of the Company. The Acts of the Directors of a company conferred upon them by the shareholders, could be taken as the act of the company for which the company could be held criminally**

[154] Tom, D. F., "The Criminal Liability of Bodies Corporate in Nigerian Law," (Enugu; Chenglo Limited, 1st ed. 2005,) P. 93
[155] (1998) INWLR Pt. 53

liable. By means of the doctrine of alter ego, the mensrea or the states of mind of the Directors of a Company or Corporation are imputed to the Company to create such criminal liability in the Company".

Thus, in **Director of Public Prosecution V Kent and Sussex Contraction Ltd,**[156] the defendant company was charged with offences which required the proof of mensrea. In finding the Company guilty of this common law crime of conspiracy to defraud, **Stable J.** said "The acts of the Managing Director were the acts of the Company". The court stated thus;

"Although the Directors or General Manager of a Company are its agents, they are something more. A company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought. The officer are the company for this purpose... there was ample evidence that the company, by the only people who could act or speak or think for it, had done both these things"

Similarly, in **Bamgboye V University of Ilorin**,[157]**Ogundare, J.C.A.** as he then was, stated that;

"A director is an agent of his Company. In view of the position occupied in the conduct of the affairs of the Company, he is considered to be the brain and nerve centre which controls the Company"

[156] (1944) K. B. 146
[157] (1991) 8 NWLR (Pt. 207) L,30

Thus, an agent who plays such an important role in the Company could be said to be company itself. This formula of ascribing the acts of an agent to that of a corporation has found its way into some of our statutes like the Companies and Allied Matters Act.

The Weights and Measures Act[158] provides as follows;

> **"Where an offence under this Act Committed by a body Corporate is proved to have been committed with the consent or connivance or to be attributable to any neglect on the part of, any Director, Manager, Secretary or other similar offences of the body to act in any such capacity, any such director or other person mentioned in this sub-section as the case may be as well as the body corporate shall be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly".**

It is clear that in the Nigerian situation, and in other jurisdictions, the directors of a company and other highly placed officers of the company are the only officers whose acts can bind the company criminally.

3.2 THE GENERAL MEETING

Members participation in governance is usually through the general meetings. The general meeting is the deliberative assembly and the highest policy

[158]S.30 (1) Weight and Measures Act. Cap. W3 Vol. 15 LFN 2004

making body of a company.[159] Members of a bank, otherwise called the shareholders of a bank exercise management powers over the affairs of the bank by decision making process in the bank meetings.

In Sharp V Dawes[160], the court defined a meeting to mean the coming together of persons for the purpose of discussing and acting upon some matter or matters in which they have common interest. The effect of the above authority, when read in conjunction with section **232 (2) of CAMA, 2004,** implies that there should be at least two persons to constitute a meeting.

However, for effective and efficient governance, members delegate authority to manage the business of the company to a specialized team- the Board of Directors, whose members are elected by and responsible to the members.

Parkinson J.E.,[161] Commenting on the rationale behind this delegation of authority, observed correctly thus;

> ***Efficiency demands that the contributors of capital hand over management of the company's affairs to a small group capable of relatively quick and continuous decision making. This also permits the company's affairs to be placed in the hands of those who are equipped with special abilities and skills which are necessary for effective management and which, many shareholders may not themselves possess. But it***

[159] . In Okeowo and Ors. V. Migliore and ors. (1979) 11 SC 138, the Supreme Court held that the ultimate power in a company rests with the general meeting of members of the company

[160] (1876) 2 Q B 26

[161] Parkinson J.E, Corporate Power and Responsibility Issues in the Theory of Company Law, (London: Clarendon Oxford; 1993) P. 52.

carries with it so many risks; that managers will act in their own interest at the expense of the shareholders, thereby reducing the expected gains, not only for the shareholders but also for the society as a whole.

3.2.1 Types of Meetings

There are three types of general meetings recognized by the Company and Allied Matters Act (CAMA). They are namely;

Statutory Meeting

Annual General Meeting

Extra Ordinary General Meeting

3.2.1.1 Statutory Meeting

By section 211 of CAMA, 2004, every public company which includes a bank, is required to hold a statutory meeting within 6 months from the date of incorporation. Statutory meeting is held only once in the life time of a bank. Prior to this meeting, the directors must prepare a statutory report which must be served on each member 21 days before the meeting.

The Statutory report must state;[162]

a. The total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares

[162] . Section 211 (3) CAMA, 2004

partly paid up, the extent to which they are so paid up and in either case, the consideration for which they are allotted.

b. The total amount of cash received by the bank in respect of all shares allotted distinguished as above.

c. The particulars of any pre- incorporation contract or proposed modification.

d. Any underwritten contract that has not been carried out and the reason for such.

e. The names, address and descriptions of the directors, auditors and managers, if any, and the secretary of the company.

f. The arrears, if any, due on calls from every director.

g. The particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares or debentures to any director or manager.

The statutory meeting affords the shareholders an opportunity to having first hand progress report from the directors and the promoters. Failure to hold statutory meeting is a valid ground for winding up under section 408 (b) of the Act.

3.2.1.2 **Annual General Meeting**

Every bank is required by section 213 of the Act to hold an Annual General Meeting (AGM) in each year in addition to any other meeting as may be held and not less than 15 months shall elapse between the date of one annual general meeting and the next. However, where a bank holds annual general

meeting within 18 months of its incorporation, it needs not bold it in that year again or the following year.

This is the meeting where the impact of members is most felt in the process of corporate governance. It affords members the opportunity to review the affairs of the bank for the past year.

The Act[163] distinguishes two types of businesses that can be transacted at the Annual General Meeting. These include; Ordinary and Special business. The Ordinary businesses include.

i. Declaration of Dividends

ii. The presentation of the financial statement and the reports of the directors and auditors.

iii. The election of directors in the place of those retiring

iv. Appointment and fixing of the auditors remuneration.

v. Appointment of members of the audit committee.

Apart from the above, any other business is deemed to be a special business. This distinction is important because the Act[164] also provides that it shall suffice to include in the notice that the business to be transacted is the ordinary business without necessarily stating the particulars.

[163] Section 214, CAMA
[164] Opcit Section 218 (2) CAMA, 2004

3.2.1.3 **Extra Ordinary General Meeting.**

This is a general meeting which is not an annual general meeting. It is "extra ordinary" because of the procedure for calling it and the nature of business transacted in it. Obviously, it is usually called to deal with matters needing urgent attention that cannot wait until the next annual general meeting. This meeting is usually convened by Board of Directors whenever they deem it fit and where they cannot form a quorum to deal with pressing matter due to the fact that some of the directors needed to form a quorum are outside the country[165]. This meeting may also be summoned by the directors on the requisition of any member or members holding not less than one tenth of the paid up capital of the bank.[166] If however, the directors fail to convene the meeting within 21 days of the receipt of a requisition, the requisitionist can convene the meeting within a period of 3 months[167]. The requisitionist shall be entitled to be reimbursed for the expenses incurred in convening the meeting.

All businesses translated at this meeting are deemed special business.

3.2.1.4 **Meeting Convened on Courts Order**

Quite apart from the other two types of meeting discussed, the Act [168] gives the court power to, on its own motion or on the application of any director or shareholder of the bank order meeting of the company or the Board of Directors. The court would act in circumstances where it is "impracticable"[169]to

[165] Section 215 (1) CAMA, 2004
[166] Section 215 (2) CAMA, 2004
[167] Section 215 (4) CAMA, 2004
[168] Section 223 (1-3) CAMA, 2004
[169] In Boro Clever Ige- Adaba V. West African Glass Ind. Ltd (1977) FRCR 171, it was held that the word "impracticable" means that the meeting of the company cannot be convened in the manner require by the articles of association.

call a meeting in any manner in which a meeting may be called.[170] The court in ordering a meeting may make ancillary orders to enable its order to be effected.[171]

3.2.2 Powers of The General Meeting

As the supreme organ of a corporate body the general meeting has the following exclusive powers.

i. Power to amend the memorandum and article of association (constitution) of the corporate body whenever members deem it fit[172]

ii. Power to appoint and dismiss any director at anytime by a simple resolution.[173]

iii. Power to render unlimited the liability of director or managers of any company's memorandum by a special resolution.[174]

iv. Power to resolve any dead lock in the board of directors and if need be exercise the power of the board or make recommendations to the board regarding action to be taken by the board.[175]

v. Power to approve any compromise or arrangement with creditors of the corporation before any further action can be taken[176].

vi. Power to appoint and remove the company's auditor at any time.[177]

vii. Power to approve scheme proposed for a merger of the company with another before further action can be taken on the matter[178]

[170]A.G. Rivers State V. Delta Consult Ltd (1977) 2 FRCR 186.
[171]. Okeowo&Ors V. Migliore&Ors (1970) 12 NSCC 210
[172] . Section 48 CAMA, 2004
[173] . Section 247 and 262, CAMA 2004
[174] . Section 289 (1), CAMA 2004
[175] Section 63 (5), CAMA 2004
[176] Section 539, CAMA 2004
[177]Section 357 and 362, CAMA 2004
[178] . Section 100-102 Investment & Securities Act CAP. 124 Vol. B L.F. 2004

viii. Power to alter the share capital of the company to either increase or reduce it.[179]

ix. Power to determine directors' remuneration and alter allowances.[180]

x. Power to call for voluntary dissolution of the company[181]

It is obvious, from the above, that the general meeting wields enormous powers that can help it have an effective oversight on the governance of a bank. However, in spite of these enormous powers, the general meetings are passive, largely content to accept decisions made by their directors. The only exception at times is institutional investors, who often take steps to see that their interests are not compromised by management. This members inactivity enables directors and executives to pursue objectives of their own.

No doubts, shareholders would make an impact if they can agree to attend and vote in a particular manner at annual general meetings. However, this will involve mobilization, education and obtaining cooperation of other shareholders. The obvious docile nature of shareholders accentuated by numerous inadequacies faced by them, perhaps, explains why governments the world over try to provide and empower the needed watchdog that can act on their behalf.

Paul L. Davies[182] while attesting to the situation in England, asserts thus;

> ***The basic problem here is that accountability cannot be secured by legal prescription unless these are enforced in the last resort by the courts in England, the cost of***

[179] Section 100 and 106, CAMA 2004
[180] . Section 267, CAMA 2004.
[181] Section 457, CAMA 2004
[182] Gower, L.C.M; "Principle of Modern Company Law", (London Sweet and Maxwell, 6th ed 1997), P. 511.

litigation, even if successful, is such that shareholders are not able and willing to resort to the courts. The major contribution that English company law has made in this area is to recognize what is needed, a watchdog empowered to take action on their behalf (by investigation, inspections and the institution of civil and criminal proceedings). In the company law field that watchdog is the department of trade and industry but in the related field of financial services; the roles are delegated to a self-standing body (the Stock Exchange Board).

Lord Denning (M.R.) in the case of **Northwest Holst V Secretary** of state for Trade[183] concisely expantiates on this point. He intones thus;

Companies are conducted in a way which is beyond the control of the ordinary shareholder. The majority of the shares are in the hands of two or three individuals. These have control of the company's affairs. The other shareholders know little or are told little. They received the annual report and most of them throw them into paper basket. There is an annual general meeting but few of them attend. The whole management and control is in the hands of the directors. They are a self-perpetuating oligarchy and are virtually unaccountable".

Nevertheless, what then should be the role of the general meeting in the process of corporate governance?

[183] (1978) 3 ALL E.R. 280

3.2.3 **The Role of The General Meeting In Corporate Governance**

The role of the general meeting should include the following;

i. Conduct an extensive search for credible person to be nominated and elected to the board of directors through their Shareholders Association or an independent search firm rather than personal contact by an existing director or directors.

ii. Nominate and ensure the election of qualified experience persons to the board instead of the present practice where members merely rubber stamp board's nominees.

iii. Be proactive in its oversight duties on the board by asking questions from time to time and confront the board promptly whenever members are not satisfied with their performance.

iv. In line with section 259 (4), CAMA, 2004, ensure that credible people are elected to represent them in the Audit Committee.

v. Through their shareholders' association, collaborate with employees' unions, government agencies suppliers, contractors, regulators and creditors etc.in order to gather firsthand information with which to confront the board.

3.2.4 **Relationship Between The Board of Directors and The General Meeting of Shareholders**

The Board of directors and the general meeting of shareholders have different functions. Their duties are contained in the article of association. By the

provision of the Act, the Board of Directors shall manage the business of the company as are not by this Act to be exercised by the members in general meeting[184]. By the provision of section 63, the Board of Directors when acting within the powers conferred upon them by this Act shall not be bound to obey the direction or instructions of the members in general meeting provided the directors acted in good faith with due diligence[185].

However, Section 63 (5) (a-b) of CAMA 2004 provides that;

Notwithstanding this provisions of Section 63 (3) CAMA, that the members, in General Meeting may;

a. Act in any matter if the members of the Board of Directors are disqualified or are unable to act because of a deadlock on the board or otherwise,

b. Institute legal proceeding in the name and on behalf of the Company, if ratify or confirm any action taken by the Board of Directors or neglect to do so.

c. Ratify or confirm an action taken by the Board of Directors.

d. To make recommendation to the Board of Directors regarding action to be taken by the board.

Section 63 of CAMA 2004 has expressly sanctioned the organic theory of the Acts and liability of the Company and approved the division of power between the company at General Meeting and the Board of Directors.

The provision of Subsections (3) and (5) of the above section came up for interpretation by the Court of Appeal in **Ladejobi V. Odutola Holdings Ltd**.[186] In that case, one of the issues for consideration in the Court of Appeal was who, as between

[184] Tom. D. Folorunsho, "Company Law in Nigeria", (Benin City, Union Publishers; 2009), p.60
[185] Section 63 (4) CAMA, 2004.
[186] (2002) 3 NWLR (Pt. 753) 121.

the Board of Directors and the General Meeting, had the Power to authorize the Company to commence action in the Court. In the light of **Section 63 of the Act Aderemi, JCA**considered the provisions of the section and after referring to the case of **Emesin V. Mrs. Nwachukwu**[187]where the word "**notwithstanding**" was held to mean **"Inspite of"**, he observed, inter alia, as follows:[188]

> **"I adopt the meaning ascribed to the word "notwithstanding" in this case as appropriate for the same word as used in Section 63 (5) of CAMA. It then follows that when Subsection (3) is read in conjunction with Subsection (5), it translates to this: that although by virtue of Subsection (2) of Section 65 the power to manage the business of the company is vested in the Board of Directors, by virtue of Subsection (5) all the same or nevertheless, the General Meeting retains the power to determine whether legal proceedings may be instituted in the name of the Company. Whereas, Subsection (3) places the management of the General Business of the Company under the Board of Directors Subsection (5) (b) put a specific item under the exclusive control of the members sitting at a General Meeting and that is the issue. Whether to institute legal proceedings in the first Plaintiff/Company. Where, in a Section of a statute there is provisions in a Subsection vesting power in a body to carry out general duties, and there is another**

[187](1999) 6 NWLR (Pt. 605) 154 at 167.
[188] At Pg. 158 – 159, supra

subsection of the same section vesting the power in another body or a bigger body to carry out specific duties, it seems to me that the intention of the law maker is to take away from the control of that body charge with performing the general duties, the power or authority to perform those specific duties. In construing the whole Section 63 of CAMA, the irresistible conclusion is that the power of management or control of the company insofar as they affect the institution of litigation in the company's name are vested in the general meeting".

3.2.5 Supervisory Role of The General Meeting Over The Board of Director

In the exercise of management powers, the directors of a bank are not bound to obey the directions and instructions of the General Meeting, provided they acted in good faith and diligently. This position has the support of the Act[189]. Therefore the Board of Director is an anonymous organ and its decisions cannot be overruled by the General Meeting. **In Automatic Self Cleansing Filter Syndicate Co. Ltd V. Cunighame[190],** article 94 of the company's article vested in the Board of Directors "the management of the business and the control of the company". Article 97(1) specifically empowered them to sell any property of the company on such terms and conditions as they might think fit.

At a general meeting of the company, a resolution was passed directing the board to sell the company undertaking to another company formed for that purpose. But the directors disapproved of the proposed terms and declined to

[189]Section 63 (4), CAMA, 2004.
[190](1906) 2ch 34.

carry out the sale. It was held that the shareholders has no say in the matter which was for the board alone to decide and could not compel the directors to carry out the resolution. It also follows that here the board of directors have validly delegated its powers to the managing directors and committee of directors, the general meeting cannot interfere[191].

But under the said section of CAMA[192], the management powers is divided between the General Meeting comprising of all the shareholders of the bank and the board of directors of the bank. Between these two management organs, the question has been asked, what is their relationship?

In other words, what powers have the Board and the General Meeting of a bank in the management of the bank.

Up to the close of 19th century, the board of directors was usually treated as a mere agent of the bank while the General meeting was regarded as the company and had overall control of the former. In **Isle of Wight Rly Co. V. Tahourdin,[193]** following the above position, it was held that members in a general meeting could pass a resolution empowering them to interfere with the ways the directors manage the affairs of the company.

In **Automatic Self Cleansing Filter Co. Ltd V. Cuninghame[194],** Judicial opinion soon changed when it was decided that the general meeting could not interfere where the article has conferred on them, the control of company affairs[195]. The provision of the Act[196] seems to have sanctioned the above

[191] section 263 (2), (3), (8) & (9), CAMA, 2004
[192] Section 63 (1) CAMA, 2004
[193] (1883) 2ch. D. 320
[194] Supra
[195] Shaw V. Shaw (1933) 2KB 113.

position. The essence of the provision is that the general meeting cannot give directions to the Board of Directors of a company on how to run the affairs of the company. neither can they override a decision arrived at by the directors in the conduct of the company's business unless such matters as are specifically reserved either by the article as originally framed or by alteration.

The powers of the Board of Directors in the Management of the affairs of the bank is not absolute. There exist some residual or ultimate powers of control in the general meeting in the sense that if the board cannot exercise their power in the conduct of the bank's affairs, the power to do so would be given to the general meeting as provided in the Act[197]. **In Boron v. Porter**[198] the two directors of the company were not on speaking terms so that effective board meeting could not be held. The plaintiff had requisitioned a shareholders' meeting at which additional directors has purportedly been appointed but the directors objected that the power to make such appointment was vested, by the company's article, on the directors. It was held that in view of the deadlock, the power in question reverts to the general meeting, so the appointment was valid.

Another supervisory power of the general meeting over the board of directors of a bank is the power to alter the article so as to enable them alter the powers of the directors as reserved therein. They can also by ordinary resolution, remove any director or sack the board before the expiration of their term of office.[199] This seems to be the position adopted in most cases

[196] Section 63 (5) (a) CAMA, 2004
[197]. Section 63 (5) (a) CAMA 2004
[198] (1914)1 ch. 895, see also Toster V. Toster (1916)1 ch.
[199] Section 262, CAMA, 2004

including **Isle of Wight Rly Co. V. Tabourdin**[200]**,** where Cotton L.J. had this to say;

> **"Directors have great powers and the court refuses to interfere with the management of the company's affairs if they keep within their powers and if a shareholder complains of the conduct of the directors while they keep within their powers, the court says to him, if you want to alter the management of the affairs of the company, go to the general meeting and if they agree with you, they will pass a resolution obliging the director to alter their course of proceedings"**

Finally, the general meeting of a bank can rely on section 63(3) (c) and section 303 of the Act, and institute legal proceeding on behalf of the bank where the directors fail to do so. It can also ratify or confirm unauthorized action taken by the board of directors of the bank.

3.2.6 Liability of Shareholders at General Meeting

The Acts,[201] stipulates as follows;

> **"A Company shall act through its members in General Meeting or its Board of Directors or through officers or agents, appointed by, or under authority derived from the members in General Meeting or Board of Directors".**

[200] Supra
[201] S.63 CAMA, 2004

From the foregoing, it can be said that the acts exercised by shareholders in a General Meeting, could be easily be taken as the act of the company as the General Meeting is the highest policy making body of a Company.

The Act[202] further states;

> **"Any act of the members of a company in a general meeting, the Board of Directors or Managing Director, while carrying on in the usual way the business of the company itself and the company shall criminally and civilly be liable therefore to the same extent as if it were a natural person".**

In every democratic society, the wishes of majority members present and voting at the general of a company prevail although the minority has the right to express their resentment of the popular view.[203] It is settled that the vote of the majority is binding on all members of a company.

The rule that majority view of shareholders of a company prevails was laid down in **Foss V Habottle**.[204] In this case, two shareholders brought an action against five directors and others, alleging certain improprieties relating to the company.

The Court held that, it was incompetent for the plaintiffs to bring such proceedings and that only the company had the sole right to do so.

Again, in **Okeowo&Ors V Megliore&Ors**,[205] the court held that, the ultimate power in a company rests with the general meeting of the members of the Company. In this case, the general meeting exercised the powers of the

[202] S. 65 CAMA, 2004
[203] Tom, D. F. Supra
[204] (1843) 2 Hare 461 E. R. 189
[205](1979) 11 Sc 138.Edokpolo and Co.Ltd V Sem-Edo Wire Ind. Ltd (2001) FWLR Pt. 74 P. 407

Board of Directors in respect of appointment and removal of the company Secretary, and the court held that it was proper.

The shareholders are the owners of the company and any act embarked upon by them is never on behalf of any person but for themselves (i.e. the company). It is therefore very easy, for the courts to hold a company criminally liable for the act of its shareholders.

3.3 COMPANY SECRETARY

In the early English statutes, no provisions were made for the appointment of a secretary[206]. The Secretary was sometimes known as clerk of the corporation. So the attitude of the English courts was to regard the secretary as mere servant whose functions are prima facie "clerical and ministerial only" and that his duties were "of limited and somewhat humble character"[207]

Today, not only has the status of a company secretary been enhanced, but that the state of affairs has been recognized by statute. That is to say that the status and authority of the secretary has developed with company practice. This recognition was given judicial approval by the immutable Lord Dennings in the epochal case of **Pamorama Dev. (Guildfod Ltd) Fidelis Furnishing Fabrics Ltd,**[208] where he said

> **"but times have changed. A company secretary is a more important person nowadays than he was in 1887.He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern**

[206] Gower L.C.M. "Gowers Principle of Modern Company Law "(London; Sweet & Maxwell Ltd, 1997) pg. 197
[207] George White Charch Ltd V. Cavanagh (1902) AC 117
[208](1971) 2 Q.B. 711, Q.A.

Company's Act, but also by the role which he plays in the day to day business of companies. He is no longer a mere clerk, he regularly makes representations on behalf of the company which came within the day to day running of the company's business. So much that he may be regarded as and held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company's affairs. All such matters now come within the ostensible authority of a company secretary".

Before the above decision, the appointment of a company secretary has been made mandatory under the 1948 UK's Companies Act[209]. In Nigeria, it was not until 1968 that the gospel of the strategic role of secretaries in company administration was given impetus. Even then, neither the UK Act nor the Nigerian Act clearly defined or spelt out the general duties of company secretaries. These were left to the directors, the general meetings and sometimes the courts to determine as circumstances may require.

The Company Secretary with reference to a bank or corporation, refers to an officer charged with the direction and management of the part of the business of the company which is concerned with the keeping of the records, the official correspondence, giving and receiving notices, counter signing documents etc.[210]

[209] Section 177(1) Companies Act, U.K. 1948
[210] Section 169 of Companies Act, 1968

Though the secretary does not exercise managerial powers, he plays a vital role in the administration of the company e.g. proper documentation and filing of returns, maintenance of company register, keeping of records of contracts and resolutions of the board, keeping of company seal, counter signing of cheques etc.

The Companies and Allied Matters Act[211]provides that every company must have a company secretary. It is compulsory and mandatory for a public company to have a secretary.

A company secretary is not an alter ego of the company but a servant. However, the same person may be appointed as a Director and Company Secretary. A company secretary while acting as an agent of the company owes a fiduciary duty[212].

If he makes a secret profit or takes bribe or allows his personal interest to conflict with that of the company or take advantage of the information at his disposal by virtue of his position to the detriment of other shareholders, he is liable just like any other officer of the company[213].

3.3.1 Qualification of Secretary

Since there is no statutory provision for appointment as secretary for a private company, any competent person could be made the secretary of a private

[211] Section 293, CAMA 2004
[212] David Folorunsho Tom, Opcitpg 72
[213] Section 297, CAMA 2004

company. But for a public company, the Act provides that the secretary must hold at least on of the following qualifications[214].

1. A legal practitioner within the meaning of the Legal Practitioners' Act
2. A member of the Institute of Chartered Secretaries and Administrators
3. A member of the Institute of Chartered Accountants of Nigeria or other similar body recognized by law
4. A person who had been company secretary of a public company for at least 3years within the past 5years immediately preceding his appointment
5. A firm or corporate made up of any of the above profession

3.3.2 Duties of a Secretary

The following are the duties of a secretary:

1. Attending and rendering secretarial services at the company's meetings
2. Advising the company on compliance with the regulations
3. Keeping records and statutory books of the company as required by CAMA.
4. Rendering returns and filing notices at the Corporate Affairs Commission
5. Performing other management and administrative functions as may be assigned to him from time to time by the Board of Directors

[214] Section 298, CAMA 2004

3.3.3 Appointment and Removal of Secretary

A secretary shall be appointed by the directors and subject to the provision of this section, may be removed by them.

The Act[215] provides as follows:

The Secretary is given 7 days' notice by the Directors of their intention to remove him. The notice shall state the grounds on which it is proposed to remove the Secretary. It shall also inform the secretary that he may make any representation to the board. The notice shall also give the secretary the option to resign voluntarily within 7days. After the expiration of 7days notice, the Board of Directors shall proceed to remove the Secretary if the secretary fails to resign or make any representation to the Board. If the secretary makes any representation, the Board could remove him where the Board is not satisfied, particularly where the allegation against him bothers on fraud or other serious misconduct. The Board must thereafter report the removal to the general meeting. However, if the ground for removal is not fraud or other serious misconduct, the board will first report the matter to the general meeting before proceeding to remove the secretary.

3.4 AUDITORS

An Auditor by definition is someone who is responsible for evaluating the validity and reliability of a company or organization's financial statements. He is an individual trained to review and verify that the accounting data provided by an audited company accurately corresponds to the activities that have

[215] Section 296, CAMA 2004, also see Wimpey (Nig) Ltd V AlhajiBalogun (1956)

been partaken by the company[216]. They are used to ensure that companies are maintaining accurate and honest financial records and statements. Auditors of companies can be internal or external.

3.4.1 Internal Auditors

These are those who are employed by the companies that they audit. They primarily provide audits related to the effectiveness of the company's internal controls over financial reporting.

Internal auditors are not independent of the company they perform audit procedure for, but they usually do not report directly to management in order to reduce the risk that they will be swayed to produce biased assessment.

3.4.2 External Auditors

External Auditors are independent accounting/audit firm hired by companies subject to an audit. They express their opinion on whether the financial statements of the company in question are free of material misstatements (these could be due to fraud, error or otherwise).

For publicly traded companies, an external auditor could also be required to provide an opinion on the effectiveness of the internal controls over financial reporting.

[216] www.e-conomic.com/accountingsoftware/accounting-v retrieved on 31/08/15

3.4.3 Appointment of Auditors

The Act[217] provides as follows:

> ***"Every company shall at each annual general meeting appoint an auditor or auditors to audit the financial statements of the company and to hold office from the conclusion of that, until the conclusion of the next annual general meeting. At any annual general meeting, a retiring auditor, however appointed shall be reappointed without any resolution being passed unless,***

a. he is not qualified for re-appointment or

b. a resolution has been passed at that meeting appointing some other person instead of him or providing expressly that he shall not be re-appointed, or

c. he has given the company notice in writing of his willingness to be re-appointed.

Section 357 (1) of the Act provides that every company must, at each Annual General Meeting, appoint an Auditor or Auditors to audit the financial statement of the company.

The first Auditors may be appointed by the Directors at any time before the first Annual General Meeting, but if the Directors do not exercise this power, then the company, at a General Meeting may appoint them.[218] But the company may remove any Auditor appointed by Directors in exercise of their power under the subsection and appoint in their place any other persons who have been nominated for appointment by any member of the company.[219]**See AVOP PLC V. AG Enugu State**.[220]

[217] Section 357 (1-6) CAMA, 2004
[218] Section 357 (5).
[219] Section 357 (5) (a).
[220] (2000) 7 NWLR (Pt 644) 260 at 276

3.4.4 Qualification of Auditors

The Act[221] states that the provision of the Institute of Chartered Accountant of Nigeria Act shall have effect in relation to any investigation or audit for the purpose of this Act so however that none of the following persons shall be qualified for appointment as auditor of a company that is;

a. an officer or servant of the company

b. a person who is a partner of or in the employment of an officer or servant of the company

c. a body cooperate

The Act[222] further states that a person shall also not qualify for appointment as an auditor of a company if he is disqualified for appointment as auditor of any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company, or would be so disqualified if the body corporate were a company.

However, a firm is qualified for appointment as auditor of a company if, but only if, all the partners are qualified for appointment as auditors of it.[223]

3.4.5 Duties and Powers of Auditors

The Act[224]states that it shall be the duty of the Company's Auditor to carry out such investigations as may enable them to form an opinion as to whether a proper accounting records have been kept by the company and proper returns adequate for their audit have been received from branches not visited by them

[221] Section 358(1) CAMA, 2004
[222] Section 358(3) CAMA, 2004
[223] Section 358(4) CAMA, 2004
[224] Section 360 (1)(a-b) CAMA, 2004

and also whether the company's balance sheet and its profit and loss account are in agreement with the accounting records and returns.

Every auditor of a company shall have a right of access at all times to the company's books, accounts and vouchers, and be entitled to require from the company's office such information and explanations as he thinks necessary for the performance of his duties[225].

The Act[226] states that it shall be the auditors' duty to consider whether the information given in the directors' report for the year for which the accounts are prepared is consistent with those accounts, and if they are of opinion that it is not, they shall state that fact in their report.

3.4.6 Liability of Auditors for Negligence

The Company and Allied Matters Act provides as follows[227]:

1. A company's auditor shall in the performance of his duties, exercise all such care, diligence and skill as is reasonably necessary in each particular circumstance.

2. Where a company suffers loss or damage as a result of the failure of its auditor to discharge the fiduciary duty imposed on him, the auditor shall be liable for negligence and the directors may institute an action for negligence against him in court.

[225] Section 360 (3) CAMA, 2004
[226] Section 360 (5) CAMA, 2004
[227] Section 368 (1-3) CAMA, 2004

3. If the directors fail to institute an action against the auditor, any member may do so after the expiration of 30days notice to the company of his intention to institute such action.

The extent to which an auditor can be held liable for both criminal and civil liabilities has been the subject of judicial comments over the years. The auditor is a watch dog and not a blood hand. In **Re-London and General Bank**, **Lindley L.J.** summed up the duties of an auditor interalia[228].

> ***"His business is to ascertain and state the financial position of the company at the time of the audit, but he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the book themselves show the company's true position. He must take reasonable care to ascertain that they do so. An auditor however, is not bound to do more than exercise care and skill in making inquires and investigations. He is not an insurer, he does not guarantee that the books do correctly, show the true position of the company's affairs, he does not even guarantee that his balance sheet is accurate according to the books of the company. If he did, he would be responsible for errors on his part, even if he were himself deceived without any want of reasonable care on his part, say by fraudulent concealment of a book from him….. he must be honest, i.e. he must not certify what he does not believe to be true and he must take reasonable care and skill before he believes that what he certifies is true".***

[228] Re-London and General Bank (No. 2)(1895) 2 CH673

The popular view is that it is not the primary responsibility of auditors to prevent or detect fraud and other irregularities in corporate organizations. The court was categorical on this in the case of **Kingstan Cotton Mill Co**.,[229]where the court stated quite appositely that

> ***"An auditor is a watchdog and not a blood hound. He is not bound to approach his work with suspicion, he is entitled to rely on the representation of trusted officers of the company"***

The auditor's duty is to state whether a set of accounts gives a true and fair view and comply with the relevant legislation.

3.5 CORPORATE GOVERNANCE IN NIGERIAN BANKS AND THE 2006 CBN CODE

The Code of Corporate Governance for Banks in Nigeria Post- Consolidation is an industry-specific corporate governance code applicable to all money deposit banks in Nigeria. Since its issuance, a lot has happened in the Nigerian banking sector. Before the 2006 CBN Code, there were in existence two corporate governance codes which were applicable to Nigerian banks. These were code of corporate governance for Banks and other Financial Institutions 2003, issued by the Bankers' Committee and the Code of Best Practices on Corporate Governance 2003 issued by the Securities and Exchange Commission (SEC). However, following the conclusion of the consolidation of banks in Nigeria, the Central Bank of Nigeria (CBN) reviewed the code of corporate governance applicable to Nigeria banks. The

[229] 1896 per Justice Lopez 2

consolidation would greater corporate governance challenges for the banks arising from integration of processes, information technology and culture. Furthermore, it was thought that the emergence of mega banks in the post-consolidation era is bound to task the skills and competences of boards and managements in improving shareholder values vis-à-vis other stakeholders' interests. Consequently, on 1st March 2006, the Code of Corporate Governance for Banks in Nigeria Post-Consolidation[230] was issued by the CBN and Compliance with its provisions was made mandatory.[231]

Essentially, the 2006 CBN code was meant to tackle two broad issues namely;[232]

1. To address the identified weaknesses in corporate governance of banks in Nigeria.
2. To resolve the challenges of corporate governance which are bound to occur post-consolidation.

The identified weaknesses in corporate governance of banks in Nigeria included disagreements between board and management giving rise to board squabbles; ineffective board oversight functions; fraudulent and self-serving practices among members of the board, management and staff; overbearing influence of chairman or managing director/chief executive officer, especially in family-controlled banks, weak internal controls; non-compliance with laid down internal controls and operation procedure; ignorance of and non-compliance with rules, laws and regulations guiding banking business, passive shareholders; poor risk management practices resulting in large quantum of non-performing credits, including insider-related credits; sit-tights directors even where such directors fail

[230] Hereinafter referred to as the "2006 CBN Code"
[231] S.1.7, 2006 CBN Code
[232] Offa Nat, Code of Corporate Governance for Banks in Nigeria Post-Consolidation 2006: Revision Required. http//ss.rn.com/abstract=1751460 retrieved 23rd Oct. 2014

to make meaningful contributions to the growth and development of the bank, succumbing to pressure from other stakeholders, e.g. shareholders' appetite for high dividend and depositors quest for high interest on deposits; technical incompetence, poor leadership and administrative ability; inability to plan and respond to changing business circumstances; and ineffective management information system.[233]

The identified challenges banks would face after the consolidation exercise included; relationship between management and staff; relationships among directors, technical incompetence of board and management; increased levels of risks in the absence of a robust risk management system; ineffective integration of merged banks, poor integration and development of information technology systems, accounting systems and records etc.....[234]

The 2006 CBN Code was made to enable banks tackle these identified corporate governance challenges. Thus, it is appropriate to assess the effectiveness of the 2006 CBN Code in achieving the set targets. This is especially so in view of the crisis in the Nigerian Banking Sector.

3.5.1 Features of The 2006 CBN Code

In view of the recent banking crisis in Nigeria, one might want to condemn the 2006 CBN Code as having failed to achieve its target as set out to address, i.e. addressing the corporate governance challenges that would confront banks in Nigeria after the consolidation exercise. This is so because; corporate governance failure has been fingered as the major cause of the

[233] Section 2, Ibid
[234] Section 3, Ibid

banking crisis. According to SanusiLamidoSanusi, the then Governor of the CBN:[235]

> **"Governance Malpractice within banks, unchecked at consolidation, became a way of life in large parts of the sector, enriching a few at the expense of many depositors and investors. Corporate governance in many banks failed because boards ignored these practices for reasons including being misled by executive management, participating themselves in obtaining unsecured loans at the expense of depositors and not having the qualifications to enforce good governance on bank management. In addition, the audit process at all banks appeared not to have taken fully into account the rapid deterioration of the economy and hence of the need for aggressive provisioning against risk assets. As bank grew in size and complexity, bank boards' often did not fulfill their function and were lulled into a sense of well-being by the apparent year-over-year growth in assets and profits. In hindsight, boards and executive management in some banks were not equipped to run their institutions. The board Chairman/CEO often had an overbearing influence on the board, and some boards lacked independence, directors often failed to make**

[235]SanusiLamidoSanusi "The Nigerian Banking Industry: What went wrong and the way forward" at P.17. Being the full text of a convocation Lecture delivered at the Convocation Square Bayero University, Kano. Retrived from www.centbank.org/out/speeches/2010 on 10th May, 2015

meaningful contributions to safeguard the growth and development of the bank and had weak ethical standards; the board committees are also often ineffective or dormant... CEOs set up Special Purpose Vehicles to lend money to themselves for stock price manipulation or the purchased private jets over the world. One bank borrowed money and purchased private jets which ... were registered in the name of the CEO's son. In another bank, the management set up 100 fake companies for the purpose of perpetrating fraud. A lot of the capital supposedly raised by these so-called "mega banks" was fake capital financed from depositors funds".

Evidently, even after the consolidation of banks and issuance of the 2006 CBN Code, the ills of the banking sector in Nigeria prior to consolidation still remained. That does not mean that the purpose for which the 2006 CBN Code was issued was not met except for the Boards and Management of banks that refused to comply strictly with its provisions. Some of the commendable features of the 2006 CBN Code are hereunder highlighted;

3.5.1.1 Separation of Powers

The two most powerful officers of a company are the chairman of the Board of Directors, on one hand, and the Managing Director/Chief Executive Officer, on the other hand. It is believed that if these two powerful positions are occupied by one person, it would lead to over-concentration of powers on that individual. Thus, international best practice on corporate governance requires

that the positions be vested in different individuals. Accordingly, **Lipman and Lipnan**observed as follows;[236]

> **"Permitting the Chief Executive Officer (CEO) to also be the Chairman of the board is a bad practice (except in private Companies), since it permits the CEO to have too much power over the board of directors and undermines the board's fiduciary duty to monitor management."**

The split of the roles of the chairman and the chief executive officer ensures that a system of checks and balances exists in the running of the affairs of the Company. Furthermore, it curtails abuse of power by an all-powerful Chief Executive Officer. Commendably, the 2006 CBN Code also provides for separation of powers by stipulating that the position of the Chairman of the Board of Directors of every bank in Nigeria be separate from the position of the Managing Director/Chief Executive Officer and that one person should not occupy both positions in a Nigerian bank.[237]

3.5.1.2 Majority of Non-Executive Directors

There are two categories of directors in the board of directors of a bank. These are the executive directors and the non-executive directors. To the chagrin of this writer, neither the Companies and Allied Matters Act (CAMA)[238] nor the Bank and other Financial Institutions Act (BOFIA)[239] defined these terms. However, the expressions were used in some sections

[236]Lipman, F. D. and Lipman, I.K., "Corporate Governance Best Practices: Strategies for Public, Private and Not-for-Profit Organization (Hoboken, New Jersey: John Wiley & Sons Inc, 2006) at P. 11.
[237] Section 5.2.1 and Section 5.2.2 Ibid. See also Section 4.8 thereof.
[238] Cap. C20, Laws of the Federation of Nigeria 2004
[239] Cap. B3, Laws of the Federation of Nigeria 2004

of the CAMA[240]. Executive directors, as defined earlier, are those directors who, apart from being members of the board of directors of the corporate body, are also its full-time employees. They are the office-bearers of the company, falling under the statutory common law duties expected of a "director". On the other hand, non-executive directors are directorssimpliciter. They are not employees of the corporate body and thus do not have any contract of service with it. However, they have the same statutory and common-law duties as executive directors, but they do not work in the company on a full time basis. Their labour is first and foremost directed towards the matters dealt with at board meeting.[241]

It has been thought that a board to be independent, it must be composed of a majority of non-executive directors. The major reason being that the non-executive directors, not being employees of the company, would be able to challenge management at board meetings by exercising their independent judgment and character during board meetings and deliberations. This would, consequently, ensure that decisions reached at board meetings will be in the best interest of shareholders as a whole. Accordingly, section 5.3.5 of the 2006 CBN Code stipulates that the number of non-executive directors on the board of directors of any bank in Nigeria should be more than the number of executive directors.[242] This is a commendable provision in the 2006 CBN Code.

[240]Section 244(2) and Section 282 (4).
[241]Plessis du, J. J., "Principles of Contemporary Corporate Governance (Cambridge: Cambridge University Press, 2nd ed. 2011), at P.110
[242] Section 4.10 2006 CBN Code

3.5.1.3 Barring Chairmen from Serving as Chairman of any Board Committee

The 2006 CBN Code provides;[243] that the practice of the Chairman of the board of directors of a bank serving simultaneously as chairman of any of the board Committees of the bank is against the concept of independence and sound corporate governance practice, and should be discontinued. By so doing, the board committees will be better placed to carry out their assignments without the overbearing influence of the chairman of the board, thus ensuring that board committees recommendations are thoroughly discussed when they are presented to the full board for consideration.

3.5.1.4 Disclosure of Insider-Related Dealings or Credits

One of the ills that plagued banks prior to the consolidation exercise in 2005 was the *"Large quantum of non-performing credits including insider-related credits"*[244]. Also the code[245] recognized insider-related lending as one of the post-consolidation challenges that banks would face. Thus, the disclosure of insider-related dealings will mitigate potential abuses that could arise from such transactions. Commendably, the code[246] provides that all insider-credit applications made by directors and top management staff of a bank and parties related to them, irrespective of size, should be sent to the Board Credit Committee for consideration and approval. The code[247] also provides that any director whose facility or that of his/her related interests remains non-performing for more than one year, should cease to be on board of the bank and could be blacklisted from sitting on the board of any other bank. It is

[243] Section 5.3.13, Ibid
[244] Section 2.9. 2006 IBN Code
[245] Section 3.9. Ibid
[246] Section 6.1.6 Ibid
[247] Section 6.1.8 Ibid

contended that these provisions have the potentials to curtail insider-related credit abuses in banks.

3.5.1.5 Independent Directors

The 2006 CBN Code[248] provides that at least two non-executive board members of a bank;

> **"should be independent directors (who do not represent any particular shareholder interest and hold no special business interest with the bank) appointed by the bank on merit". This provision was necessitated by the realization that "a committee and focused Board of Directors which will exercise its oversight functions with a high degree of independence from management and individual shareholders' is a fundamental contemporary corporate governance requirement and ipso facto a sine qua non for a successful bank.[249]**

The need for appointing independent directors in banks became very necessary that the Central Bank of Nigeria (CBN) issued a circular titled *"Guidelines for the Appointment of Independent Directors"* to all banks in 2007. The guidelines were issued by the CBN to enable banks to comply with the provision of S.5.3.6 of the 2006 CBN Code.

Nowadays, the independence of the board of director is regarded as the single most important element of the board of directors that can guarantee the performance of its function.[250] If directors are to be active, positive and

[248] Section 5.3.6 2006 CBN Code
[249] Section 4.2 Ibid
[250] Monks, R.A.G. and Minow, N., Corporate Governance (Massachusetts: Blackwell Publishing, 3rd ed. 2004) at P. 227

effective in the discharge of their oversight responsibility over management of the company, they have to be sufficiently free of such connections with the company, its management or its majority shareholders that are likely, or deemed to be likely, to effect their independent judgment and character. Thus, international best practice is to have the majority of members of the board of directors to be independent directors. The best and civilized way of checking abuse by family board members is ensuring that the board is composed of a majority of independent directors. The board will be effective if it is made up of a majority of *"directors who can think independently because they possess the right knowledge skills and attitudes toward their judiciary duties"* with the board composed of substantial number of independent directors, it is certainly difficult, if not impossible, for family members on the board to successfully perpetrate abuses.

Evidently, the 2006 CBN Code has landable provisions which are relevant in entrenching good corporate governance practices in Nigerian banks. However, there are some provisions of the Code which are less than adequate. There are also some grave omissions in the code. These are shortcomings of the Code which must be remedied.

CHAPTER FOUR

THE AFRICAN UNION

4.1 BACKGROUND TO THE UNION

The historical foundation of the African union originated in the union of African states, an early confederation that was established by late Dr. KwaweKkrumah of Ghana in the 1960s as well as the different attempts made to unite Africa including the OAU which was established on May 25 1963 and the African Economic Community in 1981. Africa under the OAU witnessed incessant crises and conflicts with the various African governments occupied with political survival, the issue of economic integration and cooperation was the responsibility of government and political leaders, whose practice of unquestioning solidary among themselves, non-interference with the nation sovereignty were not conducive for the realization of the goal of the African Union. The OAU initiative paved the way for the birth of the Africa Union.

By the time the OAU gave way to the African Union, the OAU's membership had grown to 53 member states.[251] The idea of creating the AU was revived in the mid 1990s under the Libyan head of state Muommar al-gaddafi. The heads of state and government of the OAU issued the sirte declaration. (Named after sirte, in Libya) on September 9, 1999 calling for the establishment of an African Union in conformity with the objectives of the OAU charter and the provisions of the African economic community (AEC) treaty.

[251] Lawrence O.C. Agubuzu from the OAU to AU: The challenges of African Unity and Development in the twenty-first century, NIIA lecture series, No. 83, Lagos: NIIA, p. 23

The declaration was followed by summits at Lome in 2000, when the constitutive act of the African Union was adopted, and at Lusaka in 2001, when the Plan for the implementation of the African Union was adopted. During the same period the initiative for the establishment of the new partnership for Africa's development (NEPAD) was also established.

The transition of the OAU to the AU effectively began on May 26, 2001 one month after Nigeria by depositing her instrument of ratification of the Act on April 25 2001 gave it the requisite two thirds majority for entry into force. Attempts to mend the OAU charter to reflect the dynamics and realities of Africa and international polities, met a brick wall.

The transition to the AU was formally launched at the 37th ordinary summit of the OAU in Lusaka. Zambia in July 2001. On July 9, 2002, a day after the closing ceremony of the OAU and its last and 38th summit, the AU was born. It was launched in Durban by its first president, South Africans Thabo Mbeki, at the first session of the Assembly of the Africa Union. Its headquarters is in Addis Ababa, Ethiopia.

The AU covers the entire African continent and several offshore Island such as Madagascar except Morocco which opposed the membership of WesternSahara as the Sahrawi Arah Democratic Republic in 1984. However, she benefits from services available to all AU states from the institutions of the AU, such as the African Development Bank. Its delegates also participate at important AU functions. The geography of the AU is widely diverse including the worlds

largest hot desert (the Sahara, Huge Jungles and Savannas and the world river, the Nile. It presently has an area of 29, 922, 059km^2 of coastline. The AU is Africa's premier institution and principal organization for the promotion of accelerated socio-economic integration at the continent, which will lead to greater unity and solidarity between African countries and peoples. Its vision is that of a united and strong Africa.

4.2 AIMS AND OBJECTIVE OF THE UNION

The Constitutive act of the African Union, states its objectives as follows;

To achieve greater unity and solidarity between the Africa countries and the peoples of Africa, to defend the sovereignty, territorial integrity and independence of its member states; to accelerate the political and socio-economic integration of the continent, to promote and defend African common positions on issues of interest to the continent and its peoples; to encourage international cooperation, taking due account of the charter of the United Nations and the universal declarations of Human Rights; to promote peace, security and stability on the continent.

To promote democratic principles and institutions, popular participation and good governance; to promote and protect human and peoples rights in accordance with the African charter on Human and peoples' rights and other relevant human rights instruments; to establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations; to

promote sustainable development at the economic, social and cultural levels as well as the integration of African economics.

To promote co-operation in all fields of human activity to raise the living standards of African peoples; to coordinate and harmonise the policies between the existing and future regional economic communities of the gradual attainment of the objectives of the Union; to advance the development of the continent by promoting research in all fields, in particular in science and technology; to work with relevant international partners in the eradication of preventable disease and the promotion of good health on the continent.

4.3 THE CONSTITUTIVE ACT OF THE AFRICAN UNION

The Constitutive Act of the African Union was adopted during the 36th ordinary summit of the OAU in Lome, Togo on July 11, 2000 as a result of the experience and aspiration of the OAU heads of state and government. The experience of the African leaders from the OAU, the marginalization of Africa in the post-cold war world, and the need to overcome the multiple crises confronting Africa through unity, integration and development.

The constitutive act of the Union is people centered. The preamble to the constitutive act of the African Union stresses this point, when it makes the point of;

> ***"Recalling the heroic struggles waged by our people for political independence, human dignity and economic emacipation".***

Furthermore, the preamble points out that the establishment of the AU is;

> ***"Guided by … the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohension among our peoples".***

Article 4 (c) gives expression to these declarations in the preamble by stipulating as a principle of the African Union the;

"Participation of the African peoples in the activities of the Union".

Article 17(1) of the constitutive Act stipulates;

"Inorder to ensure the full participation of the African peoples in the development and economic integration of the continent…"

Article 4(L) states that a principle of the Union is the;

"Promotion of gender equality".

The constitutive act of the Union in Article 3(b) states that an objective of the Union shall be to;

"defend the sovereign, territorial integrity and independence of it's member states."

Articles 3(g) and 3(h) commits the AU to objectives which in their conception, intention, derogate from national sovereignty.

Article 3(g) stipulates that an objective of the union shall be to;

"Promote democrative principles and institutions popular participation and good governance."

While Article 3(h) requires the union to;

"Promote and protect human and peoples rights in accordance with African charter on human and peoples' rights and other relevant human rights instruments;"

Article 4(b) assert respect for national sovereignty as a principle of the Union.

"Respect of borders existing on achievement of independence."

While Article 4(g) states that there shall be

"Non interference by any member state in the internal affairs of another."

However, the following articles diverts from national sovereignty article 4(H);

"the right of the union to intervene in a member state persuade to a decision of the assembly in respect of grave circumstances, namely, war crimes, genocide and crime against humanity."

Article 4(j) states;

"The right of member states to request intervention from the Union inorder to restore peace and security"

"Respect for the santity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities." Article 4(0)"

Article 4(p) states thus;

"Condemnation and rejection of unconstitutional charges of government."

Article 23(2) states;

…any member that fails to comply with the decisions and polices of the union may be subjected to other sanctions, such as the denial of transport and

communications link with other members and other measures of a political and economic nature to be determined by the Assembly.

Article 5(1) of the Constitutive act states that organs of the Union as;

a. The assembly of the Union

b. The Executive Council

c. The Pan-African Parliament

d. The court of Justice

e. The commission

f. The Permanent Representatives Committee

g. The Specialized technical Committees

h. The Economic, Social and Cultural council

i. The Financial Institutions.

Other organs of the Assembly may decide to establish.

The constitutive act

INSPIRED by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African states;

CONSIDERING the principles and objectives stated in the Charter of the Organization of African Unity and the Treaty establishing the African Economic Community;

RECALLING the *heroic struggles* waged by *our peoples and our* countries for political independence, human dignity and economic emancipation;

CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world.

DETERMINED to table up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world;

CONVINCED of the need to accelerate the process of implementing the Treaty establishing the African economic Community in order to promote the soci-economic development of African and to face more effectively the challenges posed by globalization;

GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples;

CONSCIOUS of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socioeconomic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda;

DETERMINED to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law;

FURTHER DETERMINED to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively;

Recalling the Declaration which we adopted at the Fourth Extraordinary Session of our Assembly in Sirte, the Great Socialist People's Libyan Arab Jamahiriya, on 9.9.in which we decided to establish an African Union, in conformity with the ultimate objectives of the charter of our Continental Organization and the Treaty establishing the African Economic Community.

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

In this constitutive Act:

"Act" means the present constitutive Act;

"AEC" means the African Economic Community;

"Assembly" means the assembly of Heads of State and Government of the Union;

"Charter" means the Charter of the OAU;

"Commission" means the secretariat of the Union;

"Committee" means a Specialized Technical Committee of the Union;

"Council" means the Economic, Social and Cultural Council of the Union;

"Court" means the Court of Justice of the Union;

"Executive Council" means the Executive Council of Ministers of the Union;

"Member State" means a Member state of the Union;

"OAU" means the Organization of African Unity;

"Parliament" means the Pan-African Parliament of the Union;

"Union" means the African Union established by the present Constitutive Act.

Article 2

Establishment

The African Union is hereby established in accordance with the provisions of this Act.

Article 3

Objectives

The objectives of the Union shall be to:

(a) achieve greater unity and solidarity between the African countries and the peoples of Africa;

(b) defend the *sovereignty, territorial* integrity and independence of its Member States;

(c) accelerate the political and socio-economic integration of the continent;

(d) promote and defend African common positions on issues of interest to the continent and its peoples;

(e) encourage international cooperation; taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;

(f) promote peace, security, and stability on the continent;

(g) promote democratic principles and institutions, popular participation and good governance;

(h) promote and protect human and peoples' rights in accordance with the African charter on Human and Peoples Rights and other relevant human rights instruments;

(i) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;

(j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economics;

(k) promote co-operation in all fields of human activity to raise the living standards of African peoples;

(l) coordinate and harmonize the policies between the existing and future regional economic Communities for the gradual attainment of the objectives of the Union;

(m) advance the development of the continent by promoting research in all fields, in particular in science and technology;

(n) work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

Article 4

Principles

The Union shall function in accordance with the following principles:

(a) sovereign equality and interdependence among Member States of the Union;

(b) respect of borders existing on achievement of independence;

(c) participation of the African peoples in the activities of the Union;

(d) establishment of a common defence policy for the African continent;

(e) peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;

(f) prohibition of the use of force or threat to use force among Member States of the Union;

(g) non-interference by any Member state in the internal affairs of another;

(h) the right of the Union to intervene in a Member state pursuant to a decision of the assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;

(i) peaceful co-existence of Member states and their right to live in peace and security;

(j) theright of Member States to request intervention from the Union in order to restore peace and security;

(k) promotion of self-reliance within the framework of the Union;

(l) promotion of gender equality;

(m) respect for democratic principles, human rights, the rule of law and good governance;

(n) promotion of social justice to ensure balanced economic development;

(o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;

(p) condemnation and rejection of unconstitutional changes of governments.

Article 5

Organs of the Union

1. The organs of the Union shall be:

(a) The assembly of the Union;

(b) The Executive council;

(c) The Fan-African Parliament;

(d) The Court of Justice;

(e) The commission;

The Permanent Representatives committee;

(g) The specialized Technical Committees;

(h) The Economic, Social and Cultural Council;

(i) The Financial Institutions;

2. Other organs that the Assembly may decide to establish.

Article 6

The Assembly

1. The Assembly shall be composed of Heads of States and Government or their duly accredited representatives.

2. The Assembly shall be the supreme organ of the Union.

3. The Assembly shall meet at least once a year in ordinary session. At the request of any Member state and on approval *by a two-thirds majority* of the *Member States,* the Assembly *shall meet in extraordinary* session.

4. The Office of the Chairman of the assembly shall be held for a period of one year by a Head of State of Government elected after consultations among the Member States.

Article 7

Decisions of the Assembly

1. The assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member states of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.

2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the assembly.

Article 8

Rules of *Procedure of the Assembly*

The Assembly shall adopt its own Rules of Procedure.

Article 9

Powers and Functions of the assembly

1. The functions of the Assembly shall be to:

(a) determine the common policies of the Union;

(b) receive, consider and take decisions on reports and recommendations from the other organs of the Union;

(c) consider requests for Membership of the Union;

(d) establish any organ of the Union;

(e) monitor the implementation of policies and decisions of the Union as well ensure compliance by all Member states;

(f) adopt the budget of the Union;

(g) give directives to the Executive council on the management of conflicts, war and other emergency situations and the restoration of peace;

(h) appoint and terminate the appointment of the judges of the court of Justice;

(i) appoint the Chairman of the Commission and his or her deputy or deputies and commissioners of the commission and determine their functions and terms of office.

2. The assembly may delegate any of its powers and functions to any organ of the Union.

Article 10

The Executive council

1. The Executive council shall be composed of the Ministers of foreign Addairs or such other Ministers or authorities as are designated by the Governements of Member States.

2. The executive council shall meet at least twice a year in ordinary session. It shall also meet in an extraordinary session at the request of any Member state and upon approval by two-thirds of all Member states.

Article 11

Decisions of the Executive council

1. The executive council shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member states. However, procedural matters, including the questionof whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Executive council.

Article 12

Rules of Procedure of the executive council.

The executive council shall adopt its own rules of Procedure.

Article 13

Functions of the Executive Council.

1. The executive Council shall coordinate and take decisions on policies in areas of common interest to the Member States, including the following:

(a) foreign trade;

(b) energy, industry and mineral resources;

(c) food, agricultural and animal resources, livestock production and forestry;

(d) water resources and irrigation;

(e) environmental protection, humanitarian action and disaster response and relief;

(f) transport and communication;

(g) insurance;

(h) education, culture, health and human resources development;

(i) science and technology;

(j) nationality, residency and immigration matters;

(k) social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped;

(l) establishment of a system of African awards, medals and prizes.

2. The executive council shall be responsible to the assembly. It shall consider issues referred to it and monitor the implementation of policies formulate by the assembly.

3. The executive council may delegate any of its powers and functions mentioned in paragraph 1 of this article to the Specialized technical committee established under article 14 of this Act.

Article 14

The specialized technical Committees

Establishment and composition

1. There is hereby established the following specialized technical Committees, which shall be responsible to the Executive Council:

(a) The committee on Rural Economy and Agricultural Matters;

(b) The Committee on Monetary and Financial affairs;

(c) The committee on Trade, Customs and Immigration Matters;

(d) The committee on Industry, Science and technology, Energy, Natural resources and Environment;

(e) The committee on transport, communications and Tourism;

(f) The committee on Health, Labour and Social Affairs; and

(g) The committee on education, Culture and Human resources.

2. The assembly shall, whenever it deems appropriate, restructure the existing Committees or establish other committees.

3. The specialized technical Committees shall be composed of Ministers or senior officials responsible for sectors falling within their respective areas of competence.

Article 15

Functions of the specialized technical committees

Each committee shall within its field of competence;

(a) prepare projects and programmes of the Union and submit it to the Executive council;

(b) ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union;

(c) ensure the coordination and harmonization of projects and programmes of the Union;

(d) submit to the executive council either on its own initiative or at the request of the executive council, reports and recommendations on the implementation of the provisions of this Act; and

(e) carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of this Act.

Article 16

Meetings

Subject to any directives given by the executive council, each committee shall meet as often as necessary and shall prepare its Rules of Procedure and submit them to the executive council for approval.

Article 17

The Pan-African Parliament

1. In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established.
2. The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto.

Article 18

The court of Justice

1. A court of Justice of the Union shall be established;
2. The statute, composition and functions of the Court of Justice shall defined in a protocol relating thereto.

Article 19

The Financial Institutions

The Union shall have the following financial institutions whose rules and regulations shall be defined in protocols relating thereto;

(a) The African central Bank;

(b) The African Monetary Fund;

(c) The African Investment Bank.

Article 20

The Commission

1. There shall be established a Commission of the Union which shall be the secretariat of the Union.
2. The commission shall be composed of the chairman, his or her deputy or deputies and the Commissioners. They shall be assisted by the necessary staff for the smooth functioning of the Commission.
3. The structure, functions and regulations of the commission shall be determined by the assembly.

Article 21

The Permanent representatives Committee

1. There shall be established a Permanent representatives committee, it shall be composed of Permanent representatives to the Union and other Plenipotentiaries of Member States.

2. The Permanent representatives Committee shall be charged with the responsibility of preparing the work of the executive Council and acting on the executive council's instructions. It may set up such subcommittees or working groups as it may deem necessary.

Article 22

The economic, social and Cultural council

1. The economic, social and cultural council shall be an advisory organ composed of different social and professional groups of the Member states of the Union.
2. The functions, powers, composition and organization of the economic, Social and Cultural Council shall be determined by the assembly.

Article 23

Imposition of Sanctions

1. The assembly shall determine the appropriate sanctions to be imposed on any Member state that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments, therefore;
2. Furthermore, any Member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States,

and other measures of a political and economic nature to be determined by the assembly.

Article 24

The Headquarters of the Union

1. The headquarters of the Union shall be in Addis Ababa in the federal democratic Republic of Ethiopia.
2. There may be established such other offices of the Union as the Assembly may, on the recommendation of the executive council, determine.

Article 25

Working Languages

The working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.

Article 26

Interpretation

The court shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the assembly of the Union, which shall decide by a two-thirds majority.

Article 27

Signature, Ratification and accession

1. This Act shall be open to signature, ratification and accession by the Member states of the OAU in accordance with their respective constitutional procedures.
2. The instruments of ratification shall be deposited with the secretary-general of the OAU.
3. Any Member State of the OAU acceding to this Act after its entry into force shall deposit the instrument of accession with the Chairman of the Commission.

Article 28

Entry into Force

This act shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU.

Article 29

Admission to Membership

1. Any African State may, at any time after the entry into force of this act, notify the chairman of the *Commission of its intention to accede to this Act and to be admitted as a member of the Union.*
2. The chairman of the Commission shall, upon receipt of such notification, transmit copies thereof to all Member States. Admission shall be decided by a simple majority of the Member states. The decision of each Member states shall be transmitted to the chairman of the Commission who shall,

upon receipt of the required number of votes, communicate the decision to the state concerned.

Article 30

Suspension

Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities fo the Union.

Article 31

Cessation of Membership

1. Any state which desires to renounce its membership shall forward a written notification to the chairman of the Commission, who shall inform Member States thereof. At the end of one year from the date of such notification, it not withdrawn, the act shall cease to apply with respect to the renouncing state, which shall thereby cease to belong to the Union.
2. During the period of one year referred to in paragraph 1 of this Article, any Member State wishing to withdraw from the Union shall comply with the provisions of this act and shall be bound to discharge its obligations under this act to the date its withdrawal.

Article 32

Amendment and Revision

1. Any Member State may submit proposals for the amendment or revision of this Act.

2. Proposals for amendment or revision shall be submitted to the chairman of the commission who shall transmit same to Member States within thirty (30) days of receipt thereof.

3. The assembly, upon the advice of the Executive Council, shall examine these proposals within a period of one year following notification of Member states, in accordance with the provisions of paragraph 2 of this article;

4. Amendments or revisions shall be adopted by the assembly by consensus or, failing which, by a two-thirds majority and submitted for ratification by all Member states in accordance with their respective constitutional procedures. They shall enter into force thirty (30) days after the deposit of the instruments of ratification with the chairman of the Commission by a two-thirds majority of the Member states.

Article 33

Transitional Arrangements and Final Provisions

1. This act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.

2. The provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the treaty establishing the African economic Community.

3. Upon the entry into force of this Act, all necessary measures shall be undertaken to implement its provisions and to ensure the establishment of the organs provided for under the act in accordance with any directives or decisions which may be adopted in this regard by the Parties thereto within the transitional period stipulated above.

4. Pending the establishment of the Commission, the OAU general Secretariat shall be the interim Secretariat of the Union.

5. This act, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the secretary-general of the OAU and, after its entry into force, with the Chairman of the Commission who shall transmit a certified true copy of the act to the Government of each signatory State The secretary-general of the OAU and the Chairman of the Commission shall notify all signatory States of the dates of the deposit of the instruments of ratification or accession and shall upon entry into force of this Act register the same with the Secretariat of the United Nations.

IN WITNESS WHEREOF, WE have adopted this Act done at Lome, Togo, this 11th day of July, 2000.

4.4 Organs of the African union

According to article 5(1) of the constitutive Act of the African Union, the organs are the assembly of the union which composed of heads of state and heads of Government of the AU states. It is the supreme governing body of the union. It meets once a year and makes its decision by consensus. The current chairman is BinguWaMutharike, the Malawian president.

The executive council is composed of ministers designated by the government of member states, it decides on matters such as foreign trade, social security, food, agriculture and communications, it is accountable to the Assembly and prepares material for the assembly to discuss and approve.

The Pan-African parliament is the highest legislative body of the African union. It seat is in Midrand, south African. It is composed of 265 elected representatives from all 53 African union states. It is intended to provide popular and civil society participation in the processes of democratic governance.

The Constitutive act provides for a court of justice to rule on dispute over interpretation of all treaties.

The African union commission is the secretariat which is composed of ten commissioners and supporting staff with headquarters in Addis Ababa. It is responsible for the administration and co-ordination of African union's activities and meetings.

There is the permanent representatives committee consisting of nominated permanent representatives of member states.

The Economic, Social and Cultural council is an advisory organ composed of professional and civic representatives and lastly the financial institutions.

4.5 DIFFERENCE BETWEEN THE OAU AND THE AU

The African Union is not only a new union, it is different from the OAU. It is true that it emanated from the OAU but it is as a result of the lesson learnt from the OAU – the increased marginalization of the African continent in the Post Cold war World, and the urgent need for Africa to over come the multiple crises confronting her through unity, integration and development. As aptly put in the preamble of the constitutive act,

"The establishment of the Africa union arose from he determination of African leaders to take up the multifaceted challenges that confront our continent and people in the light of the social, economic and political changes taking place in the world."

While the OAU in its preamble is determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of the African States and to fight against neocolonialism in all its forms.

The fundamental difference between the OAU charter and the Constitutive Act of African Union is the conferment of the power of intervention on the Assembly of the union. The union can, in defense to a recommendation of the international commission on intervention and state sovereignty, intervene in a member state in respect of grave circumstances namely war crimes, genocide, and crimes against humanity and to restore peace and stability to a member state where there is a

serious threat to legitimate order, whereas the principle of national sovereignty and non-intervention in the internal affairs of member states no matter the circumstance was one of the cordial principles of the OAU charter.

The OAU charter provided for an association of states, whose members undertook to coordinate and harmonize their general policies through cooperation in the political, diplomatic, economic, communication, health, sanitation, nutritional, scientific and technological spheres as well as cooperation in defense and security.

Among other principles that are enshrined in the AU act are;

The establishment of a common foreign policy and defense policy for the African continent; prohibition of the use of force or threat of use of force among member states; the right of the member states to request intervention from the union inorder to restore peace and security; respect for democratic principles, human rights, the rule of law and good governance; condemnation and rejection of unconstitutional changes of government; restraint on member states from entering into any treaty or alliance that is incompatible with the objectives and principles of the union, prohibition of member states from allowing the use of their territory as a base for subversion against other member states (Amendment to the Coustitutive act of the African Union: 2003). Unlike in the OAU where there was no price to be paid for ignoring the decision of the organization. Article 23 of the Constitutive act provides for the imposition of sanctions such as denial of

transport and communication links, as well as other negative political and economic measures against any defaulting member states.

Under the

CHAPTER FIVE

CONCLUSION

5.0 SUMMARY, OBSERVATIONS AND RECOMMENDATIONS

This dissertation revealed that lack of proper corporate governance is the bane of so many banks in Nigeria. Thus, those charged with the responsibility of managing banks are found wanting. This precipitates into financial mismanagement which set in Fraud in all cadre of the bank. However, the banking sector has greatly contributed to the gross domestic product of Nigeria and consequently improved the economy. Therefore, transparency, honesty and objectivity have to be encapsulated in the running of banking operations so as to have a positive effect on the continuity of the sector.

5.1 SUMMARY

The dissertation undertook an in-depth examination of the impact of Fraud on Corporate Governance in Nigerian Banks. Specifically, it aimed at examining the ways and manners in which the affairs of banking sector in Nigeria are managed by those charged with the responsibility. It is aimed at looking critically at the concept of corporate governance and the role it plays in the success or failure of banking business with respect to the role of corporate officers and the impact of fraud in Banks.

This dissertation was carried out using the doctrinal research method. Expectedly, primary and secondary legal and non-legal source materials were collected. Primary sources collected included statutes like the Central Bank of Nigeria Act, (CBN Act), the Companies and Allied Matters Act (CAMA), Nigeria Deposit Insurance Corporation (NDIC) Act, Bank and Other Financial Institution Act (BOFIA) and Case law etc. Secondary sources included

textbooks, journals, periodicals, reports, seminar papers, addresses, Newspapers, Magazines and other published and non-published materials that have bearing on the subject matter of the study.

In the preceding chapters, the concept of corporate governance and fraud as a clogg in corporate governance were extensively discussed and the provisions of the statutes mentioned above were carefully examined and analyzed in some detail. The purpose being not only to see how they can effectively be applied to help prevent fraud in corporate governance in Nigeria banks but also to see whether they are sufficient in the face of corporate fraud in banks and other financial institutions in Nigeria.

In this chapter, the dissertation's findings were summarized, commented on and solutions recommended.

The impact of fraud in banks in Nigeria cannot be over emphasized.

This had led to collapse of many banks and many others being acquired by the surviving banks. Therefore, the essence of this dissertation is to examine the positive or negative roles played by the management or rather the persons who, by Law, are charged with running of the bank.

In dealing with the above, the researcher tried to define what corporate governance means with respect to the banking sector in Nigeria. Here, the researcher stated that corporate governance are those external and internal mechanisms at work in the banking sector, created by the collaborative action of diverse stakeholders such as shareholders, directors, creditors and employees in influencing the process by which activities of the bank are directed, controlled and monitored to ensure effective performance. This also

includes the manner in which the business and strategy of the banking institutions are governed by the bank's board and senior management.

Corporate governance, means building credibility, ensuring transparency and accountability as well as maintaining an effective channel of information disclosure that will foster good corporate performance in banks.

Attention was focused on fraud and its impact on corporate governance and that fraud literarily, means a conscious and deliberate action by a person or group of persons with the intention of altering the truth or fact for personal gain. It was further stated that fraud on corporate governance has been the precipitating factor in the distress of banks,that no area of the banking system is immune to fraud and fraudsters, not even the security designed to prevent it.

This dissertation also considered the institutional and legal framework for the establishment of banks in Nigeria. It went on to define what bank and banking means, which is aptly defined in Section 43(1) of the Banking Act, Cap 28, LFN 2004 as any person who carries on banking business and include a commercial bank, discount house, financial institution and merchant bank. There was a discussion on the development of banking in Nigeria and the classes of banks in Nigeria and how banking activities in Nigeria evolved to serve the interest of the then colonial government and how the indigenous banks failed due to peculiar features that characterized banking scene in the free banking era that extended to the period of independence.These features include foreign bank domination and lack of banking control and direction, as there was no regulatory framework.

The researcher also we looked at the current legal framework for banking business in Nigeria, and discovered that real banking regulation and surveillance did not commence until the establishment of the Central Bank of Nigeria (CBN) in 1959. The CBN has the responsibility of ensuring monetary stability and a lender and secondly, the role of a regulator. This function were vested in the CBN through the primary legislation referred to as the Central Bank of Nigeria ACT, LFN, 2004. Another primary legislative framework of banking operations was conceived and today is referred to as the Banks and other Financial Institutions Act (BOFIA) LFN, 2004.

The researcher also considered yet another legislative framework of banking operation which today is referred to as the Nigeria Deposit Insurance Corporation Act, Cap N102, Laws of the Federation of Nigeria which established the Nigeria Deposit Insurance Corporation (NDIC).

The Act vests the NDIC with the powers to examine and conduct investigations into the books and affairs of licensed banks in Nigeria.

The Company and Allied Matters Act, Cap C20, Laws of the Federal Republic of Nigeria 2004 (CAMA) is another legislative framework that was enacted to respond to some problems which some companies, including banks, easily use to defraud their customers or members. This Act established the Corporate Affairs Commission (CAC) which is vested with regulatory powers over all registered companies in Nigeria.

The next issue that agitated the researcher's mind for was the institutional and legal frameworks for the Corporate Governance in Nigeria Banking Industry.

In the dissertation the researcher proffered a definition of corporate governance which, with every sense of modesty, is his humble definition of

this concept. However, corporate governance must be seen as a vehicle that banks use to attract investors both locally and internationally. Goodcorporate governance makes for more judicious use of resources which serves the long term interest of shareholders while poor corporate governance, on the other hand, was identified as one of the major factors in virtually all known instances of financial distress in Nigeria.

It was observed, in this chapter, that bank is a corporate entity which has neither hand nor limb, thus requires a lot of hands which are involved in the day to day management of the bank. Some people are placed in such a position of trust that they ought to act at all times in the best interest of the bank. Among these categories are the directors, general meeting of the shareholders, managing directors, company secretaries and Auditors.

In this dissertation, it was stated that members of a bank, otherwise called the shareholders of a bank, exercise management powers over the affairs of the bank by decision making process in the bank meetings. However, for effective governance, members delegate authority to manage the business of the company to a specialized team known as Board of Directors (BOD), whose members are elected by and responsible to the members.

The roles of the General meeting and the role of Board of Directors in Corporate governance were exhaustively discussed. Also, the relationship between the two with respect to their duties as provided in section 63 of CAMA, 2004, were properly analyzed. However, the directors of a bank are not bound to obey the directions and instructions of the General meeting, provided they act in good faith and diligently.The role of Auditors in banks was also discussed, especially the liability of an Auditor for negligence.

On the position of the modern company secretary, we aligned ourselves with the position of the immutable Lord Dennings in the case of Panorama Dev. **(Guilford) Ltd V. Fidelis Furnishing Fabrics Ltd**[252].

The researcher deliberated on the causes of mismanagement in banks which is related to disregard of professional ethics and breach of legal fundamentals which eventually led to fraud and fraudulent activities in banks.

The researcher concluded by stating that poor corporate governance precipitates into financial mismanagement, which, to a large extent, is known as fraud. A discussion on the concept and dimension of fraud in banks, types of fraud, its causes and the effect of fraud in banks was also embarked upon.

Finally, it was observed that in recent times, bank failures have received a lot of attention which necessitated the promulgation of many legislations and regulations to check and deal with it e.g. Code of Corporate Governance for banks in Nigeria Post Consolidation.

The problem of bank failures and poor corporate governance is an aspect of general distress in the socio-economic and political environment in the country and that any sanitation of the banking system will not endure unless the problem is tackled at the roots and the entire system overhauled.

5.2 FINDINGS/OBSERVATIONS

The impact of fraud on corporate governance in Nigerian banks cannot be over emphasized. This dissertation observed as follows;

i. That fraud has led to collapse of many banks and many others being acquired by the surviving ones.

[252] (1971) 2 QB 711, QA

ii. That fraud on corporate governance has been the precipitating factor in the distress of banks.

iii. That banking activities in Nigeria evolved to serve the interest of the then colonial government and that indigenous banks, failed due to the peculiar features that characterized banking seen in the free banking era that extended to the period of independence.

iv. That lack of banking control and regulatory framework contributed to bank failures.

v. That real banking regulation and surveillance did not commence until the establishment of the Central Bank of Nigeria (CBN) in 1959.

vi. That poor corporate governance precipitates into financial mismanagement, which to a large extent, resulted in fraud.

vii. That in recent times, banks failure has received a lot of attention which necessitated the promulgation of many legislations and regulations to check and deal with it, e.g. Code of Corporate Governance for Banks in Nigeria Post consolidation.

viii. That the problem of bank failures and poor corporate governance is an aspect of general distress in the socio-economic and political environment in the country and that any sanitization of the banking system will not endure unless the problem is tackled at the roots and the entire system overhauled.

5.3 RECOMMENDATIONS

After a painstaking consideration of all the sundry issues raised in this dissertation, the following recommendations are presented;

1. It is recommended that the Bank consolidation reform carried out be encouraged as the consolidation will give depositors more courage and faith in Nigerian banks.
2. That the regulatory bodies should enforce attendance at relevant courses by Bank Directors and Management as such courses would enhance their performances.
3. That only men of proven, integrity, transparency, honesty and with proper and adequate qualification should be appointed to the Board of such banks.
4. That independent directors be appointed into the Board of banking institutions as provided by the 2006 CBN Code[253] as independent directors, not being employees of the bank, shall be able to challenge management at board meetings by exercising their independent judgment and characters during board deliberations. This will consequently ensure that decisions reached at board meetings will be in the best interest of shareholders as a whole.
5. That the CBN drive towards a computerized monitoring system should also be encouraged. By this provision, the CBN can monitor major transactions in all the banks in Nigeria online. This will enable them detect on the spot any fraudulent transaction that any bank may engage in, or any unethical behavior by any staff of any bank before it is too late.
6. Thatthe involvement of external auditors in the bank's financial statement should be encouraged because internal auditors, being employees of the

[253] Code of Corporate Governance for Banks in Nigeria Post Consolidation, 2006

bank, may lack the moral courage to give negative report that may indict the directors of the said bank. The Auditors must be qualified persons in their proper field of study.

7. Thatthe directors in the Audit Committee should be restricted to non-executive directors. These representatives should also have no other interest in the company apart from shareholding. This is important to ensure the independence of the members of the committee and insulate them from pressures and overtures of over bearing executive directors.
8. Considering the important roles of the Audit Committee in Corporate Governance, we recommend that the composition of the audit committee as contained in Section 359(4) of CAMA, 2004 be reviewed with more shareholders. A strong shareholders representation is imperative as it will ensure that shareholders who are the investors have their way when issues become contentious and the need to vote arises. Besides, a greater number of shareholders could be a potent weapon for shareholders to fight corruption and mis-governance in their banks.
9. Thatcorporate organization, especially banks, should take the welfare of their employees seriously. This should be given priority because most employees engaged in fraud for fear of what might happen when they retire or are sacked. Jobs in banks should also be made more secured as absence of job security also encourages fraud.
10. We have seen in the case of Ladejobi V. Odutola Ltd, it is our humble submission that members exercise control and direct the affairs of the Company, by being encouraged to attend meetings where important decisions

are taken instead of allowing directors to impose decisions on them through affirmation.

11. The directors should not perpetrate themselves in office as directed by CBN. A Director should not be allowed to become the chairman of the same bank unless the said director had not been in the service of the bank for a period not less than 10 years to discourage the former director from embarking on the protection of his past deeds.

CONTRIBUTION TO KNOWLEDGE

This dissertation has contributed to knowledge as follows;

i. by identifying that non-adherence to laws and regulations in the banking sector, several banks in Nigeria have collapsed.

ii. by identifying the issuance of unsecured loans to themselves and their friends, directors have contributed to the weak capital base of the banks leading to the collapse of some banks in Nigeria. This has led to corruption and fraud.

iii. by identifying the engagement of unqualified staff in the bank administration, corporate governance has been brought to its lowest ebb.

iv. by identifying insecurity of tenure of appointment, workers have engaged in fraudulent practices to enrich themselves and this has led to the collapse of several banks in Nigeria.

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