MINORITY MEMBERS IN PUBLIC COMPANIES IN NIGERIA: WHAT MANNER OF MEMBERSHIP

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Abstract
Shareholders of a Nigerian public company are classified as members of the company. Members in this sense mean that they are part owners of a Nigerian public company. Because ownership carries some rights and responsibilities, this paper discusses the rights and powers of minority members of a Nigerian public company under the Companies and Allied Matters Act (CAMA). The paper argues that the rights of minority members under CAMA are tenuous and did not give the minority members any semblance of ownership. The paper concludes that minority membership in a Nigerian corporation will only be meaningful where CAMA provides for minority protection with special clauses such as all shareholder resolution for some major company decisions. This will provide minority oversight over major corporate decisions and thus, prevent the type of corporate executive fraud that led to the sacking of the management of five Nigerian banks in 2009.

1.0 Introduction

It is a general rule of company law that ownership of shares in a company having share capital qualifies the holder as a member of the company.[1] In other words, shareholding is synonymous with membership. However, companies especially the public companies are exclusively managed by a group called the 'board of directors'.[2] There is a general view amongst corporate law scholars, especially in law and economics literature that the ownership of a company's shares, which qualifies the holder as a member of the company, translates to ownership of the company by the shareholders.[3] This literally means, for example, that a holder of First Bank of Nigeria

[1]See Section 79 Companies & Allied Matters Ac Cap C20 Laws of the Federation of Nigeria 2004 hereinafter called (CAMA). The acronym CAMA will be used to represent the Nigerian Company Act throughout in this paper.
[2] Sections 244 & 63 (3), *id*.
[3]There are, however, very strong views by some corporate law commentators that corporations are persons and as such they cannot be owned like "dogs and wombats". See B. Welling, *Corporate Law in Canada: The Governing Principles*, 3rd edn., (London: Ontario: Scribblers Publishing, 2006), p.593.

Plc or Nestle (Nig.) Plc shares in Nigeria is a part owner of First bank of Nigeria Plc or Nestle (Nig.) Plc, albeit to the value of his equity[4] holding.

This paper considers this a wrong view about the relationship between shareholders and the company in which they hold their shares, particularly with reference to minority shareholders, which is the central theme of this paper. It is acknowledged, however, that shareholders of public corporations[5] generally treat their shares as their property with which they can do what they like.[6] They do not necessarily see the ownership of shares in a company as ownership of the company. Except for new shares first issued by a company, shares are not bought from a company but from the stock exchange. Money paid for the shares do not go to the company but to the owner of the shares. Where shareholders do not like what the directors of the company are doing, rather than try to influence the directors, they sell their shares.[7]

Thus, this paper will interrogate the issue of ownership of the company by shareholders in addition to the central issue, which is the so-called membership of minority members in a public corporation in Nigeria. As a starting point of this interrogation, this paper concedes that the majority may be referred to as members because of their role in management as provided for in the Nigerian Company Act[8] but questions the membership of the minority, which it argues, is abuse of language.

This is because the minority equity holder usually holds very insignificant proportion of a company's shares. He may never attend the company's annual general meeting where he can exercise the only right he has to influence decisions by the company as a shareholder under CAMA – the right to vote[9]. He has no other tangible right under CAMA except those rights under section 300 CAMA, which are labelled exceptions to the rule in *Foss* v *Harbottle.*[10] His shares, the source of his so-called membership are his only property that has reference to the company and they are only relevant on the floor of the stock exchange where shares are bought and sold.

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[4]Shares and equity will be used interchangeably throughout in this paper. They all refer to company shares.

[5]Corporation and company will be used interchangeably throughout in this paper. They both refer to a business corporation and public corporation or public company in this paper means public quoted company.

[6]See D. French *et al*., *Company Law*, 26th edn., (Oxford: Oxford University Press, 2009), p.426.

[7] D French *et al*, *op cit*., p.427. It is necessary to note that shares are bought from two sources – primary and secondary markets. The primary market for shares is the company itself, that is new shares purchased from the company on first issue while the stock markets represent the secondary market – the market where shares are bought and sold.

[8]See section 63 (5) CAMA.

[9]*Ibid*, ss. 81 & 114 CAMA for right of a shareholder to attend the general meeting of a company and to vote, and section 116 CAMA prohibits non-voting shares.

[10](1843) 2 Hare 461. It is the contention in this paper that those exceptions to this rule did not envisage the modern large public corporation with very diverse shareholding.

To discuss the issues identified above, this paper is divided into five parts, including this introduction. Part II will review expert views on ownership and control of a public corporation. Part III will discuss the rights and powers of minority members at common law and under the CAMA while Part IV will review the rights of minority members and company administration. Part V the concluding part will review the discussions in the preceding parts and argue that the principle of majority rule makes it impossible for a minority member to enjoy the protections provided for minority members under CAMA.

2.0 Power Sharing In A Nigerian Public Company

Two groups are vested with management and supervisory or control powers in a Nigerian company under CAMA – the company directors and members in general meeting. The board of directors is vested with the general power to manage the affairs of the company[11] and they are obligated to manage the company in the interest of the company and the members as a whole.[12] The members on the other hand have the powers of oversight and control over the board,[13] however, not as to how the board should manage the company[14] but the powers to act where the board fails to act[15] and to dismiss the board[16] if they find the activities of the board inconsistent with their interest.

These two groups – the board of directors and members in general meeting are classified corporate 'insiders' by corporate law scholarship.[17] The reason they are so called has to do with their insider knowledge and control of the corporations' wealth and activities. Corporate law scholarship[18] and CAMA[19] make a difference of these corporate 'insiders' and another group – the minority members and the creditor class, classified corporate 'outsiders'[20]. The bifurcation of the corporate stakeholders[21] into corporate constituencies of corporate 'insiders' and corporate 'outsiders' with

[11]Sections 244 & 63 (3) CAMA.
[12]Section 283 (1) *id*.
[13]See particularly sections 63 (5) & 262 *id*.
[14]*Shaw (John) & Sons (Salford) Ltd v Shaw* (1935) 2 QB 113; 153 L. T. 245.
[15]Section 63 (5), CAMA.
[16]Section 262, *id*.
[17] R. R. Kraakman *et al*., *The Anatomy of Corporate Law: A Comparative and Functional Approach,* 2nd edn., (New York: Oxford University Press, 2009) p.35.
[18]*Ibid.*
[19]Section 300 CAMA for minority members protection and the protection for creditors protection, especially the provisions with regards to winding up generally in Part XV, CAMA.
[20]R. R. Kraakman *et alop cit*.
[21] "Stakeholders" is the word used by most of corporate law scholars to identify all the parties involved in or are affected by the activities of the corporation, such as the board of directors, the members (majority and minority members), trade creditors, the employees and others such as the local communities within the location of the corporation. See French *et al*, *op cit*., p.32.

minority members designated 'outsiders' raises serious questions about the position of minority members as members of a Nigerian public corporation.

As noted earlier, corporate managers[22] manage the company for the interest of the company and all its shareholders.[23] This statutory duty of a director does not make any distinction between majority and minority members as all the members are classified members. However, in a public company, shareholders normally take decisions by a majority,[24] including decisions to sack the board, which can be achieved by a simple majority.[25] This means that the power to control management as contained in the Act belongs to the majority. The implication is that majority who have the controlling shares are the ones that have the actual control over the board. A situation where the voice of the minority members may not matter obviously puts the minority members at a risk because the majority as humans may behave opportunistically towards the other constituencies such as the minority members.

The function of corporate law according to Kraakman *et al*. is,

> first, it establishes the structure of the corporate form as well as ancillary housekeeping rules necessary to support this structure; second, it attempts to control conflicts of interest among corporate constituencies, including those between corporate 'insiders', such as controlling shareholders and top managers, and 'outsiders', such as minority shareholders or creditors.[26]

The second function of corporate law as identified by Kraakman *et al*. above is the main issue for this paper. We identify the constituencies involved in a Nigerian corporation as, shareholders, directors, corporate creditors, employees and local communities within the environment where the corporation is located. These constituencies have been classified by current scholarship as stakeholders because of either their involvement in the corporation or the effect of the activities of the corporation on them.[27]

However, there is one constituency classified by current corporate law scholarship[28] and the Act,[29] which did not feature in the list of stakeholders above – the minority members. The fact that this group did not feature as a distinct group amongst the constituencies identified above even though they are specially identified by corporate

[22]Board of directors, directors, and corporate managers will be used interchangeably throughout in this paper. They are used to refer to the board of directors.
[23]Section 283 (1), CAMA.
[24]P. L. Davies, *Gower and Davies' Principles of Modern Company Law,* 7th ed., (London: Sweet & Maxwell; 2003) p. 481.
[25]See section 262 CAMA.
[26]See for example, Kraakman *et al.,op cit*., p.35.
[27] Christine A. Mallin, *Corporate Governance*, 5th ed., (Oxford: Oxford University Press 2016) 73-4.
[28]See Kraakman *et al*., *op cit*., p.35.
[29]See section 300, CAMA.

law scholarship and the CAMA provides the basis to question their membership in a Nigerian public corporation. To be clear, minority members are members of a Nigerian public corporation. They are qualified to be so called because they hold the shares of the company and they are registered in the register of members.[30] Therefore, the controlling powers of the majority[31] and the compartmentalization of minority members as a constituency different from the shareholders as a class under the CAMA calls to question the membership of minority members in a Nigerian public corporation.

It is important to note here that the conflicts that corporate law controls are what economists call 'agency problem' or 'principal agent-problem'.[32] Such conflicts arise where those in charge of the corporation, whether as the board of directors or controlling shareholders act to the detriment of other constituent members of the corporation, such as minority shareholders[33] or other non-shareholder constituencies, such as corporate creditors.[34]

Even though the power to manage a Nigerian public company is shared between the board of directors and the members in general meeting, the power for the day-to-day running of the company is vested in the board on whom CAMA places a duty to manage the company in the interest of the company and that of all the shareholders.[35] It is how to ensure that the board discharges this duty of managing the company faithfully for the interest of the company and all the shareholders that is the rub in the matter. Supervising the board of a Nigerian public company is the duty of the members in general meeting. As will be discussed later on, the controlling shareholders usually have access to management and as such are able to gain sufficient insight into corporate activities. Minority members on the other hand will normally wait for the annual general meeting to review the activities of the board.

[30] Section, 79, *id*.

[31]Members decision is always by a majority, see, forexample, Section 262 which prescribes ordinary resolution for the removal of e director. See also Section 233 CAMA for the definition of ordinary and special resolution.

[32]This agency problem arises whenever the welfare of one party termed the 'principal' (in this case minority members and other non-shareholder constituencies, such as corporate creditors) depends upon actions taken by another party, termed the 'agent' (in this case the corporate managers and controlling shareholders). See Kraakman *et al*., *op cit*., p35.

[33]Members and shareholders will be used interchangeably throughout in this paper to represent the minority members of a Nigerian public corporation.

[34]There are different ways that the agency problem may arise amongst the corporate stakeholders in a business corporations which is beyond the scope of this paper. For a fuller and more detailed discussions on the agency problems inside a corporation, the reader is refered to Kraakman *et al*., note 17 pp35-37.

[35]See generally Sections 279-283 CAMA.

This paper argues that one single annual general meeting of members in one financial year[36] is insufficient to satisfactorily review the activities of the board in one year.

Apart from the members in general meeting, there are other corporate insiders whose duty is to ensure that the board does not engage in opportunistic behaviour – non-executive directors and members of the audit committee. The problem with these two bodies is that CAMA did not provide for them as part of the administration of a Nigerian public company. For example, there is no express provision under CAMA for non-executive[37] directors, yet under the provisions for the duty of care and skill,[38] CAMA provides that: "the same standard of care in relation to a director's duties to the company shall be required for both executive and non-executive directors".[39] Without defining the office and duty non-executive directors, it remains to be seen how their duty of care is to be measured. Another reference to non-executive directors under CAMA, is perhaps the provisions in section 244, that: "in favour of any person dealing with the company there shall be a rebuttable presumption that all persons who are described by the company as directors, whether as executive directors or otherwise, have been duly appointed".[40] The duties of executive directors are clear under CAMA[41] therefore, the two subsections[42] are obvious cases of inelegant drafting, a source of confusion, which does nothing to help the minority members and other non-shareholder constituencies that the office of non-executive directors is supposed to protect.

The audit committee on the order hand has a function under CAMA. The objective and functions of the audit committee as provided in section 359 (6)[43] are intended to protect the company and the shareholders' as a class against the opportunism of corporate insiders rather than to protect the minority members. However, the powers of appointment and control of the audit committee as with all the powers of control

[36] Apart from the statutory meeting, the annual general meeting is the only meeting mandated to be held by members each year, the other meetings such as extraordinary meetings is to be requisitioned, see ss. 211-215 CAMA.

[37] Nigeria adopts a non-legislative method of providing for non-executive directors in Nigeria's public companies. It is provided for in the 2011 Securities & Exchange Commission's Corporate Governance Code for Public Companies. This is another aspect of our corporate governance system that is borrowed from the United Kingdom. See the U. K's Combined Code.

[38] See section 282 CAMA.

[39] Section 282 (4), *id.*

[40] Section 244 (2), *id.*

[41] Section 279, *id*.

[42] Sections 282 (4) and 244 (2), *id*.

[43] CAMA provides for the audit committee in chapter 2, which covers auditors. Section 359 (3), CAMA provides for the establishment of audit committee which "shall consist of an equal number of directors and representatives of shareholders of the company...". The objectives and functions of the committee are provided for in (6) (a) –(f), one of which is that the committee shall "keep under review the effectiveness of the company's system of accounting and internal control".

under CAMA, is shared between the board and the majority of members.[44] This effectively puts the audit committee in the hands of the guardians of the company without reference to minority members. Therefore, the non-executive directors and audit committee of a Nigerian public company do not represent the minority members. The implication is that we need to look at other provisions of CAMA to determine the membership status with respect to the rights of minority members of a Nigerian public company.

It is important to note that shareholding in a Nigerian public corporation is diverse. This is the hallmark of the stock market system prevalent in the common law economic jurisdictions.[45] CAMA is based mainly on the United Kingdom's 1985 Companies Act.[46] The failure of the economies of the major common law economies in the early 1990's was attributed in the main to the misbehaviour of Wall Street,[47] which is the result of the inefficiency of the stock market system in the control of corporate insiders.[48] The emergence of institutional investors, such as pension funds and insurance companies was considered as a development that helped to obviate the monitoring problems of the stock market system.[49]

This stock market system is the corporate governance system in Nigeria – large business corporations with strong management and diverse membership. Like what obtains in the leading common law nations, the Nigerian corporations also have large block-holders (majority) such as institutional investors[50] and other major members with special class shares.[51] These members with majority shares are the members who can reach the management of a Nigerian corporation because they are the ones with the power to change management with their votes. They are the ones that control the corporation as members. It is to prevent the misuse of majority powers that the CAMA provided for the protection of minority in the first place.[52] This is because the majority are likely to look after their own interests rather than work for the interest of the minority.

[44] See generally chapter 2 CAMA.
[45] R. La Porta *et al*., "Corporate Ownership Around the World" *The Journal of Finance* Vol. 54 No. 2 (April 1999) pp. 471-519, p.473.
[46]See M. O. Sofowora, *Modern Nigerian Company Law*, 2nd edn., (Lagos: Soft Associates, 2002) p.33.
[47] Louis Lowenstein, *Sense and Nonsense in Corporate Governance*, (Reading: Addison-Wesley Publishing Company, 1991), p.211
[48]Lowenstein above note 47.
[49] P. L. Davies, "Institutional Investors: A U. K. View" 57 *Brook L. R* 129 (1991-1992) pp.139-40
[50] Just recently institutional investors, especially pension funds have started to acquires shares in Nigerian public companies.
[51] Founders shares and preference shares.
[52]Section 300, CAMA.

CAMA provides for different classes of shares – ordinary shares,[53] preference shares[54] and founders or deferred shares.[55] These different classes of shares have different rights, including voting rights attached to them. For example, founders' shares are usually reserved for the founders of the company. Holders of founders' shares have been identified as true residual claimants because they take after ordinary shareholders have taken which leaves them with the surplus and a possible larger share of the profits or surplus from the assets.[56] Founders' shares are usually cheaper than ordinary shares and may give the holder more votes. Preference shares on the other hand give special rights to the holder, including the right to more than one vote per share.[57] The share strength of members with these two classes of shares puts them in the position of insiders unlike most ordinary shareholders.

As noted, shareholders normally take their decisions by a majority. It follows therefore, that there may be shareholders whose opinions will never prevail and this may happen regularly if their opinions are at variance with those of the majority.[58] The majority shareholders hold larger blocks and it is easier for them to reach other block-holders and be able to achieve the majority required for major corporate decisions. This inevitably gives them control over the board of directors. A board of directors with the knowledge of the existence of a simple majority that may be able to determine its continued stay in office is most likely to take the majority members into confidence in their board decisions. Most minority members on the other hand invest in companies for the potential profit without the capacity or any intention to participate in management.[59] They mostly hold ordinary shares. Their membership is always so dispersed that collective action required to change the policies of management thought to be ineffective may not be worth the while for the minority members because the cost of such efforts will outweigh the benefits.[60]

Where the minority shareholders cannot directly monitor management as indicated above because of their inability to act collectively, the only other avenue where they

[53]Ordinary shares: these shares do not attract any special rights and they carry no fixed rate of dividend or interest. They bear the major financial risk of the company and are, therefore, often the "equity shares" of the company. This is the type of shares usually subscribed by the minority shareholders.
[54] Preference shares: See section 567, CAMA. Preference shares may in certain circumstances carry the right to more than one vote per share, Section 143 (1), CAMA.
[55] Founders or deferred shares: They are called deferred shares because payment of dividend and return of capital to the holders of such shares are deferred until payment has been made in respect of other classes of shares. They are usually held by the founders of the company.
[56]See J. O. Orojo, *Company Law and Practice in Nigeria* 5th edn., (Durban: Lexis Nexis, 2008), p.128.
[57] Section 143 (1), CAMA.
[58] See P. L. Davies, *op cit*., p.481.
[59] S. Griffin, *Company Law: Fundamental Principles,* 4th edn., (Essex: Pearson Education Limited, 2006), p.403.
[60]P. L. Davies, *op cit*., p.338.

can exercise their rights as members is at the annual general meeting (AGM).[61] This has its own problems too because the decisions at AGM depend on majority of members otherwise called shareholder democracy, which has been described as democracy of shares rather than of shareholders because of the voting rights attached to the different classes of shares.[62] It is the opinion of some corporate law scholars that AGMs are not very successful in terms of providing an opportunity for members to discuss company business for the reasons of, first, dispersed membership, which makes it impracticable for members to attend AGM. Second, the larger part of a listed company's shares are held by majority shareholders, such as institutional investors[63] and in the case of Nigeria, in addition to institutional investors, they are held as founders shares and preference shares with special rights. These groups normally rely on personal discussions with the company's directors to be informed on the progress in the company and they use proxies usually appointed on their behalf by the directors with instructions on how to vote so that their personal attendance at AGM becomes unnecessary.[64]

In view of the above, the powers in a Nigerian listed company, which are shared between members and the board of directors, are in fact shared between the majority and the board of directors. The minority on the other hand are mostly unable to get the majority required to take major policy decisions. It is for this reason that CAMA provides especially for the protection of the minority members appropriately, in the opinion of this paper, classified as corporate outsiders by corporate law scholars.[65]

3.0 Statutory Protections For and Powers Of Minority Members

One of the powers inherent in ownership is the right of the owner to protect what is owned against interference and abuse. As discussed earlier, subscription to a company's shares gives the shareholder membership right[66] of a Nigerian company. This ordinarily should give the shareholder the right to protect the company and its property against any wrong. However, the ownership of a company is a different matter. The company is a legal person different and distinct from the members. It is not capable of being owned like yam barns and dogs.[67] As a legal person created by law, it has powers under the law to sue to remedy any wrong done to it and, it can defend any suit in its own name.[68] There is another aspect to a company's legal

[61]Annual general meeting is compulsory for every company in Nigeria, especially the listed companies. For the meetings, procedure and who may attend, see sections 81, 215, 219 & 224 CAMA. However, the acronym AGM will be used to represent annual general meeting throughout in this paper.
[62]Davies, above note 24 p.328.
[63] D. French *et al*., *op cit*., p.384.
[64]*Ibid*.
[65]R. R. Kraakman *et al*., *op cit*., p.35.
[66] Section 99, CAMA.
[67]This coinage is borrowed from Bruce Welling, *op cit.*, p.593.
[68]Sections 37, 38 & 299, CAMA.

personality – the fact that a company has no hands, mind of its own, and can only act through some human organs – the board of directors and members in general meeting. Much of the functions of the company are delegated to its board of directors,[69] the eventual power and control of the company rests with those shareholders who can command a majority of the votes.[70] The implication is that any group of members who can control three-quarters of the votes would have a complete control of the company, and a simple majority of the votes would give considerable influence to any group of members, such as control of appointments and dismissal of the board of directors.[71]

The power to manage the affairs of the company vested in the board and, the power of control of the majority, may not always be exercised in the interest of the company or the interest of all the members by the board and the majority.[72] Where the powers are not exercised properly in the interest of the company by those in charge of its affairs members are generally precluded from seeking to remedy the wrong occasioned by such improper conduct. The reason for this position is that the company as a legal person is the only person that can complain of any wrong against it. This principle was established since 1843 in the case of *Foss v Harbottle*[73] and it is codified in the CAMA.[74]

As noted, the guardianship of the company's interest is in the hands of the directors and majority shareholders. Therefore, where any wrong is done to the company or its property, it is only the board or the majority that can decide whether to seek redress or not. A member or a minority group does not have the *locus* to commence legal action on behalf of the company even where the guardians of the company's affairs perpetrated the abuse.[75] Because a strict adherence to this principle may become a shield for those in charge to perpetrate fraud against the company and minority members,[76] the courts have developed exceptions to this rule.[77] These exceptions which are contained in the CAMA[78] vests aggrieved minority members a right of action where their interest is personally affected or where if the company is the affected party, the authority to seek redress where those in charge failed to act in the best interest of the company.

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[69]See also sections 244 and 63 (3), *id*.
[70] D. Keenan, *Smith & Keenan Company Law for Students*, 9th edn., (London: Pitman Publishing; 1993,) p.264; see also section 233, CAMA.
[71]See, for example, the power to sack the board by simple majority, section 262, CAMA.
[72] See *Menier* v *Hooper's Telegraph Works Ltd* (1874) 9 Ch App 350.
[73](1843) 2 Hare 461.
[74]Section 299, CAMA.
[75]French *et al.*, above note 7 p.548.
[76] See Sofowora, above note 46 p.478
[77] See *Cooks* v *Deeks* (1916) A.C 554; 114 L.T 636. See also S. Griffin above note 59 p.419
[78]Section 300, CAMA.

(i) Exceptions To The Rule In *Foss v Harbottle*

There are circumstances where a member is permitted to make application to the court for an order of injunction or declaration to restrain the company, firstly, from any transaction, which is illegal or *ultra vires*.[79] This is a statutory power for a member, especially a minority member to question transaction undertaken by the controllers that is outside the powers of the company.[80] Secondly, the company is prohibited from purporting to do by ordinary resolution any act which by its constitution[81] or the Act, is required to be done by special resolution.[82] Thirdly, an individual member has powers to restrain the company from any act likely to affect his individual right as a member.[83]

Fourthly, a member has a right of action where fraud is committed on either the company or on the minority shareholders and, the directors fail to take appropriate action to redress the wrong done.[84] This relates to circumstances where the wrong doers are in charge.[85] Fifthly, where a company meeting cannot be called in time to be of practical use in redressing the wrong done to the company or the minority shareholders[86] and sixthly, where directors are likely to derive a benefit or profit from their negligence or from the breach of duty,[87] a member will have a right of action.

(ii) The Type of Actions Available To A Minority Member Under These Exceptions

There are three types of actions available to a minority member for the enforcement of his rights under Section 300 of CAMA, otherwise called the exceptions to the rule in *Foss v Harbottle* – personal action, representative action and derivative action.

1] Personal Action: A personal action may be commenced by a member to enforce a right due to him personally where such rights have been abused by an act deemed to be that of the company.[88] An example of a personal action would be where a shareholder sought to commence an action to enforce the terms of a contractual obligation with the company.[89]

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[79]Section 300 (a), *id*.
[80] M. Sofowora, *op cit*., p.470.
[81]The constitution of the company is the memorandum and articles of association. See J. E. O. Abugu, Principles of Corporate Law in Nigeria, (Lagos: MIJ Professional Publishers 2014) 221.
[82]Section 300 (b), CAMA.
[83]Section 300 (c), *id*. See also, *Pender v Lushington*, (1877) 6 Ch 70.
[84]Section 300 (d), *id*. See also *Daniels v Daniels*, (1978) 2 All ER 89.
[85]*Cook v Deeks* (1916) A.C 554; 114 L.T 636.
[86]Section 300 (e), CAMA.
[87]Section 300 (f,) *id*.
[88]See section 301 (1), CAMA.
[89] See S. Griffin, *op cit*., p.411.

2] Representative Action: Where an individual member's right has been infringed and the infringement affects other members in the company, the appropriate action will be a representative action. By a representative action, a member will be suing the company on behalf of himself and other aggrieved members.[90]
3] Derivative Action: A derivative action may be commenced by application to "the court for leave to bring an action in the name or on behalf of a company or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company".[91] A derivative action may lie where a director or other officer of the company may be in breach of his duties or act without due authority and, as such commits a wrong against the company. However, the commencement of a derivative action is subject to the applicant satisfying the conditions imposed by CAMA[92] and the discretion of the court.[93]

(iii) Relief on The Grounds of Unfairly Prejudicial And Oppressive Conduct
Part X of CAMA[94] provides generally for the protection against acts that may be illegal or oppressive against the vulnerable groups, such as the minority members. The provisions for minority protection[95]are further strengthened by the provisions that vest power on members to petition the courts for relief because "the affairs of the company are being conducted in an illegal or oppressive manner.[96] The rights under this section[97]are available to a member, an officer of the company, a creditor or the Corporate Affairs Commission (CAC)[98] who can show that the affairs of the company are being conducted in an illegal and oppressive manner[99] and the petition must be well founded to warrant the court's intervention.[100] The courts have wide-ranging powers under CAMA to make consequential orders to redress the alleged prejudicial and oppressive conducts.[101]

As regards investigation, CAMA provides that twenty-five per cent minority "in the case of a company having share capital"[102] may request the CAC, based on evidence

[90]Section 301 (2), CAMA.
[91]Section 303 (1) *id*.
[92]Section 300 (2), *id.*
[93]Section 304 *id*.
[94]See generally sections 300-330, *id*.
[95]Section 300, CAMA.
[96]Section 310 & 311 (1), *id.*
[97]Section 311, *id*.
[98]Section 310, *id*. The Corporate Affairs Commission (CAC) is the regulatory body for companies in Nigeria.
[99]Section 311 (2), *id*.
[100]Section 312 (1), *id.*
[101] See the powers of the court, Section 312, *id*.
[102]Section 314 (2), *id.*

submitted[103] to order investigation into the company's affairs.[104] Where the CAC orders such investigation, it will appoint inspector for that purpose.[105] CAC may also order investigation into the affairs of the company "if the court by order declares that its affairs ought to be investigated".[106] The investigating inspectors appointed under this section have wide-ranging powers under the Act[107] to call for director's accounts and order the production of documents amongst others. Any obstruction of inspectors is "to be treated as contempt of court".[108] Where the company or officers of the company are indicted in the report of the inspectors, the CAC or the Attorney General of the Federation is empowered under CAMA to commence civil or criminal actions respectively against the company or the members.[109]

All the sections of the CAMA dedicated to the protection of the minority shows a clear intention to protect the minority members under the Act. It is the contention in this paper that the protection for minority members as provided under CAMA is an admission that the membership of minority members in a Nigerian public corporation is indeed tenuous. This paper argues that the 'law on the books'[110] is one thing but its application is a practical matter. Therefore, the ability of the minority members to realise the benefits offered by the protections in the CAMA will depend on other provisions in the Act and the need to ensure the success of the company as a way of preserving corporate and national wealth.

4.0 A Critique Of The Statutory Powers And Protection For Minority Members

The principle of majority rule is well established and, emphasized in the matter of litigation by the rule in *Foss v Harbottle.*[111] It is in view of this principle, that this paper questions the membership of minority members in a Nigerian public company. The obvious precarious position of minority members of a Nigerian public company is responsible for the exceptions to the majority rule principle otherwise called exceptions to the rule in *Foss*, codified in the CAMA.[112] Apart from the exceptions to the rule in *Foss*, there are other provisions that are seemingly protective of members, especially minority members. Some of these provisions are labelled 'relief on the

[103]Section 314 (3), *id*.
[104]See generally section 314, *id*.
[105]Section 314 (1) CAMA.
[106]Section 315, *id*.
[107]See sections 316-318, *id*.
[108]Section 319, *id*.
[109]Section 322, *id*.
[110]This coinage is borrowed from John Jr. Coffee, "Privatization and Corporate Governance: Lessons From Securities Market Failures" *J. Corp. L.* 29 (1999-2000) 1 p.2.
[111]Above note 73.
[112]Section 300, CAMA.

grounds of unfairly prejudicial and oppressive conduct'.[113] However, whether these protections and powers provided for the minority members under CAMA actually confer any strength on the membership of the minority members is another matter.

CAMA, for example, provides that a member shall have a right to seek an injunction or a declaration in court to restrain the company on any act or omission affecting the applicant's right as a member.[114] It has been argued that this right is not really an exception to the rule in *Foss*.[115] In the case of *Pender v Lushington*,[116] which is usually associated with this provision,[117] the court dealt with the attempted removal of the plaintiff (shareholders) right to vote. The view in this paper is that this provision does not enhance the membership of a minority member because the usefulness of his votes is called to question where such vote is at variance with the view of the majority, which will prevail in all circumstances.

Another protection for the minority members is their right to bring derivative action in the name of the company where fraud is committed against the company and directors fail to take appropriate action to redress the wrong.[118] The problem with this too is that in a successful action against the wrongdoers, where fraud is committed against the company it is the company, which takes the direct benefit of the damages recovered.[119] There is no personal advantage for the minority member because, even where the fraud of the majority results in a fall in the value of his shares, which is a personal loss to him, such losses have been held to be irrecoverable.[120]

Where the company enters a transaction, which is illegal or *ultra vires*, a member may have a right of action to restrain the company from entering into such an illegal or *ultra vires* transaction.[121] This also has its shortcomings because the company may ratify such a transaction by a super majority (special) resolution. This is also the case where the company does by ordinary resolution what is required under CAMA to be done by special resolution.[122] The courts are usually reluctant to make orders on matters touching or irregularity because the company is able by a majority to ratify

[113]Sections 310-313 CAMA. See also the provisions for the investigation of companies and their affairs by inspectors appointed by the CAC and the consequential powers of CAC and the Attorney General of the Federation to act on the reports of investigation contained in sections 314-329 CAMA.
[114]Section 300 (c), CAMA.
[115]See D. Keenan, *op cit*., p.265.
[116] (1877) 6 CH 70.
[117]See M. Sofowora, *op cit*., p.479.
[118]Section 300 (d), CAMA.
[119] See S. Griffin, *op cit*., p.412.
[120]*Prudential Assurance Co Ltd* v *Newman Industries* (1982) 1 All ER 354.
[121]Section 300 (a), CAMA.
[122]Section 300 (b), *id*.

such irregularity.[123] Besides, the significance of this right is severely limited because it is rare for shareholders, especially minority shareholders to be aware of proposed illegal or ultra vires act in time to seek an injunction.[124]

We noted that CAMA provides for relief on the grounds of unfairly prejudicial and oppressive conduct[125] and for the investigation of companies and their affairs.[126] A member has power under CAMA to bring application to the court for an order to restrain the controllers of the company from conducting the affairs of the company in an illegal or oppressive manner.[127] Where the application is successful, the court has powers to make orders regulating the affairs of the company, including the power to wind up the company.[128] However, the power to bring application under this provision is not exclusive to the minority members, as it is open to all stakeholders, that is all those with interest in the company or against the company, such as creditors, officers, directors, and even the CAC.[129] Generally, the problem with realising this kind of right is that a minority member will have to be aware of the affairs of the company for him to know that it is conducted in an illegal and oppressive manner. A minority member who has no direct access to the company has no way of knowing how the affairs of the company are conducted, and thus take advantage of this provision.

Members have powers under s 314 of CAMA to petition the CAC to investigate the affairs of the company. However, it is argued that the provisions for "other investigations of the company" under s 315, may be more useful to minority members than the power under s 314. This is because of the requirement of twenty-five per cent threshold of the votes of the members holding one class of shares to petition under Section 314 raises the issue of how the minority members can organize their members to achieve the twenty-five percent of their class vote to be able to take advantage of this provision. Apart from these problems identified above, there is also a problem with the outcome of the investigations. For example, where a civil proceeding is required to be commenced against the persons investigated in the public interest,[130] or any person is guilty of an offence and thus criminally liable, the co-operation of the officers of the company is required to proceed in both cases.[131] This co-operation may be difficult to achieve where those in charge acted in concert with the wrongdoers.

[123]*Browne* v *La Trinidad* (1887) 37 ChD 1.
[124] Brenda Hannigan, Company Law, 4th ed., (Oxford: Oxford University Press 2016) 556.
[125]Sections 310-319 CAMA.
[126]Sections 314-329, *id*.
[127]Section 311 (1) *id*.
[128]See generally section 312, *id*.
[129]Section 310 (1), *id*.
[130]Section 321, CAMA.
[131]Section 322, *id*.

It is obvious from the above that all the powers granted the minority members under CAMA would require the co-operation of the officers of the company to realise. It is doubtful that a minority member can afford the time and expense required to remedy any wrong committed against the company or against the member or cause an investigation into the companies' affairs with all the bottlenecks identified above.

5.0 Conclusion

CAMA grants the power of control of a Nigerian company to the members in general meeting without any distinction. The same CAMA provides for some special protection for the minority members as a class. This paper contends that the special protection granted minority members under CAMA is a confirmation that the minority members are outside those for whom control is granted in general meeting. The control in general meeting is itself qualified – as majority of the members in general meeting because CAMA has no provision for all shareholder resolution.

In view of the above, commentators in this field are right to classify minority members with other non-shareholder constituencies such as corporate creditors as corporate 'outsiders' and the majority members and the board of directors as corporate 'insiders'. It is obvious from all the discussions above, that insider knowledge will be required to trigger all the rights specially granted to the minority members under CAMA such as the rights to requisition an investigation of the company and the right to apply to the court for relief on the grounds that the affairs of the company are being conducted in an illegal and oppressive manner. This insider knowledge is, however, unavailable to the Nigerian minority member of a public company.

If all the members' resolutions in a public company depends on the majority and insider knowledge is required to know when to take actions about the other rights granted minority members, it is the contention in this paper that ascribing membership to a minority member of a Nigerian public company is an abuse of language. They are shareholders, yes. The shares they own are their property not the company. Those shares they hold have no direct relevance to the company, as they are valuable only on the floor of the Nigerian Stock Exchange where shares are bought and sold. The minority member has no access, as a right of membership, to the board of directors or the headquarters of the company where he is supposedly a member. Therefore, the minority members' classification as shareholders is right but it is a wrong classification to call them members of the company because the rights of the minority under the Act are circumscribed by the majority rule.

This paper concludes that a situation where majority takes all major decisions excludes the minority and suggests that the classification of minority members as members of a Nigerian public company will be more meaningful if their votes count in some major company's decisions. However, for their votes to count, it will require

a review of the current corporate legal regime to include special clauses, such as all shareholder resolutions for some major company decisions. This will bring about greater minority participation in corporate decision-making. Where all shareholder vote is mandatory for a particular company decision, the majority and other controlling members of a Nigerian company are more likely to take the interest of the minority and indeed all 'outsider' constituents into considerations in the way they manage the affairs of the company.

The meaningful participation of minority members in corporate decision-making will promote minority oversight. This will ultimately provide a better protection for the minority members than the mostly unrealisable minority members' protection provisions under section 300 of CAMA, thus making minority members of Nigerian company members indeed. Besides minority protection, it will also help to prevent the type of executive fraud that led to the sacking of the management of five Nigerian banks in 2009 thereby ensuring the success of Nigerian companies and preserving corporate and national wealth.