

AN ANALYSIS OF THE ROLES OF REGULATORY AGENCIES IN THE NIGERIAN CAPITAL AND STOCK MARKET

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Abstract

The regulation of the Nigerian capital market by voluntary and mandatory regulatory agencies is geared towards achieving the prime objective of a fair, efficient, and transparent financial market and investor protection. However, the multiple regulatory agencies in the capital market give rise to the problem of an overlap of regulatory roles which necessitates a clear role-boundary demarcation. Sequel to the above, this paper undertakes a critical analysis of the roles of regulatory agencies in the capital market, with a view to a clear role-boundary demarcation. It examines relevant primary and secondary sources of law and also adopts an inter-jurisdictional comparative approach of best practices in the United Kingdom, the United States of America, and the Republic of South Africa. The paper finds that there are sliver role demarcations amongst capital market regulatory agencies which need to be either collapsed into one agency or statutorily make clear their role demarcation. Sequel on the findings this paper humbly makes recommendations for the way forward.

Introduction

The stock and capital market in any economy globally plays a pivotal role in the promotion and protection of investments.¹ It has the potential for providing financial facilities for economic development. This import has informed civilised legal systems to place a very high premium on the capital market as its contribution to economic development of a country is immeasurable. The success or failure of any economy is hinged on

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¹ Nwangwu M. O., *An Analysis of the Economic Impact of Stock Market on Nigerian Economy (1986-2010)*, a project work for the award of Bachelor of Science Degree (B.Sc) in Economics, Faculty of Management and Social Sciences Caritas University, Enugu (2013) at the abstract.

the viability of the financial system which depend largely on the effective structure and operation of the capital market of such economy².

Stock or capital market, like most other jurisprudential concepts have not had a universally accepted definition though arguably one can state with some level of certainty that there is a minimum content upon which the term can be described.³ The Black's Law Dictionary⁴ has defined 'capital market' to mean, '*a securities market in which stocks and bonds with long-term maturities are traded*'.⁵ This definition is a bit restrictive as it does not envisage the provision of short term financial facilities in the capital market which is also a feature of capital market. Similarly, Al-Faki proffered one thus:

...it can be described as a network of specialised financial institutions, series of mechanisms, processes and infrastructure that, in various ways, facilitate the bringing together of suppliers and users of medium to long-term capital for investment in socio-economic

² Ikechukwu, O. I., 'Money Market on the Nigerian Economic Development', Vol.4, No.5, 2013 *Journal of Economics and Sustainable Development*, 2222-1700 .

³ The minimum content any definition ought to reflect of a stock or capital market are: a market that is organized; transacts in securities; only accredited and authorized persons are allowed to transact; and compliance with rules and bye-laws of the market. See Samiksha S., '4 Main Features of Stock Exchange', retrieved from www.yourarticlelibrary.com accessed on September 9, 2016.

⁴ Garner B. A. (ed.), *Black's Law Dictionary*, 8th ed. (U.S.: West Publishing Co, 2004) p. 989.

⁵ Murinde, V., 'Capital Markets: Roles and Challenges', paper presented at the International Conference on 'Accelerating Africa's Development Five Years into the Twenty-First Century', held in Tunis on November 22-24, 2006 under the joint organization of the African Development Bank and the African Economic Research Consortium. He defined the term thus: *Capital markets are markets for trading long term financial securities, including ordinary shares, long term debt securities such as debentures, unsecured loan stock and convertible bonds. Government bonds and other public sector securities such as Treasury bills and gilt-edged stocks are also traded on capital markets.*

development projects. It embraces all the arrangements that facilitate the buying and selling of securities.⁶

Al-Faki's definition⁷ appears technical in a strict sense though substantially encompassing. In another vein, capital market is a financial market that provides facilities for mobilising and dealings in medium and long-term funds⁸. Bhadmus in his work gave a very simple definition without technicality. He defines capital and stock market as a place where people buy securities such as shares, debentures, and bonds⁹.

The Nigerian Capital and Stock Market

The Nigerian Capital Market plays the unique role of making funds available for economic development and growth¹⁰. At the same time, the stock market gives investors an opportunity to invest in government bonds as well as companies securities and benefit from profits made in such investments.¹¹ Therefore, when companies need funds to grow and expand, open new branches with new technologies, repay loans owed; or when government need money for development of public infrastructure and other facilities, capital market becomes a good option.¹² A company may be involved in the market for the purpose of soliciting funds from the public through selling of its securities or upon corporate

⁶ Al-Faki M., 'The Nigerian Capital Market and Socioeconomic Development'. Paper presented at the 4th Distinguished Faculty of Social Science Public Lecture, University of Benin, (26 July, 2006) pp. 9-16. Also see Donwa P. and Odia J., 'An Empirical Analysis of the Impact of the Nigerian Capital Market on Her Socio-economic Development', *Journal of Social Sciences*, Vol. 24 issue 2 (2010), 135-142.

⁷ Ibid.

⁸ Akintola, J. *et al*, *Nigerian Investment Laws and Business Regulations*, Vol. 1, (Lagos: Learned Publishments Ltd, 2002) p. 35.

⁹ Bhadmus Y. H., *Bhadmus on Corporate Law Practice*, (Enugu: Chenglo Ltd, 2009) p. 383.

¹⁰ Akintola *et al*, *Nigerian Investment Laws and Business Regulations*, op cit, p. 35.

¹¹ Nwangwu M. O., at note 1 p. 33.

¹² Bhadmus Y. H., Op cit, at p. 383.

restructuring by way of merger and acquisition, arrangement or compromise or take over.¹³

In the context of our discussion it should be noted that even before the advent of organized markets for trading capital, traditional African and indeed Nigerian communities had in the past, and up till now, used collective investment schemes for creating wealth, building houses and cultivating farms. Odife submits that ‘savings were and are still mobilized in most rural and urban communities through an investment business activity in the form of “DASHI” or “ESUSU”, as well as “CO-OPERATIVES”, “COMMUNITY DEVELOPMENT ASSOCIATIONS” and “WELFARE UNIONS”.¹⁴ By such activities, informal mobilization of capital and the conversion same for economic and social infrastructural purposes continued to thrive in Nigeria. In his report, Odife finds that ‘a large informal sector has existed and continues to thrive outside of what has been defined as the formal Money and Capital Market in Nigeria which appears to operate without formal regulation’.¹⁵

The need for a financial system that can make funds available from the public sector to run the local administration, prompted the establishment of a formal Capital Market in Nigeria by the British government during colonial times. Hence, the basic infrastructure for the operation of such a financial system pending the development of an organized private sector was set up.¹⁶ The colonial government in Nigeria in pursuance of the above necessity enacted, *Government and Other Securities (Local Trustees Powers) Act* of 1957. This law specified the types of securities in which trust funds may be invested. In addition, the colonial

¹³ Ogbuanya N. C. S., *Essentials of Corporate Law Practice in Nigeria*, (Lagos: Novena Publishers Ltd, Lagos 2010). at p. 527.

¹⁴ See Dennis Odife Panel Report on *The Review of the Nigerian Capital Market* (1996) Federal Government Panel Report Ref. 15281, dated September 24th, 1996, at p. 97.

¹⁵ Ibid.

¹⁶ Osaze E. B., *Capital Markets – African & Global*. Nigeria: The Book House Company (2007) Chap. 4, p. 55- 63

government set up the Professor Barback committee¹⁷ to examine the ways and means of fostering a securities market in Nigeria, which subsequently led to the promulgation of the *General Loan and Stock Act* and the *Local Loan (Registered Stock and Securities) Act* all of 1957 on the committee's recommendations.¹⁸

At post-independence Nigeria, the '...government set up its own capital market Regulatory Framework, first in 1962 as an ad hoc consultative and advisory body, which operated as a "public utility" or monopoly along the lines of the London Stock Exchange'.¹⁹ In 1962, the Federal Government under the aegis of the Central Bank of Nigeria established the "Capital Issues Committee", as the first purely Government Regulatory Agency²⁰ set up to oversee the Public Issue aspect of the work of the Stock Exchange. Its mandate was to examine applications from companies seeking to raise capital from the capital market and recommend the timing of such issues to prevent issues clustering which could overstretch the market's capacity²¹. An increase in the level of economic activities, coupled with the promulgation of the Nigerian Enterprises Promotion Decree in 1972, necessitated the establishment of a body backed by law to regulate capital market activities. Hence the creation of the Capital Issues Commission to take over the activities of the Capital Issues Committee.²² The Capital Issues Commission's establishment focus was not the enlargement of the Capital Market, but the pricing of securities for

¹⁷ The committee recommended, among others, the creation of facilities for dealing in shares, the establishment of rules regulating share transfer and measures for encouraging savings and issues of securities of government and other organizations.

¹⁸ Osaze E. B., *Op Cit*.

¹⁹ See Dennis Odife Panel Report on *The Review of the Nigerian Capital Market* (1996) Federal Government Panel Report Ref. 15281, dated September 24th, 1996, at p. 97.

²⁰ Which is without a regulatory framework for its establishment and operations.

²¹ Oteh A., *The History of Capital Market Regulation in Nigeria: Timeline of Regulatory Intervention in Nigeria*, at the Nigeria at 50 Investment Forum October 28, 2011; 0846 hrs, Omole, Lagos, Nigeria accessed at www.proshareng.com on 11/09/2014.

²² The Capital Issues Commission was established with the promulgation of the Capital Issues Commission Decree in March 1973.

the protection of the investors who were considered unsophisticated.

In 1979, the Capital Issue Commission was transformed into the Securities and Exchange Commission²³ but the focus was still on the determination of prices of securities to be sold to the Nigerian public or in companies with alien participation. The Commission had more powers to regulate and develop the Nigerian capital market. This is in addition to determining the prices of issues and setting the basis for allotment of securities. Unlike its two predecessors, the Commission at this stage was excised from the CBN, although it continued to receive funding from it.²⁴

Nine years after the establishment of the Securities and Exchange Commission, the enabling law²⁵ was reviewed with additional provisions to address observed lapses in the previous arrangement and to enable the Commission pursue its functions more effectively. To further enhance the Commission's pursuit of its objective of investor protection, a review of the capital market was carried out in 1996 by a seven - man panel headed by Chief Dennis Odife. Based on the panel's recommendations, the *Investment and Securities Act*²⁶ was enacted. The new Act was expected to promote a more efficient and virile capital market, pivotal to meeting the nation's economic and developmental aspirations. The Investment and Securities Act (ISA) was further reviewed, amended and subsequently passed into law in 2007.

Overview of the Regulatory Agencies of the Stock Market in Nigeria

²³ The recommendations of the Financial System Review Committee in 1976, led to the establishment of the Securities and Exchange Commission styled after the United States' commission following the promulgation of the Securities and Exchange Commission Decree No. 71 of 1979 to supersede the Capital Issues Commission in 1979.

²⁴ Oteh, *Op cit.*

²⁵ See Decree No. 7 of 1979, which was re-enacted as Securities and Exchange Commission Decree No. 29 of 1988

²⁶ Which was No. 45 of 1999 and was promulgated on May 26, 1999. The Act also repealed the Securities and Exchange Commission Act of 1998.

The daily activities or transactions carried out at the capital market are regulated by institutions set-up by government to efficiently manage the affairs in the market through a regulatory framework.²⁷ Regulatory framework has been identified as a framework of rules, procedures and principles put in place to guide a system²⁸. The implication therefore is that agencies that are established to make rules, regulations, and to guide the conduct of affairs of the stock and capital market are all referred to as capital or stock market regulatory agencies. There are several regulatory agencies in the Nigerian stock and capital market, some of which include:

1. Securities and Exchange Commission (SEC)
2. Corporate Affairs Commission (CAC)
3. Nigerian Stock Exchange (NSE)
4. Federal High Court (FHC)
5. Investment and Securities Tribunal (IST).

The above mentioned regulatory agencies and their roles are closely examined hereunder, beginning with SEC.

Securities and Exchange Commission (SEC)

The Securities and Exchange Commission (SEC) was established pursuant to the provisions of the Investment and Securities Act 2007²⁹ (ISA) as a body corporate with all the incidents of corporate citizenship³⁰. The SEC is the apex regulatory

²⁷ Dynamic Portfolio Ltd research, 'Investing in the Capital Market: Benefits & Prospects', retrieved from www.dynamicportfolio.com accessed on 30/09/2014.

²⁸ Nwude, C., 'The Impact of Capital Market Regulation on the Nigerian Economy'. *Zenith Economic Quarterly*, vol. 2 issue 11, (2007) pp.36-43; also see Okaro, S. C. and Oraka, A. O., 'Achieving Effective Capital Market Regulation in Nigeria- A holistic approach'. Electronic copy available at: <http://ssrn.com/abstract=1994514>. Accessed on 27 September, 2014.

²⁹ See section 1 of the Investment and Securities Act, CAP 124 Laws of the Federation of Nigeria 2010.

³⁰ These include perpetual succession, common seal, enabled to acquire, hold or dispose any movable or immovable property, and can sue and be sued in its name. Corporate citizenship is the legal status of a corporation in the jurisdiction

institution of the Nigerian capital market, though it is a statutory body supervised by the Federal Ministry of Finance.³¹ This fact seems to have drawn several concerns such as the implication that the regulatory role of the Corporate Affairs Commission in respect of transactions on securities is subject to that of the SEC.

The functions of the commission have been enumerated by section 13 of the Act³², but in summary some authors have reduced them to basically two functions or roles, which this paper adopts by virtue of the fact that all the statutorily enumerated functions are geared towards achieving these two basic functions. In any case, these functions are to protect the investors' interest and thereby enhance their confidence in the capital market, and ensuring orderly and equitable dealings in securities business. Also, the commission is to promote capital market development and growth.³³ Amongst other things, the Commission is specifically empowered to:

- a. regulate investments and securities businesses in Nigeria;
- b. register all securities to be offered to the public for sale or subscription;
- c. register stock exchanges, commodities exchanges and capital trade points (which are mini exchanges);
- d. register clearing and settlement companies, custodian and depositories;

in which it was incorporated. See Business Dictionary at <http://m.businessdictionary.com>, accessed on 30th September 2014; also see Akintola *et al*, *Op Cit*, p. 35.

³¹ See sections 12 and 13 of the Investment and Securities Act, 2007; also see Ndanusa, S. A., "Country Experience with Capital Market Development: The Nigerian Experience", being a Paper presented at the Fifty Annual Financial Markets and Development Conference: The Future of Domestic Capital Markets in Developing Countries Organized by the World Bank on April 14–16, 2003 at Watergate Hotel, Washington, D.C.

³² For further details on the functions of the Commission, see section 13 of the Companies and Allied Matters Act.

³³ See Akintola *et al*, *op cit* p. 38.

- e. register all operators in the market such as stockbrokers, registrars, issuing houses, investment adviser, portfolio managers and capital market consultants such as solicitors, accountants, estate valuers, etc;
- f. register all securities traded on the exchanges;
- g. regulate mergers, acquisitions and all forms of business combinations;
- h. regulate collective investments schemes including pension funds, venture capital and esusu (i.e. rotating savings schemes).

It can be deduced from the aforementioned functions of the Commission that the lawmakers in their wisdom intended that the regulatory powers of the commission be far reaching so that existing institutions³⁴ and those to be established in the future with the growth of the economy and capital market shall all be supervised by the commission.³⁵

The ISA 2007 confers on the Commission, the power to suspend registration of securities of public companies and capital market operators where they violate the provisions of the Act and rules made thereunder³⁶. To this end, the commission in exercise of its regulatory powers may order that the certificate of a capital market operator be withdrawn and such market operator be disallowed from carrying on any capital market functions, if it is in the interest of the public to do so.³⁷ Where registrations of the securities of public companies are suspended, trading in the securities on the exchange (if listed) would cease for the period of suspension³⁸. The Commission is equally empowered to impose any type of penalty on erring operators including monetary

³⁴ These include the capital trade points, options, futures and commodities exchanges etc.

³⁵ See Orojo, J.O., *Company Law and Practice in Nigeria*, (5th ed.) South Africa: LexisNexis Publishers, (2008) at 367.

³⁶ Section 13 of the Investment and Securities Act 2007. Also see Ndanusa, *Op Cit*.

³⁷ Akintola *et al*, *Op Cit*, p. 39.

³⁸ See *Owena Bank Plc v NSE, infra*.

penalties. The commission has sequel on its above functions and pursuant to section 269 of the Investment and Securities Act 2007 make rules and regulations to regulate the activities of the capital market. These provisions vest in the Commission legislative, executive, and adjudicatory powers as the principal regulator of the capital market.

In the celebrated case of *Owena Bank (Nig) Plc v Nigerian Stock Exchange*³⁹, the scope of the disciplinary powers of the Securities and Exchange Commission was considered. The Supreme Court in that case held that the commission has powers to suspend the registration of any person's security for a period of twelve calendar months and no more. The court further held that the commission has to obtain the approval of the Minister in order to revoke the registration of a person's securities.

The Commission as a regulatory body has been empowered by the ISA to establish specialised departments for the purpose of regulating such aspects which includes securities exchanges, capital market operators, collective investments, mergers, takeovers, acquisitions and other forms of business combinations.⁴⁰

Corporate Affairs Commission (CAC)

The Corporate Affairs Commission (CAC) is a body corporate established pursuant to section 1 of the Companies and Allied Matters Act (CAMA) 1990.⁴¹ The mandate of the CAC is to administer the CAMA, and perform other functions specified by any other law.⁴² The CAC as submitted by Prof. Emiola is 'bestowed with very wide and multi-dimensional functions and powers which are summarily regulatory, supervisory, and judicial in nature over the formation, incorporation, registration,

³⁹ (1999) 5 S.E.C. Law Report p. 2; also see the cases of *I.E.C. Utomi v Nationwide Securities Ltd*, AHC/12/95 and *Securities and Exchange Commission v CMB Securities* AHC/14/95.

⁴⁰ See section 9 of the Investment and Securities Act 2007; also see Orojo, *Op cit*, at 367.

⁴¹ CAP C20 Laws of the Federation of Nigeria, 2010.

⁴² See section 7 (1) (a, b, & c) of the Companies and Allied Matters Act, CAP C20, LFN 2010.

management, and winding up of companies.⁴³ For the aforesaid purposes, the commission is empowered to make regulations generally for the purpose of fulfilling the objectives of the CAMA.⁴⁴

The functions of the commission are provided for in section 7 (1) of the CAMA as follows:

- a) for regulation and supervision of the formation, incorporation, registration, management and winding up of companies under or pursuant to this Act;
- b) to establish and maintain a company's registry and offices in all the states of the Federation suitably and adequately equipped to discharge its functions under the Act;
- c) to arrange or conduct an investigation into the affairs of any company where the interest of the shareholder and the public demand.⁴⁵
- d) perform such other functions as may be specified by any Act or enactment;
- e) undertake such other activities as are necessary or expedient for giving full effect to the provisions of this Act.

From the provisions of the CAMA reproduced above, the functions of the CAC in relation to stock and securities market is becomes clearer through the specific provision of paragraph (c), and the incidental and omnibus functions. Transactions involving companies including share transfers and allotments as provided in Companies and Allied Matters Act are also regulated by the Corporate Affairs Commission.⁴⁶ The above enumerated functions

⁴³ See Emiola, *Op Cit*, pp. 54-55.

⁴⁴ *Ibid*.

⁴⁵ Inam, *Op Cit* at p. 6.

⁴⁶ See sections 115, 151, and 152 of the Companies and Allied Matters Act, CAP C20, LFN 2010; Idigbe Anthony, "Legal, Operational and Regulatory

and powers of the commission have been submitted to interpretively extend its classification as a stock and capital market regulatory agency.⁴⁷

While the full scope of the powers of the Commission's powers can be comprehended by reference to a more detailed study of the provisions of the Companies' Act, this paper shall restrictively dwell on a few of the commission's regulatory role in the Nigerian Capital market. In particular, regarding stock and capital market, the CAC oversees matters relating to allotment and transfer of shares; conversion from private to public company in order to raise funds;⁴⁸ alteration of company shares; insider trading⁴⁹; and several others.

Nigerian Stock Exchange (NSE)

Stock Exchange though not defined anywhere in the Investment and Securities Act, but in simple terms "is a market for the sale and purchase of securities".⁵⁰ The Stock Exchange as a market provides the essential trade facilities for companies and government to raise money for business expansion and development projects through investors who own shares in corporations for the ultimate benefit of the economy⁵¹.

Framework of the Nigerian Capital Market", retrieved from www.punuka.com accessed on 27th September, 2014.

⁴⁷ Ibid. also see Sasegbon D. (ed.) *Nigerian Companies and Allied Matters Law and Practice*, (1st ed.) Vol. 1, Nigeria: DSc Publications, (1991) at pp. 16 – 18.

⁴⁸ If a private company desires to raise capital by way of public subscription, it must first be converted to a public company by following the procedure laid down under section 50 of the Companies and Allied Matters Act, CAP C20, LFN 2010; see Emiola, *Op Cit*, at p. 75; also see Mmadu, R. A., "An Examination of Disclosure Philosophy in Company Law: Making a Case for Reform in Nigeria" *British Journal of Advance Academic Research*, vol. 3 number 1 (2014); 32-66, pp. 42-43.

⁴⁹ See sections 280 (2) and 287 of the Companies and Allied Matters Act, LFN 2010.

⁵⁰ See Orojo, *Op cit*, at 370.

⁵¹ Lucky O. and Raphael E. O., "Impact Assessment of the Role of Nigerian Stock Exchange on the Economic Development of Nigeria", *International Journal of Economic Development Research and Investment*, Vol. 2 No. 1; April 2011, at 185.

The Nigerian Stock Exchange (NSE) was formed in 1960, as Lagos Stock Exchange, under the Act of 1961.⁵² By the provisions of section 3 of the Act of 1961, only members of the stock exchange were permitted to trade or carry out business in the floor of the market. In December 1977, the name was changed to the Nigerian Stock Exchange following the recommendations of the Okigbo Committee report⁵³. Currently, the Nigerian Stock Exchange (NSE) consists of six branches and the Head office is in Lagos, but has an office in Abuja. The trading system of the NSE is fully automated⁵⁴. The Nigerian Stock Exchange is governed by a team of shareholders elected at an Annual General meeting. These shareholders constitute the governing council (Board) of the Nigerian Stock Exchange⁵⁵. The council is headed by a president (chairman) while the national secretariat is led by a Director General (DG) (Chief executive officer) who is responsible for the day-to-day administration of the exchange.⁵⁶

The activities of the Nigerian stock exchange are carried out through the primary and secondary markets⁵⁷. The transactions on the exchange are regulated by the exchange itself as a self-regulatory organization. And the regulatory role of the Nigerian Stock Exchange can only be felt in the regulatory process adopted

⁵² The Lagos Stock Exchange Act, 1961.

⁵³ See Orojo, *Op Cit*, at 371.

⁵⁴ Nwaolisa E. F., Kasie E. G., and Egbunike, C. F., "Effect of the Nigerian Capital Market Operations on the Local Investments in Nigeria", *Kuwait Chapter of Arabian Journal of Business and Management Review* Vol. 3, No.1; Sep. 2013.

⁵⁵ Whose duty include: policy making; enforcing discipline among members; making rules and regulations for dealing members; giving approvals to quotations and listing of securities; protecting the interest of the investing public; and investigating and settling disputes and complaints against and among members.

⁵⁶ Lucky and Raphael, *Op Cit*, at 185.

⁵⁷ The primary market is that where new securities (shares, stock, bond, etc), are either bought or sold. It is a market for securities that are being traded for the first time; while the secondary market is a market or an arrangement whereby already issued securities, shares, bonds or debentures and other long-term securities are purchased and sold by large and small investors through the help of individual stockbrokers. See Lucky and Raphael, *Op Cit*, at 186 - 187.

by it in the listing of shares and other forms of securities in either the primary or secondary markets. Thus, before any securities are quoted on the primary stock market, such securities must first go through the issuing house that will evaluate the records of the company. The evaluation is purposed to ascertain that such companies meet up with the requirements set down by the Nigerian stock exchange⁵⁸. A major difference between primary market and secondary market is that the money raised at the secondary market does not go into the purse of the companies rather the money goes into the coffers of the individual shareholders who wish to dispose of their entire shareholding or part thereof.

Federal High Court

The regulatory role of the Federal High Court in capital market issues is in its interpretation, giving of directions to the CAC to conduct enquiries⁵⁹, settlement and application of the law as to how an act is to be done or not. To this end, for courts or tribunals, the regulatory role can only be measured pursuant to its functions mentioned above as derivable from the statute creating such court and its agency jurisdictional⁶⁰ competence deductible from the body of statutes regulating the capital market.⁶¹ The CAMA contains several provisions that make confer jurisdiction on the Federal High court in respect of companies' proceedings

⁵⁸ Ibid. Also see Orojo, *Op Cit*, at 428 – 429, where the learned author briefly elucidated on the nine stages of public quotation – consultation; the mandate; preparation for application; submission of application and approval; the completion board meeting; distribution and marketing; range of analysis and allotment; undertaking and declaration of compliance; and listing, after fulfilling the requirements for listing in accordance with the Stock Exchange Regulations.

⁵⁹ See Sasegbon (ed.) *Op cit*, at p. 16.

⁶⁰ Garner's (ed.), *op cit* at 867 defines agency jurisdiction as "the regulatory or adjudicative power of a government administrative agency over a subject matter or matters". Also see Ogbuanya, *Op Cit*, at 632 – 633.

⁶¹ For instance the power of the Federal High Court to give directions to the Corporate Affairs Commission to conduct enquiries with respect to compliance by any person or company with the provisions of the Act which also envisages the provisions on dealing on shares and other company securities is section 563 of CAMA. Section 53 of the Investment and Securities Act confers similar powers to the same court.

and allied activities.⁶² This court has been conferred with the exclusive jurisdiction in civil causes and matters arising from “the operation of Companies and Allied Matters Act or any other enactments regulating the operation of companies incorporated under the Companies and Allied Matters Act”.⁶³

The Federal High Court besides the very express provisions of the 1999 constitution of Nigeria conferring jurisdiction on it⁶⁴, by implication has a very wide jurisdictional competence with regard to capital market investment disputes. Some of such regulatory roles of the court include ordering a company to deliver share certificate to a person entitled to have it⁶⁵; disallow the acquisition of a dissenting shareholder’s shares during a merger⁶⁶; order for an inquiry or investigation to be conducted by an inspector or other person on the affairs of the company or any such case⁶⁷; direct that any shares in or debentures of a company shall cease to be subject to restrictions⁶⁸ and several others.

Investment and Securities Tribunal

⁶² See the provisions of sections 567 of the Companies and Allied Matters Act, CAP C20 LFN 2010; 251 (1) of the Constitution of the Federal Republic of Nigeria, 1999; and 7 (1) (c) (i) of the Federal High Court Act, CAP F12, LFN 2010.

⁶³ See section 7 (1) (c) (i) of the Federal High Court Act; and also see section 251 of the 1999 Constitution which has a similar provision, and is to the synoptic effect that the Federal High Court has exclusive jurisdiction on company proceedings and the administration of the Companies and Allied Matters Act, which also extends and includes capital market transactions.

⁶⁴ Section 251 (1) (e) which provides for the jurisdiction of the court to the effect that it has power on the operation of Companies and Allied Matters Act or any other enactments regulating the operation of companies incorporated under the Companies and Allied Matters Act; and (p) & (r) which are to the effect that the court has competence to hear and determine any matter to which the federal government or its agencies are involved.

⁶⁵ See section 146 (5) of the Companies and Allied Matters Act. Also see the position as expressed by the Court of Appeal in *Standard Trust Bank Plc v Olusola* [2008] 1 NWLR [Pt. 1069] 561.

⁶⁶ Section 129 of the Investment and Securities Act 2007, CAP 124, LFN 2010.

⁶⁷ See both the provisions of sections 315 and 319 (3) and (4) of the Companies and Allied Matters Act.

⁶⁸ Section 329 of Companies and Allied Matters Act 1990.

The Investments and Securities Tribunal (IST) was created by Section 224 of the Investment and Securities Act 1999.⁶⁹ This statutory creature is made pursuant to the need for a Tribunal rather than a regular court to adjudicate on civil cases in the capital market. There was also the need to ensure that such cases are given speedy resolution by a body which is not only vast in the general practice of law, but is conversant with the securities law, the practices and operations of the capital market.⁷⁰

The jurisdiction of the Investment and Securities Tribunal, as a specialised civil and fast-track court, is both original and appellate. On its appellate jurisdiction, the tribunal entertains matters from the Administrative Proceedings Committee of the Securities and Exchange Commission.⁷¹ Decisions of the tribunal are enforced as decisions of the Federal High Court and appeals against its decision lies directly to the Court of Appeal⁷². The jurisdiction of the tribunal is provided for in section 284 of the Investment and Securities Act⁷³ which is made and exercisable in

⁶⁹ That Section has now been replaced by the extant Section 274 of the Investment and Securities Act 2007 (ISA), which power the National Assembly derives from the constitution. The legal basis for the establishment of the IST by the ISA can be found in Section 6(5) (j) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which vests judicial powers of the Federation in such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly makes laws.

⁷⁰ Idigbe, *Op Cit*.

⁷¹ The Committee is a quasi-judicial body with powers of sanction. It has been a very effective tool in determining and dealing with rule breaches. Although membership is restricted to the Commission, industry groups such as stockbrokers, issuing houses, trustees and registrars attend every proceeding as observers. Those observers indeed participate actively in deliberations and decisions of the Committee. This has generally enhanced the transparency and acceptance of the proceedings and decisions of the Committee.

⁷² Amakiri, Y. D. "Anatomy of the Investments and Securities Tribunal", *Nigerian Law Today*, Tuesday, 23 April, 2013; retrieved from www.nigerianlawtoday.com and accessed on 2nd November, 2014.

⁷³ (1) The Tribunal shall, to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving- (a) a decision or determination of the Commission in the operation and application of this Act, and in particular, relating to any dispute- (i) between capital market operators; (ii) between capital market operators and their

exclusion of all other courts, as well as its additional appellate jurisdiction on pension matters⁷⁴.

The decisions of the tribunal are final and cannot be appealed against except only on points of law or mixed law and facts.⁷⁵ This is based on the notion that the capital market assessors who have cognate experience in capital market operations would have resolved all facts relating to the capital market issues during the hearing of the matter before the tribunal.⁷⁶

Capital Market Regulatory Challenges in Nigeria

As earlier examined, the Nigerian capital market has been bedevilled with very serious challenges that call for urgent attention. One thing that is incontrovertible is the fact that the failure and inadequacy of regulation has been a major causative or contributory factor.⁷⁷ The foregoing are just a few of the regulatory shortcomings that were observed in the Nigeria capital market.

- 1. Lack of will in the exercise of regulatory powers:** One principal regulatory shortcoming in the Nigerian capital market is the inability of the pivotal regulatory agency and

clients; (iii) between an investor and a securities exchange or capital trade point or clearing and settlement agency; (iv) between capital market operators and self-regulatory organisation; (b) the Commission and Self-Regulatory Organisation; (c) a capital market operator and the Commission; (d) an investor and the Commission; (e) an issuer of securities and the Commission; and (f) disputes arising from the administration, management and operation of collective investment schemes.

(2) The Tribunal shall also exercise jurisdiction in any other matter as may be prescribed by an Act of the National Assembly.

(3) In the exercise of its jurisdiction the Tribunal shall have the power to interpret any law, rules or regulation as may be applicable.

⁷⁴ Exercisable pursuant to the provisions of section 284 (2) of ISA and also by the provision of Section 93 of the Pensions Reform Act 2004 (as amended), which provides that a person that is aggrieved by the decision of the National Pension Commission may refer the matter to the Investment and Securities Tribunal. One of the implications of the above is that the IST does not have original jurisdiction in pension matters.

⁷⁵ See section 295 (1) (a), (b), and (c) of the Investment and Securities Act year.

⁷⁶ Ogbuanya, *Op Cit*, at 635.

⁷⁷ Sulaiman, *Op Cit*.

other regulatory agencies to properly exercise their powers and functions in the formulation and execution of capital market policies. Some of these have been traced to the inadequacy of capacity and capability particularly of the Securities and Exchange Commission to implement the provisions of the Investment and Securities Act and effectively exercise its authority over market operators, exchanges, Self-Regulatory Organizations and other market participants, especially as the market grew very rapidly in size and complexity. The SEC is ill equipped both technologically and on human capacity to properly regulate the capital market. This was also copiously observed and admitted by the Securities and Exchange Commission through its Director General during a public presentation on the Nigerian Capital market.⁷⁸

2. **Lack of co-ordination in implementation of regulatory laws and policies:** Other regulatory issues and challenges faced by the market have included: inadequate co-operation and co-ordination between and among our various financial market regulators to assure coherent policies. Frequent inconsistent and uncoordinated policy initiatives and pronouncement from these regulators and agencies have created considerable uncertainty in market confusion. An aspect of this market uncertainty and confusion is as a result of the widespread market perception that the Nigerian Stock Exchange, is an entity independent of Securities and Exchange Commission's authority and oversight and not subject to SEC rules and regulation. The Nigerian Stock Exchange is seen or sees itself as being at par with the SEC. This is possibly because the NSE was established before SEC, and it operates an effective

⁷⁸ See Oteh A., Presentation on the Nigerian Capital Market by the Securities and Exchange Commission for the April 2012 Public hearing organized by the ad hoc Committee on Capital Market, House of Representatives of the Federal Republic of Nigeria.

monopoly market, its proximity to market, and the prominence given to its daily activities.⁷⁹

3. **Balancing market regulation and development:** Another regulatory challenge militating against the capital market regulatory agencies is the inability to strike a balance between effective market regulation and market development. For an emerging market like Nigeria, the law recognizes the need not just to regulate but also to develop the capital market. This has required a balance to be maintained between regulation and development. In other words, market development is not carried out at the expense of regulation and vice versa. For instance, if there is too much emphasis on development, regulation would most likely be down played, which could impact adversely on the market. It is submitted that a good regulatory environment would accelerate a market's development.

4. **Inordinate delay in adjudication and lack of knowledge on capital market practices:** Delay and lack of requisite knowledge of the capital market and its practices on the part of regular courts like the Federal High Court has posed lots of regulatory challenges to the development of capital market and the economy. Experience has shown that the regular courts take months and sometimes years to resolve matters. This can be frustrating and discouraging to parties, who as businessmen are concerned with time and changes in business practices. Besides, the judgments of the regular courts have sometimes shown lack of understanding and essence of the capital market, which are capable of affecting the capital market adversely.⁸⁰

⁷⁹ Nigeria's capital market: Making world-class potential a reality, *The Report of the SEC Committee on the Nigerian Capital Market - February 2009*.

⁸⁰ This view has been expressed by Ekiran, O., *Basic Understanding of Capital Market Operations*, Nigeria: CIBN press (1999); Idigbe A. *Dispute Resolution in the Capital Market: A Review of Administrative and Judicial Mechanisms*,

5. **Independence and Impartiality of specialised tribunals of the SEC:** One of the challenges of constructive capital market regulation and development is the fact that the Administrative Proceedings Committee and Investment and Securities Tribunal are all part of the Securities and Exchange Commission. Whereas capital market disputes that are brought before these institutions often include the Commission as a party, which controls them. This goes a long way to question the independence and impartiality of their proceedings and judgment, so that even where justice is done, the aggrieved party (if not the Commission) may question the decision.

6. **Lack of regulatory pro-activity and cohesion:** In order for the regulatory agencies to be proactive, it is required that they be a step ahead of those they regulate at all times and in all ramifications⁸¹. The evidence which has come to constitute a challenge is that the Securities and Exchange Commission has been more reactive than proactive in its approach to regulation in Nigeria. Witness the Cadbury (Nig.) Plc. accounting scandal and more recently, the rumblings at the Nigerian stock Exchange.⁸² In each case, it was majorly the activities of third parties that exposed the problems. In the case of Cadbury (Nig.) Plc., a due diligence search by the parent company (then Cadbury/Schweppes) trying to reacquire control helped to expose the financial misstatements in the company. This is in spite of the routine audits of the company by their external auditors

being a paper delivered at the Securities and Exchange Commission's Judges Workshop, 24th – 25th February, 2016 at p. 5.

⁸¹ This implies being ahead in the areas of technology and technical know-how, training and retraining of man-power of the agencies, integrity and uprightness, transparency and accountability, good working conditions etc. See Okaro, S. C. and Oraka, A. O., 'Achieving Effective Capital Market Regulation in Nigeria- A holistic approach'. Electronic copy available at: <http://ssrn.com/abstract=1994514>.(access date)

⁸² See Cadbury Nigeria Plc. website at www.cadburynigeria.com/news.php; also see Mmadu, *Op Cit*, pp. 42-43.

and the routine surveillance of the institutions by SEC staff.⁸³

7. **Issues of transparency, accountability, and corruption:** Current standards for identifying, terminating and correcting market manipulation in trades are inadequate. Some market operators, regulators, Self-Regulatory Organizations (SROs) and company officials have access to privileged and price sensitive information before the information is disclosed to the public, giving room for imperfect information availability and insider trading. Despite the fact that these conducts have been proscribed by the CAMA and ISA, perpetrators have devised new means of utilizing these bits of privileged information and thereby circumventing the penal provisions of the CAMA and ISA. Indeed, the NSE requires that listed companies must file with it all reports and planned corporate actions before release to the public. Stock market operators, especially stockbrokers, are also able to utilize privileged and confidential client information to “front run” and execute proprietary deals in advance of client trades.

Comparative Analysis of Regulatory Agencies

Regulatory approaches to securities markets have traditionally been characterized as Government or Government-led and Self-regulation⁸⁴. However, a third categorization which is a

⁸³ Abdullahi, M., Enyinnaya Okpara, & Ahunanya, S., Transparency in Corporate Governance: A Comparative Study of Enron, USA and Cadbury PLC, Nigeria. *The social Sciences*, 5(6), pp.471-476 2010.

⁸⁴ However, a recent global survey by Howell Jackson & Stavros Gadinis, on regulatory approaches concluded that there are three models of securities regulation namely: “Government led Model” exemplified by the France, Germany and Japan, “Flexibility Model” typified by the United Kingdom, Australia and Hong Kong and the “Cooperation Model”, as practiced in the United States and Canada; see Jacob K. Gakeri, “Regulating Kenya’s Securities Markets: An Assessment of the Capital Markets Authority’s Enforcement Jurisprudence”, *International Journal of Humanities and Social Science Vol. 2 No. 20 [Special Issue – October 2012]* 265.

configuration of the two variously described as “Self-regulation with Oversight” or “Cooperative regulation” or “Government Supervised Self-regulation”⁸⁵ has developed. This regulatory model combines the attributes of government and self-regulation. The configuration of capital market regulatory mechanisms differs from one jurisdiction to another so that one can hardly come across a uniform regulatory framework in different geographical divides⁸⁶.

United States of America

The United States is one of the countries that imposed public regulation on securities markets very early, which was about the 1920s.⁸⁷ However, neither the executive branch nor the legislature is involved in the day-to-day regulation of the securities market. They are also not involved in the establishment of rules governing the operation of the securities market and Self-Regulatory Organizations (including the exchanges) and neither do they have any power of direction over the regulatory authority.⁸⁸ The regulatory approach presently adopted in the United States is the collaborative or co-operation model.⁸⁹ By this model, the SEC as well as the Investment Company Industry collaborates to ensure that market rules are made and complied with while maintaining investor confidence.⁹⁰

In the first part of the twentieth century most states Laws subjected brokers and dealers to public oversight and required that

⁸⁵ Joel Seligman, “Cautious Evolution or Perennial Irresolution: Stock Market Self-regulation during the First Seventy years of the Securities and Exchange Commission”, 59 BUS LAW 1347 (2004).

⁸⁶ Gakeri, *Op cit*.

⁸⁷ Roye P., Regulation of Mutual Funds in the United States – A Successful Regulatory Regime, a speech presented at FEFSI General Membership meeting at Paris, France, September 22, 2000 retrieved from www.sec.gov/news/speech accessed on 18th September 2016.

⁸⁸ The checks and balances under constitutional and administrative law doctrines are ensured through the power to appoint the Commissioners and to require the SEC to make reports and give evidence to the legislature.

⁸⁹ Gakeri, *Op cit*.

⁹⁰ Roye, *Op cit*.

securities be registered with a public agency before they were sold. In 1933 and 1934, partly in response to the market crash of 1929 and the ensuing Great Depression, the United States Congress created a national regulatory agency called the Securities and Exchange Commission⁹¹ to enforce newly enacted securities laws. The regulatory function is performed by the Commission which is an independent statutory body set up by statute. The commission's independence extends to its rule making functions for the capital market. However, the Commission will consult the Secretary of the Treasury if the proposed changes to rules filed with the Commission by registered securities associations primarily concern conduct relating to transactions in government securities. It is worthy of note that there is no statutory requirement for the Commission to consult the Secretary of the Treasury on other changes to the rules proposed by the Self-Regulatory Organizations⁹².

The Securities and Exchange Commission is comprised of five presidentially-appointed Commissioners with the advice and consent of the Senate. The President designates one of the Commissioners as Chairman, who is the Commission's top executive.⁹³ The Commissioners meet to discuss and resolve a variety of issues brought to their attention by staff of the Commission⁹⁴. The meetings are open to the public and the media unless the discussion pertains to confidential subjects, such as whether to begin an enforcement investigation. The four divisions of the commission are the corporate finance division, market

⁹¹ Kitch, *Op cit.*

⁹² See "Regulation of the Securities Market in the United States", retrieved from www.info.gov.hk accessed on 2nd November, 2014.

⁹³ *Ibid.*

⁹⁴ At these meetings the Commissioners – (a) interpret federal securities laws; (b) amend existing rules; (c) propose new rules to address changing market conditions; and (d) enforce rules and laws. There is a statutory framework, including the Securities Act of 1933 that provides for the SEC's oversight of the securities market. As the statutory regulator, the SEC engages in rule-making to maintain fair and orderly market and to protect investors by altering regulations or creating new ones.

regulation division, investment management division, and enforcement division.⁹⁵

The Securities and Exchange Commission administers the provisions of four securities statutes. The Securities Act of 1933⁹⁶, The Securities Exchange Act of 1934⁹⁷, The Investment Company Act of 1940⁹⁸, the Investment Advisor's Act of 1940⁹⁹, and the Trust Indenture Act of 1939¹⁰⁰. The Commission's primary concern is maintaining fair and orderly markets and protecting investors from fraud. Two types of firms come under the Commission's jurisdiction, which are all corporations that sell securities to the public; and securities broker/dealers and other securities markets intermediaries. To enable investors to make informed investment choices, the Commission also has statutory authority over financial accounting standards.¹⁰¹

⁹⁵ See "Regulation of the Securities Market in the United States", op cit

⁹⁶ The Securities Act of 1933 requires that public offerings of securities by issuers and issuer affiliates must be registered with the Securities and Exchange Commission.

⁹⁷ The Securities and Exchange Act covers the following aspects of the securities industries. (1) Self-regulatory organizations or SROs, including all exchanges and the National Association of Securities Dealers (NASDA), (2) licensing of brokers and dealers, (3) margin credit, (4) manipulation of securities markets, (5) information reporting by issuers of securities, (6) solicitation of proxies by issuers of securities, (7) position reporting by officers and five percent shareholders, (8) position reporting by holders of large positions in securities markets, (9) misrepresentation, deception or insider trading in connection with the purchase or sale of a security, and (10) tender offers. A common structural feature of the statute is to require that the regulated entity (exchange, broker, dealer, issuer, and so on) be registered, and to give the Securities Exchange Commission discretion to control what the registered entity can, cannot and must do.

⁹⁸ The Investment Company Act of 1940 gives the Commission authority to regulate the structure and activities of investment companies, more commonly known as mutual funds.

⁹⁹ The Investment Advisor's Act is a licensing statute for persons who offer investment advice to the public.

¹⁰⁰ The Trust Indenture Act regulates some of the terms of the indentures that set the terms of bonds sold in public offerings.

¹⁰¹ Edward V. Murphy, "Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets", *Congressional Research Service*, (May 28, 2013) 7-5700 [www.crs.gov R43087](http://www.crs.gov/R43087).

The United States capital market regulatory regime shows an adequacy of capital market laws which are administered by the SEC. As shown above, the regulatory functions of the Investment Company Industry is more of an oversight function. This puts the SEC in a position as the chief regulator of the capital market with both legislative and executive powers. The Nigerian situation is far from this, as the regulatory agencies in the capital market are multiple, which brings about overlap of regulatory functions. Unlike the Nigerian SEC, the United States SEC do not have judicial powers, which rules out the issue of natural justice.

United Kingdom

The United Kingdom in particular has had considerable success in building a London-based global securities market using a regulatory approach that self-consciously rejects many features of the US model¹⁰². In the United Kingdom, Her Majesty's Treasury is responsible for the overall institutional structure of regulation in the field of financial stability, and the legislation which governs it. The Financial Services and Markets Act (FSMA) established in 2001, set out the statutory framework for the regulation of the financial markets, and provides for the establishment of the Financial Services Authority¹⁰³ (FSA) as the single statutory regulator directly responsible for the regulation of deposit-taking, insurance and investment businesses. It is an independent non-governmental body¹⁰⁴ accountable to the Treasury and, through it, to the Parliament. Although the members of its board are all appointed by the Chancellor of the Exchequer, the FSA is not subject to the executive authority of the Treasury.

¹⁰² See Kitch, *Op Cit.*

¹⁰³ The FSMA requires the FSA to pursue four objectives (a) to maintain confidence in the UK financial system; (b) to promote public understanding of the financial system; (c) to secure an appropriate degree of protection for consumers while recognising their own responsibilities; and (d) to reduce the scope for financial crime.

¹⁰⁴ A company limited by guarantee and financed by levies on the industry. This is a statutory body but funded by market participants and designed to be more attuned to the needs of the markets than would be a governmental department. See Davies, *Op Cit.*, at 860.

Prior to the coming into effect of the FSMA, the responsibility for the regulation of the financial matters was shared by several organisations, namely the Bank of England, the Securities and Investments Board (which became the FSA), Self-Regulating Organisations (SROs), the Department of Trade and Industry Insurance Directorate, the Building Societies Commission, the Friendly Societies Commission and the Registry of Friendly Societies¹⁰⁵. The purpose of creating a single regulator was to produce a more coherent and cost-effective approach to regulation, and to remove the scope for duplication, gaps and inconsistency that had affected the old system. The above described old regime of capital market regulation in the United Kingdom shares almost all basic features of the present Nigerian capital market regulatory regime. Notable is the fact that the challenges that the UK old regime posed are common with the present regulatory challenges in the Nigerian capital market, which therefore implies a serious need for a positive change.

The FSA acquired its responsibility for supervising banks, listed money market institutions and related clearing houses from the Bank of England, and the regulatory and registration functions from the SROs (including the listing function of the London Stock Exchange). The FSA's assuming all of the listing regulatory functions formerly performed by the LSE has removed the potential for conflict of roles on the part of LSE, particularly in light of pressures to relax listing standards, and has recognised that statutory regulators can better weigh public interest arguments than a profit seeking exchange.¹⁰⁶

Unlike Nigeria and the United States where the stock exchange is responsible for assessing the eligibility of an issuer to be listed whilst the regulator is responsible for information disclosed to the market by the issuer, all responsibilities for primary market regulation in the UK lie with the UK Listing Authority (UKLA), a division of the FSA which is the competent

¹⁰⁵ The powers of all these regulatory agencies were derived from different pieces of legislation, and each had approached its regulatory tasks in its own distinctive way.

¹⁰⁶ See "Regulation of Investment Markets in the United Kingdom", *op cit*.

authority responsible for admission of securities to the official list. Prior to the setting up of the FSA, the LSE was a private limited company, and was the Competent Authority for Listing in the UK. In 2000, the LSE transferred its role as the UK Listing Authority to the FSA and became a public limited company. Notwithstanding the transfer of the listing functions, the Exchange has continued to set its own requirements for companies quoted on its trading boards, including the right to decide whether or not to admit a listed security to trading and to make and enforce its own rules¹⁰⁷.

Kenya

As this paper has examined above, while the United States operates the co-operation model, and the United Kingdom the self-regulation model, Kenya operates the government-led model. By this model, the securities and capital market of Kenya is regulated principally by government forces¹⁰⁸. The Capital Markets Authority (CMA) is a statutory agency charged with the responsibility of regulating the development of an orderly, fair and efficient capital market in Kenya. It licenses and supervises market intermediaries, develops regulations for the market, conducts on-site and off-site market surveillance and enforces compliance, promotes market integrity and plays a critical role in deepening the capital market.¹⁰⁹

Although the Capital Markets Authority Act and the Licensing Regulations recognize the securities exchange and expressly provide for the promotion of self-regulation, the Nairobi Stock Exchange operates under the heavy oversight of the Capital Market Authority. The precursor of government regulation was the Capital Issues Committee established in 1971. Interestingly, the Committee did not fundamentally change the regulatory

¹⁰⁷ Ibid.

¹⁰⁸ The regulatory approach for Kenya's capital markets before the enactment of the Capital Markets Authority Act in 1989 was one of the self-regulatory model. From 1954 to 1971, the Nairobi Securities Exchange was responsible for all regulatory aspects of the securities markets.

¹⁰⁹ Speech delivered by the Chief Executive Officer, capital markets authority, Mrs. Stella Kilonzo - Mbs, during the Official Opening of the Fourth Annual University of Nairobi Open Day at Taifa Hall on April 13, 2012.

architecture except in relation to approval of new issues. Substantive government regulation was institutionalized by the Capital Markets Authority Act, 1989.¹¹⁰

The basic powers of the Nairobi Stock Exchange are embodied in its constitutive documents, the CMA Regulations, Membership and Trading Rules and the Listing Manual. The Capital Markets Act makes no direct reference to the powers. Although the constitutive documents accord the stock exchange an extensive mandate¹¹¹ the objects and powers conferred are exercisable subject to the provisions of the Capital Markets Act and Regulations made under the Act which render them largely ineffectual¹¹². For instance, although the exchange is empowered to promote any other company to facilitate acquisition of property or acquire or hold shares in other companies, the CMA has restricted its shareholding to the Central Depository and Settlement Corporation Ltd (CDSC).¹¹³

Administratively, the securities markets in Kenya fall under the powerful Ministry of Finance (Treasury) which is in turn accountable to the Parliament¹¹⁴. Notably, the ministry exercises overwhelming influence over the CMA which could adversely affect its capacity to discharge its statutory mandate. A panoramic view of the powers of the minister reveals that they are encompassing and are manifested in the appointment, removal and fixing remuneration of members of the Authority and the Capital Markets Tribunal, law making, sources of finance and fees payable

¹¹⁰ See Gakeri, *Op cit*, at 265.

¹¹¹ See the content of the mandate as reproduced and enumerated in Gakeri, *Op cit*.

¹¹² The Nairobi Stock Exchange is empowered to admit new members, approve listing of securities, promulgate and enforce Membership and Listing Rules, undertake real time market surveillance, publish stock prices and index, approve prospectuses and charge for services rendered.

¹¹³ The oversight jurisdiction of the CMA over Kenya's securities markets extends to its relationship with the Central Depository and Settlement Corporation, its affiliate.

¹¹⁴ This appears to be similar to the operational method in the United Kingdom except the fact that there is little or no control of government in the securities and capital market.

to the Authority, prescription of penalties for breach of provisions of the Act and accountability.

Recommendations/ the Way Forward

Having done an overview of the roles of regulatory agencies in the Nigerian Capital Market, this paper briefly recommends on possible steps to address the regulatory challenges to the Nigerian Capital Market.

1. That there should be a single regulator of the capital market vested with all the powers and functions of all other agencies that are stakeholders in regulation of the Nigerian capital market. This is to produce a more coherent and cost-effective approach to regulation, and to remove the scope for duplication, gaps and inconsistency that has affected the present regulatory regime. This has been done in the United States and the United Kingdom respectively and have all produced desirable results. Nigeria should follow suit as its legal system as well as socio-economic background is rooted in the English legal system while the present structure of the SEC was styled after that of the United States of America.
2. The adjudicatory jurisdiction in capital market disputes should be divested of the Securities and Exchange Commission and the Investment and Securities Tribunal as a part of the Commission, as disputes resolved under these institutions having the Commission as a party may not properly reflect the principles of natural justice. This is because what has been considered pertinent for cognitive perception on judicial bias is ‘...that which would give other right thinking persons an impression of bias notwithstanding the judge’s subject impartiality’.¹¹⁵ Persons or entities that have grievances with the Commission will only approach the tribunal because it is the appropriate venue provided by law, but with a

¹¹⁵ See *Onigbede & Ors. v Balogun & Anor.* (2002) FWLR (Pt. 99) 1062 at 1081 SC.

psychologically defeatist attitude. It is recommended that rather than the Federal High Court exercising jurisdiction on capital market disputes, a specialised but regular court severed from the Commission be established.

3. The Securities and Exchange Commission should be properly funded and equipped enough with both modern scientific infrastructure and manpower development so as to enable the staff and the commission be proactive in capital market regulation at the face of the wiles of market operators.
4. In order for the securities and capital market to record geometric progression in Nigeria, there is the need to vest more of the markets regulation to the private sector and only exercise oversight regulatory functions aimed at protecting investors and capital market development. This regulatory approach is intended and designed to be more attuned to the needs of the markets than would be a governmental department.

Conclusion

In any jurisdiction, the law governing the issuance of and trading in securities is a mix of public laws and regulations, requirements of private industry organizations, industry custom and private contractual arrangements. This paper has shown the lag in the execution of regulatory laws and policies in the Nigerian capital market. Possible and actual overlap of regulatory functions between and among regulatory agencies is inevitable if the current state of affairs is to persist. It is in this regard that the paper asserts that a decentralization of regulatory powers would rather give rise to issues of blurred role demarcation. The paper concludes by strongly asserting that the seeming overlap of regulatory roles in the Nigerian capital market as well as issues of capital market development will be a thing of the past, if the recommendations made here are considered for a change.