

**CORPORATE GOVERNANCE FUNCTION OF COMPANY LAW: COMMON, CIVIL
AND ISLAMIC LAWS BOARD STRUCTURES IN PERSPECTIVE**

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ABSTRACT

This article is a conceptual legal research that uses analytical and comparative methods of investigation. The concept of corporation as a legal category and narrower legal categories such as business corporation and company law including the functions of the law have been discussed to provide some context and background to the study. The objective is to show how agency problem which company law addresses as one of its functions is approached under three different board structures rooted in varying legal tradition and culture. The research finds that company law performs two principal functions; establishing the corporate form function and governance of the established company function. While companies are established to have common structure across jurisdictions and legal tradition and culture, their governance pattern may vary according to the legal philosophy of jurisdiction concerned. The conclusion is that there is no one-size-fits-all solution to the corporate governance function of company law in addressing agency problem.

1.0 Introduction

The disciplines of “comparative law” in general and “comparative company law” in particular are natural companions to the globalization of social, political and economic activity...Just as the merchants who engaged in the earliest forms of international trade developed a commercial law that was trans-jurisdictional so today are merchants and their counsel often at the forefront of comparative legal activity.¹

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¹David C. Donald, *Approaching Comparative Company Law*, Institute for Law and Finance, Working Paper Series No. 77, 02/2008, p.2.

David C. Donald

The above statement brings to light the historical role of merchants and their lawyers in the development of comparative law in globalization process, especially in the area of comparative company law that encompasses comparative corporate governance. The modern companies evolved and developed from the commercial activities of merchants aided by lawyers and company law emerged as an offshoot of commercial law to regulate, in the main, the creation and governance of companies as the juristic personalities or entities used as a medium of doing business. The history of the modern companies could be traced to the local commercial activities of members of the guild system in England which developed into international trade conducted by multi-national corporations.² This is as a result of the increased contact of the English merchants with their counterparts and other peoples in foreign territories for commercial purposes and also due to colonization and the unprecedented technological improvement making the commercial world a global one-stop shop.

It will perhaps not be an exaggeration to assert that there is no human interaction that brings in contact and binds peoples from different backgrounds more than international trade. International trade has been facilitated ever since the advent of a business corporation or company as it is referred to in the United Kingdom or corporation as it is called in the United States. Indeed, it was the exigencies of international trade that led to the emergence of business corporations as flexible and adaptable mediums of doing business and as such their basic characteristics and problems are international and universal in nature and not specific and jurisdiction-bound.

² Yusuf, A. O. (2012), *An Analysis of the Nigerian Corporate Governance Framework: The Legal Relationship between the Directors, Shareholders and Stakeholders* (PhD thesis submitted to the International Islamic University Malaysia), p. 30-32.

It is against this background that this article seeks to explore the commonality in the structure of business corporations and their governance to address agency problems as the common problems facing them across jurisdictions and legal tradition and culture. Corporate Governance models rooted in the shariah, common and civil legal culture and tradition have been explored with examples of their varying board structures to illustrate how similar agency problems and costs associated with business corporations can be differently approached according to the tradition and culture underlying a particular legal system and order.

2.0 The Concept of Corporation

A discussion on companies carrying on business as legal entities will not be complete without reference to the concept of corporation especially legal personality as one of its essential characteristics. By the concept of legal personality, the distinction between legal persons and other beings lies in the capacity of the legal persons to acquire rights and bear duties. This signifies the capacity to do or be subjected to certain things in their names including to own property, enter into contracts, appoint or be appointed as agents, be civilly or criminally liable and sue or be sued as distinct persons.³ Things including animals and inanimate like a piece of land and clothes are not legal persons being objects and not subjects of rights and duties. Legal personality should not be differentiated from human personality. A human being as a 'natural person' is not necessarily a legal person⁴ possessing legal personality under some legal systems. Conversely and by the

³ See Emiola, A. E., *Corporation Law* (Ogbomosho, Nigeria: Emiola (Publishers) Ltd., 2005), 14-19.

⁴ For instance slaves though natural persons are not regarded as legal persons in some cultures and legal systems. The court affirmed in *Sanusi Alaka v. Jinadu Alaka* (1904) 1 N.L.R. 55 to the effect that a slave is the property of his master. Begho, a judge notes that "The slave, in various systems of law all over the world, was not only 'rightless' at one time or the other but 'duteless' as well...He could not take action for wrongs done to his person or property as that was for his master to do." See Begho, M. A., *Law and Culture in the Roman and Nigerian World* (Benin City: Midwest Newspaper Corporation, 1971) p. 75. Slavery has been abolished in most modern countries in their provisions of law relating to human rights fashioned on international and regional human rights provisions. Section 34(1)(b) of the Constitution of the Federal Republic of Nigeria, 1999 provides that "no person shall be held in slavery

principle of attribution, legal personality may be attributed to entities other than individual human beings (known as juristic or artificial persons) which are considered to have a fictional will like a group of human beings, a fund, an office or an object of veneration.⁵ Legal Persons can therefore be either human or juristic (artificial) persons.

Corporations exemplify juristic persons. The word corporation originates from ‘corpus’, a Latin term meaning ‘body’⁶ as in a body of people organised to act as one.⁷ A corporation consisting of a body of people in the original meaning of the word ‘corporation’ is called a corporation aggregate. The modern corporation, however, does not necessarily consist of a body of people. It may be a corporation sole which is made up of a single person or even a corporation created by the law,⁸ without determinate person(s) consisting it. To encompass all forms of corporation, a corporation is generally described with reference to the concept of legal personality as an artificial or legal entity created by or under the authority of the law of a state.⁹ A corporation is founded on fiction thus one of the popular theories explaining the basis of corporate personality or the legal personality of corporations is the fiction theory.¹⁰ This theory recognises man as the real person and holds that law is originally and primarily concerned with man. The origin of corporation as a legal fiction in the English law has been traced to the concept of corporate office devised and

or servitude”. Also in some early legal systems aliens were not allowed to bring suits in the courts because they were not recognised as persons before the law. The prevailing trend is to recognize all human beings as legal persons.

⁵ The Privy Council recognised an idol as a legal person in the Indian case of *Pramatha Nath Mullick V. Pradyumna Kumar Mullick* (1925) L.R. 52 Ind. App. 245. Adaramola observes that in Africa “certain idols, shrines, trees, rocks and rivers are not considered merely sacred but also possessing legal personality under customary law.” See Adaramola *infra* note 15 p. 139.

⁶ Black’s Law Dictionary (USA: Thomas Reuters, 2009) 9th ed., P.395.

⁷ Monks, R. A. G., and Minow, N., *Corporate Governance* (West Sussex, England: John Wiley & Sons Ltd., 2008) 4th ed., p.9.

⁸ Emiola *Supra* note 3 p.1 and see Companies and Allied Matters Act 2020 that recognises One Person Company (OPC) as a new development not in the repealed and replaced Companies and Allied Matters Act 2020.

⁹ Ibid

¹⁰ The other theories include concession, bracket and realist theories. On discussion of the theories see Adaramola *infra* note 13, pp139-145; and Wolff “On the Nature of Legal Persons” (1938) 54 L.Q.R. 494.

recognised by the common law to enable a piece of land vested in a priest of a church in his official capacity to be for the benefit of the church.¹¹ A corporation is therefore defined at common law as “an artificial being, invisible, intangible, and existing only in contemplation of law...”¹². This definition was adopted by Karibi-Whyte in *Gani Fawehinmi V. Nigerian Bar Association*¹³ as “intangible being existing only in the contemplation of the law”.

The basic attributes inherent in all corporations are three namely, (1) body corporate, (2) perpetual succession and (3) common seal. One of the conventional ways of creating corporations today is by statute directly (statutory corporations). These three attributes of corporations are usually expressly provided for in a statute creating a corporation by describing the corporation as a ‘body corporate with perpetual succession and a common seal.’¹⁴ First, the phrase ‘body corporate’ as an attribute of a corporation is used interchangeably with the word corporation. It signifies the corporate personality of a corporation as a distinct body possessed of rights and duties and a legal existence. Second, the attribute of ‘perpetual succession’ signifies that continuous existence of a corporation that enables it to manage its affairs and hold and transmit or transfer property without the need of a perpetual conveyance.¹⁵ This attribute ensures continuity of a corporation and maintenance of its legal personality as its membership or human agents change. Third, ‘common seal’ is the attribute of a corporation that symbolises incorporation and authority. The seal also known as the corporate seal is ‘an emblem of the corporate identity of a corporation and its stamp of authority’.¹⁶ It is ‘a seal adopted by a corporation for executing and authenticating its corporate

¹¹EmiolaSupra note 3 p.6.

¹² Marshall, C.J. in *Trustees of Dartmouth College V. Woodward*, 17 US (4 Wheat.) 518, 636 (1819).

¹³(No.2) (1989) 2 NWLR (Pt.105) 588 at 633

¹⁴ See for example S.1 (2)(a) of the Companies and Allied Matters Act 2020.

¹⁵Nchi, S. I., *The Nigerian Law Dictionary* (Zaria: Tamaza Publishing Co. Ltd., 1996) p248.

¹⁶ See EmiolaSupra note 3 p. 20

and legal documents'.¹⁷ At common law, a corporation cannot exercise certain powers or transact certain businesses without common seal. The Nigerian Supreme Court, for example, held that unless there is a statutory provision to the contrary, a corporation at common law 'must appoint agents under seal'.¹⁸ Another way of creating modern corporations is by registration under an enabling law such as registration of a company under the enabling statute. For example, as soon as an enterprise is registered as a company under the Nigerian Companies and Allied Matters Act 2020 (CAMA) or counterpart statute in any other jurisdiction, it acquires corporate status¹⁹ encapsulating the above three (3) attributes among others.

Corporations are called incorporated bodies to distinguish them from other bodies like friendly societies, clubs, professional associations, partnerships and trade unions which are treated as unincorporated bodies at common law and therefore not generally regarded as legal persons.²⁰ They generally cannot in their names own property, enter into contract, sue or be sued and they have no debts or liabilities distinct from those of their members.

The scope of the concept of corporation is so wide in the modern times that it encompasses all offices including traditional and religious ones, state²¹ and government at all levels (such as the federal and state governments of Nigeria), organisations and institutional bodies including public service bodies and business enterprises created or recognised by law as persons whatever their

¹⁷ Black's Law Dictionary (USA: Thomas Reuters, 2009) p.1467.

¹⁸ *Adeagbo Ode & Ors. v. Registered Trustees of Ibadan Diocese* (1966) 1 All N.L.R. 287; *Tunde Bamgboye v. University of Ilorin* (1991) 8 NWLR (pt. 207) 1 at 30.

¹⁹ See sections 42 of CAMA.

²⁰ See Ladan, M. T., *Introduction to Jurisprudence-Classical and Islamic* (Lagos: Malthouse Press Ltd., 2010) p.179-180. See also section 18 of the Interpretation Act, Cap. 123, Vol. 8, Laws of the Federation of Nigeria 2004 which defines a "person" to include any body of persons corporate or unincorporated. This suggests that not only incorporated bodies such as limited liability companies but also unincorporated bodies such as trade unions as we will see later can be legal persons.

²¹ Many scholars including Professor MacGuigan include states among associations recognised by law as legal persons. See Emiola *Supra* note 3 p. 9.

nature or form, by whatever nomenclatures they are called and howsoever they are established.²² In terms of their nature, and depending on their ownership and/or control, functions or purpose for which they exist or are created, corporations may be variously classified. They are classified as private and public, public service-oriented and commercial, ecclesiastical and lay, traditional and modern, domestic and foreign, national and multinational etc.²³

3.0 Understanding a Company or Business Corporation

The term ‘company’ or alternatively ‘business corporation’ refers to a corporation set-up mainly for business and commercial purposes.²⁴ The term ‘business’ refers to ‘all forms of industrial and commercial profit-making activity.’²⁵ Various terms such as ‘business units’ ‘firms’ and ‘enterprises’ are used to refer to the mediums for doing business or for organizing the production and sale of goods and services for commercial purposes. Basically in almost all jurisdictions businesses with reference to their ownership take one of three legal forms, namely sole proprietorship, partnership and corporate form.²⁶ A business takes the form of sole proprietorship when it is owned by a single person and may either be a partnership or a corporate form when it is owned by two or more persons. A business corporation takes corporate form and is structurally distinct of sole proprietorship and partnership.

Business corporations are profit-making entities as opposed to non-profit-making bodies. Non-profit-making bodies including companies limited by guarantee, incorporated trustees, co-

²² See Emiola *Supra* note 3.

²³ See Ibid. pp9-14 for discussion on the forms corporations may take.

²⁴ Corporations may be classified into public and private, public service-oriented and commercial, religious and lay, domestic and foreign, national and multinational etc in view of their ownership and/or control or by reference to the functions or purposes for which they are set-up See Emiola *Supra* note 2 p. 9.

²⁵ Black, J., Dictionary of Economics (New York : Oxford University Press Inc., 2002) p.43.

²⁶ Inyang, B. J., “Nurturing Corporate Governance System: The Emerging Trends in Nigeria” 4 No. 2 *JBSGE* 1-13, p.6-7.

operative societies, statutory corporations and quasi-corporations such as clubs, trade unions and professional associations are not, strictly speaking, business units or firms or enterprises, as they are not set up, at least primarily, as profit-making bodies.²⁷ By a business corporation or the corporate form, we mean a jointly-owned commercial entity characterized by some basic features shared across jurisdictions²⁸ that distinguish it from other corporations (or incorporated entities), and which is usually adopted by entrepreneurs in conducting businesses. In jurisdictions like UK, Malaysia and Nigeria,²⁹ it is a company limited by shares as distinguished from some other entities that may take corporate form such as unlimited companies as they are generally not suitable for business and are usually not adopted by entrepreneurs; and companies limited by guarantee and incorporated trustees being not-for-profit incorporated entities.³⁰

It is perhaps better to describe a business corporation than to define it as its complex nature and dynamic functions cannot be constrained by definition. Even attempts to describe the corporation have been without much success; the authors offering the descriptions acknowledge the gross inadequacy of the descriptions³¹. Business corporations are usually described to in particular distinguish them from partnerships which are also jointly-owned business units and are increasingly sharing the features of a corporate form in the modern day business world³².

²⁷Orojo, J.O., *Company Law and Practice in Nigeria* (Cape Town: LexisNexis Butterworths, 2008), 5thed.,p. 4-5.

²⁸ These features are legal personality, limited liability, transferable shares, delegated management under board structure and investor ownership. They are provided for in the basic company statutes like the Malaysian Companies Act 1965 and the Nigerian CAMA.

²⁹CAMA provides for three types of companies in Nigeria namely, limited liability company, unlimited company and company limited by guarantee. The Act also provides for incorporated trustees. Entrepreneurs usually adopt limited liability company as a vehicle of doing business. Incorporated entities like company limited by guarantee and incorporated trustees are used to form not-for-profit organisations.

³⁰ See section 21(c), section 26 and part c of CAMA for unlimited liability companies, companies limited by guarantee and incorporated trustees respectively.

³¹ See for example Gower's critique on his definition *Infra* note 32 p. 9-11.

³² For example, a Limited Partnership is characterized by limited liability, an important feature of corporate form. In the US, the equity securities of so-called 'master' limited partnerships may be registered for public trading thereby

A business corporation may be described in terms of its object which is traditionally said to be economic gain. Gower views a business corporation which he refers to as a company being from the UK jurisdiction as: ‘an association of a number of persons for a common object, that object normally being the economic gain of its members’.³³ This description which focuses on members of a company (shareholders) and their economic interest does not in the first place distinguish a company from a partnership because both business units have members constituting them and economic gain of the members as essentially the purpose of establishing them. The description seems to have adopted ‘exclusive approach’ to suggest that companies are set-up and managed for the benefit of their members/shareholders.³⁴ It does not consider a company in the context of the modern ‘inclusive approach’ by which companies are expected to as well recognize their non-shareholder stakeholders such as employees, creditors, suppliers and customers³⁵ and accept ‘triple bottom line’ philosophy which encourages companies to recognize and emphasize not only the economic, but also the social and environmental aspects of their activities³⁶. The modern corporations should therefore in addition to economic interests be equally concerned with the social, environmental, cultural and other interests of all its stakeholders including the society at large.

Monks and Minow view a business corporation, which they refer to as a corporation being from the US jurisdiction, in a more elaborate sense as: ‘a structure established to allow different parties

making them to share the corporate form feature of transferable shares. See Loss *supra* note...pp. 23-27 for discussion on general and limited partnerships as distinct of a corporation.

³³ Gower, L.C.B., *Gower’s Principles of Modern Company Law* (London: Stevens & Sons, 1979) 4th ed. P.9.

³⁴ Tahir, K.H., *An Assessment of the Relationship Between Corporate Governance and Internal Control System in the Nigerian Banking Industry* (Unpublished PhD Thesis) Bayero University Kano, 2008, p. 77-78.

³⁵ *Ibid.* P.78

³⁶ Report of the National Technical Committee on Review of Code of Corporate Governance in Nigeria (Securities and Exchange Commission), Vol. 1, p. 25.

to contribute capital, expertise, and labor for the maximum benefit of all of them.’³⁷ This attempt appears clearer and wider than that of Gower as it has explicitly considered not only shareholders of a business corporation but other stakeholders as well. The benefit contemplated in this view about a business corporation is apparently economic and as such it also suffers the limitation of neglecting other aspects of life which should be the concern of the modern corporations in the context of ‘inclusive approach’ to viewing corporations. The weakness of this view obviously arises from the restriction of the contemplated benefit to internal parties of a corporation, the shareholders, directors and employees. External parties such as customers, creditors, suppliers, government and the society at large are not reflected and thus other aspects of life apart from economic not contemplated. Monks and Minow are perhaps influenced in their inward-looking view about a corporation by its description as a ‘nexus of contracts’ in economic literatures which appears to contemplate only internal stakeholders of a corporation as opposed to arguably a better description as a ‘nexus for contracts’ which appears wider to encompass both internal and external stakeholders.³⁸

A business corporation is referred to as an enterprise and described as ‘..a creation of the society, by the society and for the benefit of the society.’³⁹ This description of a business corporation appears to focus on the society as a whole, embracing all stakeholders of companies and all aspects of their activities.

³⁷ Monks and Minowssupranote 7 p. 9.

³⁸Kraaman, R. etal.,*The Anatomy of Corporate Law: A Comparative and Functional Approach* (New York: Oxford University Press, 2009), 2nd ed., p. 6.

³⁹Sampath, K. R., *Law and Procedure on Corporate Restructure Leading to Mergers/Amalgamations, Takeovers, Joint Ventures, LLPs and Corporate Restructure*(Mumbai: Snow White Publications Pvt. Ltd., 2011) 11th ed.,p.4.

Companies can be classified in various ways⁴⁰. A number of criteria can be used to classify companies including size, number of members, control, liability and access to capital. Companies can be classified on the basis of size into small companies and other companies, on the basis of number of members into one person company private companies and public companies, on the basis of control into holding companies, subsidiary companies and associate companies, on the basis of liability into limited by shares or limited by guarantee or unlimited, and on the basis of access to capital into listed companies and unlisted companies.

The purpose of using corporate form in doing business is to obviously do business that transcends the ability and lifespan of human persons or the capacity of non-corporate business units particularly partnerships. The use of corporate form by businesses lowers the cost of conducting business as a result of the presence of the five features. Corporate form has indeed served man well over the years. It has been found to be one of the most flexible and adaptable economic tools ever devised and thus enjoys wide acceptance across all jurisdictions⁴¹.

The attribute of legal personality makes a business corporation a legal person, subject of rights and duties. Legal personality entails separation of the business corporation, in terms of legal relationships, from the individuals forming it. It enables business corporations to accommodate law, especially property and contract law. Business corporations as legal persons, therefore, have

⁴⁰Broadly speaking, a business corporation may be 'open' or 'public' corporation on one hand or 'closed' or 'private' corporation on the other. Open/public corporations are corporations with freely tradable shares whereas closed/private corporations have restrictions on the tradability of their shares. A public company may be listed or unlisted. It is listed when its shares are listed for trading on an organised securities exchange and otherwise (unlisted) when not. Another way of categorizing business corporations is into 'closely held' and 'widely held' in view of the number of shareholders and their relationship. A company is described as closely held as opposed to widely held when its shares are held by a small number of individuals whose interpersonal relationships are important to its management.

⁴¹Louis Loss, *Trends in Corporate Governance and Investor Protection*, The J.I.C. Taylor Memorial Lecture for 1980, Lagos University Press (Nigeria), 1981, p.7.

the capacity to exercise rights and bear liabilities in their own names. The capacity includes that of owning property, entering into contracts, delegating authority to agents or being appointed as agent and suing and being sued in its own name.

To emphasize the capacity of a business corporation to enter into contracts and to also buttress that relationships within the corporation are essentially contractual in character, (and thus based on consent rather than involving some form of extra-contractual command-and-control authority) a firm is often described in the economics literature as a ‘nexus (bundle) of contracts’.⁴² This suggests that a business corporation is nothing more than the sum of all of the agreements leading to its creation. It also indicates that important relationships within the firm including those among the firm’s owners, managers, and employees are essentially contractual in nature. This description of a firm does not seem to distinguish a firm from other networks of contractual relationships⁴³ and appears restrictive and ambiguous. It arguably leaves out other networks of contractual relationships involving the external stakeholders of the firm such as its creditors, suppliers and customers. A description of a firm as a ‘nexus for contracts’ as opposed to a ‘nexus of contracts’ is suggested to be more appropriate as it portrays a firm as a common counterparty in numerous contracts with multiple persons within and outside the firm.⁴⁴ A firm as a ‘nexus for contracts’

⁴² The description of a firm as a ‘nexus of contracts’ originates with Micheal Jensen and William Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure”, 3 JOURNAL OF FINANCIAL ECONMICS 305 (1976). This builds on ArmenAlchian and Harold Demsetz, “Production, Information Costs, and Economic Organisation”, 62 AMERICAN ECONOMIC REVIEW 777 (1972). See Armour *supra*. Examples of literatures that adopt the description are Ronald Coase, “The Nature of the Firm,” *Economica*, 4, 1937, p. 386; and Frank H. Easterbrook and Daniel R. Fishel, “The Corporate Contract,” *Columbia Law Review*, 7, Nov. 1989, p. 1416. “The corporate structure is a set of contracts through which managers and certain other participants exercise a great deal of discretion that is ‘reviewed’ by interactions with other self-interested actors” (p.1418). See Monks and Minow *Supra* note 36 p88.

⁴³ Many legal relations not involving firms can be said to be essentially contractual in character. For example, commercial and labour relations involving individual human persons emanate and are regulated by contracts and can thus be described as contractual in nature.

⁴⁴ Armour, J. et al., *The Essential Elements of Corporate Law*, p.7. Available at : <http://ssrn.com/abstract=1436551>.

necessarily implies that a firm coordinates the actions of the multiple persons involved in contracts with it through exercise of its contractual rights.

Legal personality, and in particular the capacity of a business corporation to own property and enter into contract, is very essential in corporate transactions. The capacity of a business corporation to own property involves the demarcation of the assets of the corporation from that of its owners. The firm can exercise rights of ownership over its assets through its designated agents including right to use the assets or sell them. The assets of the firm are only available for attachment by the creditors of the firm and not by the personal creditors of the owners of the firm. This provides protection of the assets of the firm. The capacity to enter into contracts enables a business corporation to serve as a single contracting party that is distinct from the various individuals who own or manage it. This provides opportunity for various individuals to engage together in joint business that acts as a single entity distinct from them⁴⁵.

We sum up discussion on the description of a company or business corporation with what an American journalist said capturing the features of a corporation with a deft pen and a sense of satire and humour in the following passage as quoted by Loss:

“...the corporation itself, as an abstract form, is a creation of art wonderful to behold. A corporation comes into existence when it is needed, and dies when its usefulness is done. It can own property and money and other corporations; it can buy and sell rather eminent men. It can hire lawyers, sue and be sued. It can advertise, buy books, make binding contracts, expand, contract, manufacture all goods, perform all services. It needs no sleep, takes no vacations. It can borrow and steal, and even beg. It is never liable to anyone beyond what it has; if its debts exceed its assets, that is too

⁴⁵ Ibid

bad for its creditors. If you prick it, it does not bleed; if you tickle it, it does not laugh. It can scream, however, if taxed or otherwise annoyed. Exactly what a corporation is nobody knows; that is one of its beauties.”⁴⁶

4.0 Company Law and its Functions

The structure of modern business corporations makes them unique and also ideal and adaptable for businesses in all jurisdictions. It thus enables them to play key role in national and international economies. Our consideration of the structure of a business corporation is intended to identify and discuss its legal characteristics. The attributes and/or advantages of a business corporation as identified and discussed by many authors vary in number⁴⁷. The basic ones that constitute its legal structure and which are shared across jurisdictions are five (5)⁴⁸ as discussed below. They are legal personality, limited liability, transferable shares, delegated management and investor ownership.

To appreciate the company law as a legal concept or legal category, it is important to distinguish it from the wider related concept of ‘corporation law’ and the narrower related concepts of ‘corporate governance’ and ‘corporate management’.

As an institution concerned with enforceable legal arrangements relating to a company, company law provides for the formation and termination of companies; confers on companies some special

⁴⁶Loss *Supra* note 40 p.40.

⁴⁷ For examples, Sampath *Supra* note 38 p 8-9 identifies nine (9) advantages namely: Legal Personality, Enduring Structure, Limited Liability, Anonymity, Credibility, Transfer of Ownership, Centralized Management and Separation of Ownership and management. Orojo *supra* note 26 p. 6-7 identifies eight (8) features to be formalities, number of members, legal personality, perpetual succession, borrowing powers, transfer of shares, management and taxation. Gower *Supra* note 32 p.97-111 identifies legal entity as the fundamental attribute of a company and gives other seven (7) features namely, limited liability, property, suing and being sued, perpetual succession, transferable shares, borrowing and formalities, publicity and expense. Monks and Minow *Supra* note 36 p. 10-12 simply identify four (4) features which they put as limited liability for investors, free transferability of investor interests, legal personality and centralized management.

⁴⁸ For the detailed discussion on the five core features see Armouretal. *Supra* note 43 pp. 7-16.

features such as legal personality and limited liability; regulates the relationship between participants in companies such as that between directors and shareholders; and facilitates dealings between companies and outsiders like their customers.⁴⁹ Corporation law, on the other hand, is the law dealing with corporations generally including company law as its aspect.

Corporate governance and corporate management can be distinguished from company law in terms of the functions of the law. Company law performs the following two primary functions:

- (1) The creation of the company itself and
- (2) The definition and coordination of the roles of various corporate participants.⁵⁰

While company law covers the above two functions, corporate governance is only concerned with the second and thus is narrower than company law. Corporate governance as an aspect of company law performs the above second function of company law. Corporate governance is concerned with the definition and coordination of the roles of various corporate participants. It ensures value-addition for the company by minimizing the agency/legal problems that manifest in opportunistic behaviours or conflicts of interest involving various corporate participants at different levels of corporate activities. Opportunistic behaviours in corporate affairs bring about value-reduction for one or more of the classes of corporate stakeholders. In the legal circle in Nigeria, the phrase 'company law' has been used to include what the phrase 'corporate governance' now stands for right before its emergence in America in the 1970s and appearance on the Nigerian corporate landscape. With the emergence of corporate governance as a distinct concept or subject, company law can now be distinguished from it. While company law is wide in scope to include formation,

⁴⁹Sulaiman, A.N.M. e tal, *Commercial Applications of Company Law in Malaysia* (CCH Asia Pte Limited, 2008), 3rd edn., p.25.

⁵⁰ See Kraakman e tal *Supra* note 23, p. 2.

regulation and termination of companies, corporate governance is about the structures and processes put in place to ensure control of companies and promotion of their objectives. Corporate governance is narrowly and specifically concerned with the role of direction and control of the companies performed by the board of directors appointed by the shareholders in general meeting.⁵¹

Regarding corporate management, it is an aspect of company law narrower than corporate governance. Corporate management is strictly concerned with the day to day running of the company by a management team delegated by the board to do so. Ghosh discusses the distinctions between corporate management and corporate governance as elaborated by Das but in a slightly modified version.⁵² He expresses the distinctions in the following ten points:

- (1) Corporate management implements order while corporate governance gives the order;
- (2) corporate management is more esoteric while corporate governance is more exoteric;
- (3) while power is delegated by the board to management team in corporate management, the board is empowered in corporate governance;
- (4) corporate management is a static concept while corporate governance is a dynamic concept;
- (5) Corporate management works in a close-ended system while corporate governance works in an open-ended system;
- (6) Corporate management is job performer while corporate governance is job designer;

⁵¹See Tahir *Supra* note 11 pp. 77-78.

⁵²Ghosh, B.N., *Business Ethics and Corporate Governance* (New Delhi: Tata McGraw Hill Education Private Limited, 2012), p. 325.

(7) Corporate management decides 'how to go'? while corporate governance decides 'where to go';

(8) Corporate management need not be innovative while corporate governance has to be innovative;

(9) Corporate management is more a stereotyped function while corporate governance is more challenging and exciting job; and

(10) Corporate management is to do things right while corporate governance is to do the right things.⁵³

Notwithstanding that corporation law, company law, corporate governance and corporate management are in the strict sense distinguishable as shown above, they are related economic and utilitarian institutions that should be viewed first and foremost in terms of their contribution to economic and business conduct and regulation.

The functions and goal of company law constitute the role of the law in corporate regulation. Company law has two principal functions. The first principal function of the law is the establishment of corporate form, i.e. providing enterprises with a legal form that possesses the five core attributes of corporate form mentioned above and which are shared across jurisdictions. These characteristics respond to the economic exigencies of the large modern business corporation and as such company law everywhere must, as a matter of necessity, provide for them. By providing for corporate form and making it user-friendly, the company law enables entrepreneurs to transact easily through the medium of the corporate entity, and thus lowers the costs of conducting

⁵³Ibid.

business. Their presence in companies across jurisdictions make business corporations have a fundamentally similar set of legal characteristics and also face a fundamentally similar set of legal problems in all jurisdictions. The other principal function of company law is therefore reducing the ongoing costs of organizing business through the corporate form in view of the anticipated legal problems. Company law performs this second function in two ways. One is through facilitating co-ordination between participants in corporate enterprise and the other is by reducing the scope for value-reducing forms of opportunism among different constituencies.

Company law is indeed largely devoted to responding to three principal sources of opportunism namely:

1. Conflicts between managers and shareholders,
2. Conflicts among shareholders, and
3. Conflicts between shareholders and the company's other constituencies

The above generic conflicts may be regarded as what the economists called 'agency problems'. Company law addresses these conflicts or problems to achieve its goal which is presumably advancing the aggregate welfare of all who are affected by a firm's activities, including the firm's shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment. This in line with the general objective of law (company law inclusive) which is serving the interests of a society as a whole or what economists regard as the pursuit of overall social efficiency.⁵⁴

⁵⁴ For detailed discussion on the role of company law and agency problems see for examples Kraaman *Supra* note 37 pp 28-53 and *Bearls and Gardiner, The Modern Corporation and Private Property* (New York: Macmillan, 1932).

5.0 Common Law, Civil Law and Islamic Law Board Structure Models

We have earlier noted the functions of company law to involve creation of a company with five fundamental legal characteristics and also containing conflicts or agency problems among corporate participants. Agency problems are addressed through running the affairs of a company in the most effective and efficient way. The affairs of a company are basically run by the shareholders in the general meeting and board of directors through appointment of board committees and also management team for the day to day running of the affairs of the company. Conflicts are mediated or agency problems are addressed in running the affairs of a company through corporate governance and corporate management. Corporate governance is concerned with the activities of the board of directors in directing and controlling companies and on the other hand corporate management is concerned with the activities of the management team for the day to day running of the affairs of companies.⁵⁵ We are concerned with different structures of board of directors adopted in different jurisdictions or by different companies but all to address the same problems (agency problems) to ensure good corporate governance and more specifically the attainment of the goal of companies which is advancing the aggregate welfare of all who are affected by their activities.

The primary responsibility for corporate governance lies with the board of directors.⁵⁶ All other corporate stakeholders such as the regulators, creditors and auditors have secondary responsibility for corporate governance. Corporate governance as indicated above entails direction and control. The direction aspect of corporate governance charges the board of directors with the responsibility

⁵⁵ For detailed discussion on 'corporate governance' and 'corporate management' see Dominic Asada (2006), *Effective Corporate Governance and Management in Nigeria: An Analysis* (PhD Thesis submitted to the University of Jos, Nigeria).

⁵⁶ Davies, G., *Principles of Modern Company Law* (London: Sweet & Maxwell, 2012), 9th ed. P. 383.

of coming up with plan and strategies for the running of affairs of a company by the management team. The control aspect of corporate governance, on the other hand, is concerned with the board's supervision of the management to ensure that the affairs of the company are run according to the plans and strategies it put in place.⁵⁷

The board of directors is therefore central to the running of affairs of companies and in particular to addressing agency problems. There are basically two types of board structure, namely one-tier board structure and two-tier board structure. A one-tier board structure refers to a system where a company has only one board essentially appointed by the shareholders and which may consist of both executive and non-executive directors of a company. On the other hand, a two-tier board structure is a system of having two boards, the managing board and the supervisory board. The managing board consists of the executives of the company whereas the supervisory board consists of non-executives that may include the representatives of the employees of the company and supervises the managing board.⁵⁸ We will examine these two types of board structure with the below examples of company board structures in the common law, civil law and Islamic law jurisdiction.

One of the important issues that influence the development of company law in the United Kingdom and the United States as important common law jurisdictions is the desire to protect the interest of shareholders of companies particularly the non-management shareholders. This is based on the premise that shareholders are the company's residual claimants and risk bearers who are unlike other corporate stakeholders like creditors, employees and suppliers are not protected by

⁵⁷ See Tahir *Supra* note 33.

⁵⁸ See Yusuf *Supra* note 2 pp 57-59.

contract.⁵⁹The corporate governance pattern of the United Kingdom and the United States is therefore shareholder-centric and thus one-tier board structure of a board appointed solely by the shareholders prevails in the countries. Also the practice in commonwealth countries like Malaysia and Nigeria is in favour of one-tier board structure⁶⁰.

Germany as an important civil law jurisdiction is a good point of reference as far as a board structure is concerned. The German company law provides for two-tier board system at least for companies having significant impact. The managing and supervisory boards in the country are called *Vorstand* and *Aufsichtsrat* respectively. The managing board is responsible for the day-to-day running of the affairs of the company and it has the powers of appointing officers for the discharge of the responsibility. The supervisory board does not participate in the day-to-day running of the affairs of the company; its function is to monitor the managing board. The composition of the supervisory board reflects the system of co-determination in Germany which promotes and enforces the participation of employees of companies in the decision-making processes of the company. Half of the members of the supervisory board are elected at the general shareholder meeting and the second half is comprised of the representatives of employees. The presence of employees in the supervisory board shows that the interests of stakeholders other than shareholders are considered in board composition and in corporate governance generally in Germany⁶¹.

Under this sub-head, we will use the board structure of Islamic banks as the banks are structured and developed to conform to the principles of the Islamic law. Islamic Banks, like other companies,

⁵⁹ See Kraaman *Supra* note 37 p. 28

⁶⁰ Perhaps with the exception of Islamic or non-interest banks in the countries with Sharia Supervisory Boards that can be equated with supervisory board for the banks to have two-tier board structure.

⁶¹ Okene, O.V.C., "The Regulation of Corporate Governance in Nigeria: Lessons from Recent Policy and Implementation Process in Germany", 1 *NJBCL* 89-113 (2010).

are generally incorporated under the basic company statute of the country they operate and are therefore characterized by the five core attributes of business corporation. For examples, Islamic banks in Malaysia are subject to the Malaysian Companies Act 1965. Islamic banks operating in Bahrain are similarly subject to the Bahrain Commercial Companies Law 1975 in the same way that Islamic banks in Bangladesh are subject to the Bangladesh Companies Act 1913. This besides specific legislations regulating the banks in the countries like the Islamic Financial Services Act 2013 in Malaysia which repeals and replaces the Islamic Banking Act 1983.

The countries operating Islamic banks have Shariah Supervisory Board or Committee or any similar body that supervises banks.⁶² This is so to ensure that operations of Islamic banks are in conformity with the Shariah principles. In other words, the board or body is put in place to address the agency problem of compliance with the principles of Shariah with the responsibilities to ensure that:

1. Banking facilities and services are in accordance with Shariah laws
2. The investments or projects in which the Islamic bank has interests are permissible by Shariah
3. The Islamic bank is managed in line with Islamic principles⁶³

The Shariah supervisory is required in Islamic banks in addition to the ordinary board required under general company statute. It can therefore be concluded that Islamic banks have two-tier board structure at least in countries like Malaysia and Nigeria. In countries like Malaysia and Nigeria as well as the United Kingdom as noted above, the practice is in favour of one-tier board

⁶² See section 30 of the Malaysian Islamic Financial Services Act 2013.

⁶³ Lee, M. P. and Detta, I. J., *Islamic Banking & Finance Law* (Kuala Lumpur: Longman, 2007), p 142.

system although the laws in the country do not explicitly require a single board. There is therefore no legal problem regarding operation of Islamic banks in the countries with two-tier board.⁶⁴

6.0 Conclusion

The article explored the functions of company law to include the function of addressing agency problems. These problems include the problem of compliance with the principles of Shariah in countries operating Islamic banks. Agency problems are virtually the same across jurisdictions. However, different approaches in the form of one-tier board or two-tier board are adopted to address similar problems depending on the jurisdiction and the nature of the company. In some jurisdictions like Malaysia the one-tier and two-tier board structure co-exist for application to conventional and Islamic-based companies especially the banks as the case may be.

⁶⁴Aldohni, A. K., *The Legal and Regulatory Aspects of Islamic Banking: A Comparative look at the United Kingdom and Malaysia* (London: Routledge, 2011), p. 81.