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The Unveiled Nigerian Code of Corporate Governance (NCCG) 2018: Progress or Setback for Corporate Governance, Corporate Nigeria and Sectoral Regulators? – Part Two

Sound Corporate Governance as a Panacea to Mal Corporate Behaviour

Two corporate governance research scholars, David F. Larcker and Brian Tayan of the Corporate Governance Research Initiative at the Stanford Graduate School of Business once said, "Corporate governance is an important phenomenon, however, would you know 'good corporate governance' if you saw it?" Corporate governance is a controversial topic and the debate is often characterised by considerable hype but few hard facts. To get it right in any jurisdiction, the drafters of corporate governance codes, must apply intellectual rigour and look at the evidence (in the literature, practice and industry). Sometimes the evidence might be inconclusive, but like in common law, some precedents are well-established.

First, it is well-established that, in terms of board structure (and processes), the composition of the board contributes to effectiveness. In this regard, the independence of board members (both of the mind and of the making of laws/regulations) is crucial, as well as the structural access of board members to the right individuals in the organisation and to information. In terms of processes, it is well-established that boards that have robust and agile processes for risk management, strategy, board evaluation, governance review, succession planning (emergency and planned), regulatory matters, director remuneration, director selection, director induction, director development, director protection, board diversity, board meetings, board meeting agenda, board papers, board minutes, board calendar and board committees, will be more effective.

Second, well-managed board diversity of gender, opinion, thought, personality, age, skills and experience (industry, professional and academic background) have shown to have great impact on board effectiveness. Without the right composition, the competitive power of a board may never get released, and the power of the board as a competitive weapon depends on the quality and diversity of its members (Charan, 1998). According to Ram Charan (2009), "The role of the board has unmistakably transitioned from passive governance to active leadership with a delicate balance of avoiding micromanaging," … the board "needs the right composition to succeed, and that composition will have to change, sometimes abruptly, as conditions do." He concluded by stating that with the right composition, a board can create value, with the wrong or inappropriate composition, it can easily destroy value.

Third, it is well-established that one of the hallmarks of high-performing boards has to do with the positive and appropriate behaviour of board members, both individually and collectively, which is commonly referred to as board behavioural dynamics or simply board dynamics. Positive board behavioural dynamics add to board effectiveness. Board members' behavioural dynamics are fundamentally linked to the culture of the board, and the board culture must not only serve as the bedrock for the organisation's culture, but must be conducive to the board conducting its activities in an effective and efficient manner (Cossin & Caballero, 2014; Kiel, Nicholson, Tunny, & Beck, 2012). Thus, the overall group culture and dynamics of the board ultimately determine its effectiveness. In contrast, inappropriate board behaviours and tendencies such as groupthink, Abilene paradox, social loafing, social conformity, bounded awareness and false consensus bias should be avoided as they hinder board effectiveness.

Furthermore, it is well known that corporate governance has undergone several enhancements globally as a result of the occurrence of landmark global events such as the great depression of the late 1920s/early 1930s, the dot.com bubble of the 1990s, the fall of Enron and Arthur Anderson in the early 2000s and the global financial/credit crisis of 2008, to mention but a few. The meltdown as a result of the global financial crisis in 2008, followed by the worst economic downturn since the great depression of the late 1920s and early 1930s sent a wake-up call to both the corporate world and corporate boards. This unfortunate event changed the global corporate landscape, including change in corporate governance regimes and approaches. This event occurred in less than a decade after the fall of Enron and Arthur Anderson. While in most jurisdictions, this event, and similar events before it, have caused actions to be taken, in some others, not much has been achieved. Still in others, no serious steps have been taken. In the U.S., the Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted in response to the Stock Market crash of 1929 and with a view to restoring investors' confidence. Ultimately, both laws were enacted to counter the challenges of the great depression. Similarly, the Sarbanes-Oxley Act of 2002 was enacted to restore investors' confidence after the fall of Arthur Anderson, Enron and WorldCom, amongst others. In the same vein, the Dodd-Frank Act of 2010 was enacted as a response to the global financial crisis of 2018.

In the UK, the spectacular corporate failures in the early 1990s, especially, that of the Mirror Group (Robert Maxwell"s empire), Asil Nadir"s Polly Peck and the Bank of Credit and Commerce International (BCCI) led to the formation of the Committee on the Financial Aspects of Corporate Governance ("The Cadbury Committee") in May 1991 by the London Stock exchange (LSE), the Financial Reporting Council (FRC) and the accountancy profession. The report of the committee was released in December 1992. The Cadbury Report of 1992 marks the beginning of the issuance of principles-based corporate governance Codes in the UK. In other to keep up with the changes in the business landscape, the UK imbibed the culture of continually reviewing and updating the UK Code of Corporate Governance, which was called the Combined Code on Corporate Governance ("Combined Code") until 2010 when the name was changed to the UK Corporate Governance Code. Since the 2003 Combined Code, the Code has been updated seven times (2006, 2008, 2010, 2012, 2014, 2016 and 2018). Prior to the issuance of the 2003 Combined Code, several committees were constituted and the reports from those committees were consolidated and issued as the Combined Code on Corporate Governance 2003. The reports of the pre-2003 UK Corporate Governance committees were called: (i) The Cadbury Report (1992), (ii) The Greenbury Report (1995), The Hampel Report (1998), Higgs Report on the Effectiveness of NEDs (2003), Smith's Report on Audit Committees (2003), and Turnbull's Guidance on Internal Control (1999). The Turnbull's Guidance was revised in 2005 and completely revamped in 2014 and renamed as the "Guidance on Risk Management, Internal Control and Related Financial and Business Reporting."

The Cadbury Report struck a chord in many countries, and provided a yardstick against which standards of corporate governance were measured in the 1990s and early 2000s. For example, not long after the issuance of the Cadbury Report, South Africa inaugurated the King Committee on Corporate Governance and by 1994, the King Report on Corporate Governance (King I) was issued in South Africa. King II was issued in 2002, King III in 2009 and King IV in 2016. The South African Code, right from King I, along with the UK Code of Corporate Governance (even in its early days when it was the Cadbury Report), are the two most referenced, and arguably the most recognised gold standard principles-based unitary board structure corporate governance codes in the world.

From Nigeria's perspective, the first Code was not issued until 2003. The first Code, which was the CBN's Code of Corporate Governance for Banks and Other Financial Institutions in Nigeria was issued in August 2003. The Code was the combined initiative of the CBN and the Bankers' Committee. This was followed by the Code of Corporate Governance in Nigeria (the Atedo Peterside Code), which was issued in October 2003. The Atedo Peterside Code was the initiative of the Securities and Exchange Commission (SEC) in collaboration with the Corporate Affairs Commission (CAC).

A rigorous review of both Codes shows that some of the well-established precedents in corporate governance literature were conspicuously missing, particularly those already established in the Cadbury, Greenbury, Hampel, Smith, Higgs and Turnbull's Reports in the UK, as well as those in King I (1994) and King II (2002) Reports (South Africa). For example, the Atedo Peterside Code of 2003 permits one executive director on the Audit Committee, whereas the U.S. jurisdiction requires audit committee members in listed companies to be composed solely of independent directors since1978. The Cadbury Report of 1992 (paragraph 4.35b) requires membership of the audit committee to be Non-Executive Directors (NEDs), majority of whom should be Independent Non-Executive Directors (INEDs). Similarly, King II of 2002 requires the board to appoint an audit committee that has a majority of INEDs (Paragraph 6.3.1), and the chairperson should be an INED and not the chairperson of the board (Paragraph 6.3.2). The Atedo Peterside Code of 2003 also contains a statement that "Executive directors should not play an active role in the determination of their remuneration," when it was already established under Paragraph 4.42 in the Cadbury Code that "Executive directors should play no part in decisions on their own remuneration" and Paragraph 2.5.2 of King II (2002) affirmed that "Companies should appoint a remuneration committee or such other appropriate board committee, consisting entirely or mainly of independent non-executive directors … and the committee must be chaired by an independent non-executive director." The Paragraph further stated that "In order to obtain his or her input on the remuneration of the other executives the committee should consult the chief executive officer, who may attend meetings by invitation. However, a chief executive should play no part in decisions regarding his/her own remuneration."

The CBN's Code of 2003 was revamped in 2006 and renamed the CBN Code of Corporate Governance for Banks in Nigeria Post Consolidation. The 2006 CBN's Code was the first mandatory corporate governance code issued in Nigeria, and was issued to counter the challenges that banks could face post consolidation. In 2011, the SEC issued a revised code of corporate governance for public companies in Nigeria. The Code was a voluntary code when it was issued in 2011, but was changed to a mandatory code in 2014. The CBN further revised its Code in 2014 and retained its mandatory compliance status. The National Insurance Commission (NAICOM), the National Pension Commission (PenCom) and the Nigerian Communications Commission (NCC) issued corporate governance codes in 2009, 2010 and 2014 respectively. While the NAICOM and PenCom Codes were mandatory from the outset, the NCC Code was voluntary when it was issued in 2014, but was made mandatory in 2017/18. Thus, all existing sectoral corporate governance codes in Nigeria are mandatorily binding on the operators within the specific sectors.

It is apparent in the discussion thus far that no attempt was made in Nigeria to have a National Code of Corporate Governance until January 2013 when the Steering Committee on National Code of Corporate Governance was constituted with the remit to develop a unified code of corporate governance for Nigeria. On October 17, 2016, the National Code of Corporate Governance (Private Sector) was issued by the FRCN, but was suspended by the Federal Government of Nigeria on Thursday October 28, 2016. On Thursday January 18, 2018, a 15-man Technical Committee was constituted to review the suspended National Code of

Corporate Governance of 2016 (private sector), taking into cognisance the extensive public commentary received on the suspended Codes (Private, Public and Not-for-Profit), develop/recommend the revised Code(s) and carry out such activities as are necessary to give effect to the foregoing objectives. In 2018, the FRCN released a draft Code put together by the Technical Committee on the National Code of Corporate Governance, which was renamed as the Nigerian Code of Corporate Governance 2018. The final Code unveiled on January 15, 2019 and released to the Nigerian public on January 17, 2019 retained the name contained in the draft 2018 Code. The suspended FRCN private sector Code of 2016 was named National Code of Corporate Governance (NCCG).

The ensuing paragraphs in this paper will be used to provide an analysis of the Nigerian Code of Corporate Governance 2018, highlighting the key issues and concerns, areas of excitements, the way forward and recommendations, if any. In the analysis, emphasis will be given to the specific provisions or paragraphs of the Code. Like in academic research, certain questions will guide the analysis and these questions include:

- are specific provisions of the Code in line with leading practice requirements and well-established precedents;
- are specific provisions of the Code reflective of common global corporate governance practices; and
- are specific provisions of the Code in line with corporate governance literature.

The analysis will, as far as possible, de-emphasise direct comparison between the 2016 Code (i.e. the suspended Code) and the 2018 Code issued in January 2019.

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To be continued tomorrow

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