



Board diversity and corporate performance legal and governance implications

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Abstract

A crucial issue with board diversity is corporate governance and corporate law. This study looked at multi-dimensionality, theoretical foundations, and the connection between corporate success and diversity. Proponents claim that diversity increases a company's value, although detractors disagree to this. The doctrinal research involved the use of the various legal provisions in Nigeria (Companies and Allied Matters Act 2020, Nigerian Code of Corporate Governance 2018, 1999 Constitution of Nigeria and court judgements) and secondary literature. Results show that there is improvement in the level of independence of boards, but that there are still some areas of weakness in terms of gender and demographic diversity. The paper suggests legislative changes that will ensure gender diversity in companies, make the implementation more robust and create cultural changes towards inclusiveness to boost corporate performance and sustainable governance in Nigeria.

Keywords: Board diversity, corporate governance, corporate performance, Companies and Allied Matters Act 2020, Nigerian Code of Corporate Governance, agency theory, gender quota

Introduction

A corporate board of directors, traditionally known as an internal administrative structure, has evolved over the past 30 years from a mere function of management into a pivotal factor in the debate around corporate performance and the quality of corporate governance. According to the Oxford dictionary definition, the word diversity means: "the quality or condition of being diverse; variety; the presence of a wide range of different people or things". Board diversity, in a corporate governance sense, is the difference among individual personal attributes, work history, gender, ethnicity, age, and mentalities of the people that make up a company's board of directors. The idea is that a diverse board of directors is more likely to be able to provide effective oversight, strategic advice and to avoid the "group think" that has plagued homogeneous boardrooms in the past.

The Nigerian Code of Corporate Governance 2018 (NCCG 2018)^[5] and the Companies and Allied Matters Act 2020 (CAMA 2020)^[32] are two key instruments that have spearheaded the regulatory action in Nigeria to this call. The regulatory action to this call in Nigeria has been through two main instruments namely the Companies and Allied Matters Act 2020 (CAMA 2020)^[1, 32] and the Nigerian Code of Corporate Governance 2018 (NCCG 2018)^[5]. Despite these measures, empirical and anecdotal evidence indicates that Nigerian corporate boards are still largely homogenous, lacking in the female and ethnic minority presence at the decision-making level.

The research problem that this paper attempts to address is therefore bi-modal, that is, is the current legal and regulatory framework in Nigeria sufficient to guarantee true diversity in the boardroom, and, is the presence of diversity in the boardroom, when achieved, clearly reflected in a positive improvement in corporate performance. The main argument is that the existing legal framework fails to prescribe the broad range of board diversity needed to achieve optimal corporate performance and there is an

urgent need for law reform based on both domestic constitutional values and comparative international practice. This paper is divided into two parts: Section 2 outlines the definition and context of board diversity. Section 3 discusses theoretical approaches to diversity-performance arguments. Section 4 critically examines the academic arguments concerning the link between board diversity and corporate performance. Section 5 examines the current legal and regulatory landscape of board diversity in Nigeria, and their respective parallels in international instruments. Judicial decisions are explored in Section 6. Results and recommendations are given in Section 7 and the conclusion is given in Section 8.

Conceptualising Board Diversity

Board diversity is complex and cannot be easily defined. It is defined at its simplest as having multiple facets of diversity, including demographic diversity (gender, race/ethnicity, age, nationality, etc.) and cognitive diversity (educational background, professional expertise, thinking styles, decision making processes, etc.). The Governance Platform includes a broad definition of board diversity, including those who have a variety of "educational abilities, ethnicity, cultures, genders, abilities, experiences, and perspectives. This broad pronouncement is the natural development of a corporate governance thinking that, starting with the narrow focus on shareholding and financial skills, now extends to a view of the board as a representation and reaction to the complicated social and economic context in which today's corporations exist.

Diversity is a key concern in the NCCG 2018 in a gendered and experiential lens. According to the second principle of the Code, the board should "ensure an appropriate balance of skills and diversity (including gender and experience) without reducing competence, independence and integrity". While this is a commendable formulation as a norm, it is not a required one, it is an aspirational one. It doesn't have specific benchmarks for female or ethnic minority

representation and the lack of mandatory diversity measures mean it is not legally binding; it is up to the company.

Board diversity has significant linking points with the principles of equality and non-discrimination which are stated in section 42 of the Constitution of the Federal Republic of Nigeria 1999 [2] which bans discrimination based on community, ethnic group, sex, religion or political opinion. Section 42 is mainly geared towards state action but the normativity of section 42 has spread to corporate governance thinking and enabled arguments for board diversity of companies licensed, regulated, and incorporated under Nigerian laws.

Theoretical Frameworks

1. Agency Theory

The agency theory was first consistently formulated by Jensen and Meckling, who view the corporation as a contract that entrusts managers (agents) with authority over shareholders (principals). The basic issue that arises due to this delegation is: Principal-agent conflict which can be manifested as managerial opportunism, shirking and self-dealing. The board of directors is thought to be the main way that managerial actions are monitored and that managerial incentives are aligned with the shareholder's interests. Those who believe in board diversity believe that a diverse board can work better in this role because members of the board with diverse backgrounds are less likely to be affected by the social cohesion that can hamper independent board oversight in homogeneous boards. Adams and Ferreira discovered that female directors kept more closely to task than their male counterparts, were present at board meetings more frequently and held management to a higher standard of accountability. The corporate law implication is that the push for greater diversity is not limited to being a social policy goal but is also a governance imperative based on the basic logic of agency theory.

2. Resource Dependence Theory

An alternative view is provided by Pfeffer and Salancik's resource dependence theory. It states that organisations rely on external environments for some of their most important resources capital, information, legitimacy and expertise and that the board of directors is key to accessing and securing these resources. To summarise Hillman and Dalziel's integration, the agency perspective and the resource dependence perspective led the directors to provide two main values: monitoring and resource provision. On this score, a diverse board is beneficial just because it broadens the firm's resource-acquisition ability. Different professional, ethnic and demographic directors bring different networks, relationships and human capital that can help mitigate uncertainty in operations, serve to open up new markets and improve the firm's reputational capital. Resource dependence theory therefore offers a good theoretical justification for diversity as a strategic asset, and not a compliance burden.

3. Critical Mass Theory

The concept of critical mass theory comes from Kanter and it discusses the point where diversity appointments are "underperforming. Kanter suggested that when minorities are less than about thirty-five percent of the team, they become symbolic tokens whose actions are influenced by the visibility and contrast of being different, and the

pressures for assimilation. These dynamics will affect both the capacity to contribute in an authentic way and the reinforcement of norms of the dominant group. Emerging from this theory, Torchia, Calabrò and Huse went on to test the theory with regard to the corporate board, showing that firms with at least three female directors are characterized by significantly higher levels of innovation, strategic renewal, and board effectiveness versus those with fewer female directors, with the three being the major driver of difference. Noting that the number of women on a board is not enough, Bello has come back to this idea and put forward a "Board Spark Theory," which posits that deliberative change happens only when the women who are appointed to the board have the cognitive sophistication and independence needed to trigger that change. This is a refinement that shows the significance of the diversity in quality along with the diversity in quantity.

Literature Review

1. The Affirmative Case

There is a considerable body of research that has suggested that diversity on the board is related to company performance, especially gender diversity. In a groundbreaking empirical study of Fortune 1000 companies, Carter, Simkins and Simpson discovered a statistically significant positive association between the proportion of women and minorities on corporate boards and the value of those firms (measured by Tobin's Q). The authors explained this relationship as the more diverse boards' better monitoring and more abundant resource base in corporate decision making. They have been widely replicated in various jurisdictions, industries and over time, and so are generally applicable.

In the UK, the two female directors' study of FTSE 100 companies attributed a statistically significant increase in the financial performance of companies with 2 female directors per board, specifically in terms of ROE and Tobin's Q. The study by Brahma, Nwafor, and Boateng of FTSE 100 companies in the United Kingdom found that a company with 2 female directors had a statistically significant improvement in financial performance on the basis of ROI and Tobin's Q. The study also has some significant operationalisations of critical mass theory as in the case of a single appointment (tokenism), there was no measurable improvement in performance, but when appointments span the threshold, a positive effect was achieved. The obvious legal and policy implication is that voluntary codes that only call for some role for women but don't set minimum standards are ineffective in driving performance improvements which are claimed by the diversity advocates.

El-Haj analysed the diversity of the Boards of four Asian and four Eastern-European listed firms and found that, six measures of board diversity, when moderated by strategic change, had a positive association with financial performance. The study pointed out that the effect on the benefits of board diversity can be dampened in periods of fast strategic reorientation, indicating the importance of the governance environment in which a board functions as well as the composition of a board. The nuance has major impacts on emerging markets, which change rapidly like Nigeria where the variability of the regulatory and economic environment could interact with board diversity to give different results depending on the context.

2. The Skeptical Position

Despite the positives, there is a large body of empirical, well-researched research that warns against assuming benefits for performance when it comes to board diversity. In one of the most commonly referenced studies on this topic, Adams and Ferreira discovered that, although female directors are better monitors, imposing gender diversity quotas may negatively impact shareholder values in companies with good internal governance as it would lead to over-governance. The finding directly contradicts the case for quotas, and implies that the governance advantages of diversity vary among firms.

In her study of Danish listed firms, Rose did not find any statistically significant link between the proportion of women in the boardroom of the sample firms and their firm performance in terms of Tobin's Q, suggesting that nationality and the cultural context could be significant mediators of the diversity performance relationship. Both Rhode and Packer noted that while the empirical evidence is broadly positive, it is not unanimous and the case for diversity depends on how diversity is managed, whether diverse directors are truly included in the board's process or not or whether they are included as token diversity.

Havrylyshyn, Schepker and Nyberg added another twist when they found that the positive effects of gender-diversity on the performance of boards was much more heavily dependent on the attitudes and behavior of the male directors. For instance, male directors who had worked previously only with token women actually did worse than male directors with all-female counterparts in terms of the deliberative contribution made by the female directors unconscious biases stemming from the tokenism experiences of male directors proved to be detrimental to the female directors' contribution. The study's results will question the notion that diversity is a mandate that will automatically result in improvements in performance if there is not a change in the culture and attitudes of boards, and highlight the need for boards to change more than the numbers if they wish to improve their performance relative to diversity.

3. Synthesis

The research generally agrees that board diversity driven by truly reaching the tipping point at a level of diversity and integrated into a governance culture that values diversity brings measurable benefits to the firm's financial, strategic and environmental, social and governance (ESG) aspects. This discrepancy in results is largely due to the variation in the definitions and measurement of diversity, methodological differences between studies, and the lack of consideration for moderating factors like institutional context, strategic environment and board culture. The message of this literature is that, in Nigeria where boards of corporate management are still very homogeneous and governance institutions are still in their infancy, the legislative measures, if they are to bring the benefits of diversity that their advocates hope for, need to be supported by cultural, institutional and enforcement reforms.

Legal and Regulatory Framework

1. The Nigerian Framework

The main law that regulates the composition of boards in Nigeria is the CAMA 2020^[34]. The number of independent non-executive directors is required by section 275(1) of the

Act to be at least three in all public companies. This is an improvement over the previous repealed CAMA 1990 which did not provide any such requirement, and is notable for its lack of mention of gender or demographic diversity. The primary statute does not contain any diversity requirement and this omission needs to be complemented, in a more effective way, by the less stringent provisions of the NCCG 2018. The NCCG 2018 issued by the Financial Reporting Council of Nigeria pursuant to the Financial Reporting Council Act 2011^[4], seeks to tackle diversity largely in Principle 2, wherein the board shall ensure that it has the right balance of skills and diversity, which shall include experience and gender, without impairing the competence, independence and integrity of the board. The NCCG 2018, principle 2.3(a) also requires that the board be "of adequate size, considering the scale and complexity of operations" and that the board be comprised "to ensure diversity of experience. But as Akanmu and others have noted, the NCCG 2018 is based on a 'comply or explain' principle and its diversity provisions are 'hortatory' with no quantified targets.

The NCCG is supplemented by the Securities and Exchange Commission Code of Corporate Governance 2018^[6] which states that the board of a public company should be diverse, encompassing gender and skills. Despite this, the Code does not require minimum gender quotas and the system of monitoring and enforcing the diversity provisions of the Code is weak. The outcome, as chronicled by African Women in Law is that boardrooms in Nigeria are still predominantly male with women being a small percentage of Directors on boards of listed companies.

Another legal deficiency in Nigeria is the lack of any criminalization or penalization of board composition that does not include criteria for diversity in CAMA 2020^[34]. However, the duties on directors under section 307 of the Act are directed at the individual director and are around the best interests of the company and do not seek any specific demographic makeup of the board. Ohunene has challenged the powers of CAMA 2020^[34] without accountability measures in place, which allows boards to be able to challenge diversity reforms by invoking business judgement defenses.

2. Constitutional Dimensions

The Constitution of the Federal Republic of Nigeria 1999^[2], Section 42, provides for the freedom of every citizen from discrimination based on sex among other attributes. This does not have a direct impact on private company practices, but its influence has grown and been cited in corporate governance scholarship as a reason to claim that the continued lack of female representation on corporate boards is a violation of the constitutional promise of equality. The Constitution, in section 17(3)(b) gives the state a direction principle of policy that is to ensure that all citizens have equal and adequate opportunities without discrimination on any ground whatsoever. When read sympathetically, these constitutional provisions are sufficient to offer a powerful constitutional justification for legislation. When interpreted in a generous fashion, they constitute a robust constitutional basis for legislating for gender diversity in the boardrooms of corporations as a component of the state's constitutional duties to provide for equality of opportunity.

3. Comparative International Framework

The international experience on the gender diversity of the boards is a good lesson. The Cadbury Report of 1992^[28] was the first to introduce the idea of a 'critical mass' of 'qualified' and 'independent' non-executive directors to boards in the UK to ensure that the views of the management of the board could be effectively challenged. This was followed by the Greenbury Report (1995)^[30] on director compensation, and the Hampel Report (1998)^[29] that combined the recommendations from all of the earlier reports into a set of principles-based governance. These reports formed the basis for the UK Corporate Governance Code 1998 (UK CG Code 2018)^[5, 29].

The UK Corporate Governance Code 2018^[7] calls on boards to take a wide perspective of diversity, which encompasses gender, social and ethnic backgrounds as well as cognitive and personal strengths. The European Union's Directive 2022^[3]/2381 on improving the gender balance among directors of listed companies is even more stringent: it aims to have at least 40% of the non-executive board seats or 33% of all the board seats in listed companies filled by the under-represented sex by 30 June 2026. This is a mandatory quota system with binding penalties such as the rejection of non-compliant appointments the most powerful law to date for guaranteeing effective board gender balance. Martínez-García discovered, in line with the resource dependence theory, that even non-punitive laws had an impact in incentivising the appointment of more qualified female directors: companies try and minimise uncertainty and obtain human capital resources that diversity brings. The finding gives credence to Nigeria's need to implement a graduated legislative strategy, starting with aspirational targets with disclosure obligations that will be followed by mandatory quotas with enforcement mechanisms as the governance architecture is developed.

Judicial Analysis

Statutory requirements in the area are yet to be directly adjudicated upon by the Nigerian judiciary. There is, however, a body of judicial opinion which is directly relevant to the diversity debate on the fiduciary duties of directors. A fundamental common law principle that has been followed by the Nigerian Courts in the case of *Percival v Wright* was that directors have fiduciary duties to the company and not to the individual shareholders. This principle in the context of diversity, would mean that a board that is set up in such a way which excludes the benefit of diversity perspectives and capabilities, may in principle be failing to perform its duty in the best interests of the company.

The Nigerian Court of Appeal in *Salofa v Kasim* upheld the principle that the directors are to act in good faith and in the interest of the company and this, as discussed in Section 4, is not always the case for the majority of boards, where they prefer to remain homogeneous despite the available empirical evidence that diversity contributes to better corporate performance. *Cook v Deeks* extended the Privy Council's ruling that the directors should not look after their personal preferences and connections over the company's best interests, which can apply to the continuation of 'exclusionary' board composition practice. These powers offer a loose foundation for contending that a law requiring that boards have a diversity of members is consistent with,

and perhaps even required by, the current structure of directors' fiduciary duties.

Lack of statutory diversity provisions, and few stakeholders' demands in the Nigerian corporate world, may account for the undeveloped nature of Nigeria's case law in this area. Reform of the law to establish meaningful rights for shareholders to challenge board size and composition that are not compliant with the law would give the judiciary the doctrine to which to apply and give substance to board diversity obligations.

Findings and Recommendations

The analysis in the previous sections gives the following results: First, the current Nigerian laws and regulations, namely CAMA 2020 and the NCCG 2018^[5, 34], are not suitable to require real board diversity. Section 275(1) of CAMA 2020^[34] states that there must be three independent directors on the Board, but does not mention gender or demographic diversity. The NCCG 2018's aspirational diversity principles are too general, and don't provide for sanctions, so they are not obligatory but merely advice.

In a world of legitimate scepticism, the academic research, far from providing justifications for the contrary view, argues for the positive effect of board diversity when it is truly realised on all aspects of corporate performance, including financial and non-financial. The critical mass literature, especially that of Bello clearly shows that token appointments have proven to be insufficient and targets in the statute should require a meaningful minimum percentage of under-represented groups on corporate boards.

Comparative international frameworks, such as the EU Directive 2022^[3]/2381 and the UK Corporate Governance Code 2018^[5], have shown that it is possible and effective to establish principles for the regulation of board diversity and achieve governance and performance improvements. The international spread of listed companies that are not using these international standards in their corporate governance structures gives Nigeria's listed companies a competitive disadvantage, especially in attracting institutional investors from abroad, who now consider board diversity metrics amongst their investment criteria as they adopt Environmental, Social, and Governance (ESG) criteria.

Fourth, the constitution (CFRN 1999)^[2] has a normative and legal foundation for legislative action that will demand a diversity of board members, thus establishing a domestic constitutional basis for action rather than just foreign imitation.

Based on the above, the following recommendations are made in this paper:

- 1. Amendment of CAMA 2020:** The legislature should include a provision in CAMA 2020^[34] to require listed public companies to have no more than seventy percent of the total membership of company's board comprised of the same gender for compliance within three years of enactment. The Corporate Affairs Commission should have the power to issue compliance notice and impose financial penalties to the companies that do not comply.
- 2. Amendment of the NCCG 2018:** The Financial Reporting Council of Nigeria (FRC) should specify quantified diversity targets in Principle 2 of the NCCG 2018^[5] and mandate listed companies to annually report on the composition of their boards and measures

adopted to meet diversity goals and why it was not achieved in the event of such failure.

3. Securities and Exchange Commission Disclosure

Rules: In the securities and exchange commission's disclosure rules, a special disclosure space for the gender, ethnic, age and professional profile of every member of a listed company's board of directors should be added, so that investors and the public can gauge the real diversity of corporate boards.

4. Judicial development: In suitable cases, the judiciary should evolve fiduciary duty as defined by section 307 of CAMA 2020^[34] to include a positive obligation on the part of directors to take board diversity into consideration as part of their duty to act in the best interests of the company as per the Brahma, Nwafor and Boateng findings on the performance gains of diverse board.

5. Cultural and institutional reform: Statutory demands are not enough without further initiatives. It is important that there is a wider cultural shift among corporate Nigeria towards inclusive leadership, this should be facilitated by capacity building programmes for the recruitment of qualified female and minority directors, and by board diversity being included as a voting criterion on general meetings by institutional investor stewardship codes.

Conclusion

The paper has explored the legal and governance aspect of board diversity to corporate performance in Nigeria. It has suggested that the concept of board diversity is multi-dimensional and that each of the dimensions described gender, ethnicity, age, and cognitive affects corporate performance via the agency theory, resource dependence theory, and critical mass theory. The paper has critically evaluated the scholarly discussion, recognising that the advantages of diversity do not automatically and universally occur, but are dependent on being able to achieve critical mass representation, and to create inclusive board cultures, and to operate in supportive governance environments.

The study of the Nigerian legal regime has revealed that there is a huge disconnect between the ideal themes of diversity adopted in the NCCG 2018 and the statutory provisions of CAMA 2020^[34]. The corporate law structure in Nigeria has yet to provide for a true diversity in their boards and the non-imposition of a diversity requirement in the law is a governance failure and a contradiction to the principle of equality which is enshrined in CFRN 1999. EU Directive 2022^[3]/2381 and the UK Corporate Governance Code 2018^[7] provide examples of the international experience on the issue of board diversity and show that legislative measures allowing for board diversity are constitutionally acceptable and economically sensible.

This paper has therefore called for a set of legal reforms, including the amendments of CAMA 2020^[34], revision of the NCCG 2018, strengthening the SEC disclosure requirements, judicial development of the concepts of fiduciary duty, and cultural and institutional changes. The corporate governance reforms proposed would not just bring Nigeria's corporate governance framework in line with international best practice but would also allow Nigeria's

corporate boards to reap the tangible performance gains that a diverse and truly inclusive corporate board can bring to shareholders, stakeholders and the Nigerian economy at large.

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