

The Financial Reporting Council of Nigeria and Her Misguided Regulatory Approach: A Classic Example of How Not To Be a Regulator

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ABSTRACT

This article seeks to review the recent regulatory interventions of the Financial Reporting Council of Nigeria (FRCN), particularly, the National Code of Corporate Governance for Not-For-Profit-Organisations (NFPOs) ('the NCCG') and tests same against the five criteria of a 'good regulation' highlighted by Prof. Robert Baldwin et al. This article argues that the NCCG falls short of a 'good regulation' and that the FRCN could have averted the confusion it created, had it acted in line with best practices and allowed good judgement to prevail. Starting with an overview of the NCCG, the article proceeds to consider some of the legal issues triggered by the NCCG, and more importantly, tests the NCCG against the five criteria of a 'good regulation' as alluded to by Prof. Robert Baldwin et al. The article concludes with recommendations for the FRCN as well as other regulators (in Nigeria).

KEYWORDS: Regulation, Financial Reporting Council of Nigeria, Corporate Governance, Subsidiary Legislation, Administrative and Constitutional Law

1.0 INTRODUCTION

It is often said that those who the gods would first destroy, they first make mad; for indeed, only fools rush in, where even angels fear to tread. With these wise sayings echoing in my mind, I

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reflected on the trajectory of events that culminated in the recent removal of the Executive Secretary of the Financial Reporting Council of Nigeria¹ (FRCN)² Jim Obazee, chief of which is the controversial National Code of Corporate Governance (NCCG) for the private,³ the public⁴ and Not-For-Profit-Organisations (NFPOs) sectors,⁵ reported to have been responsible for the 'forceful retirement' of Pastor Enoch Adeboye as the head of the Redeemed Christian Church of God (RCCG) in Nigeria.⁶

¹ 'Buhari sacks official whose actions led to Adeboye's exit as RCCG leader' *Premium Times*, 9 January 2017, available at <<http://www.premiumtimesng.com/news/headlines/220007-breaking-buhari-sacks-official-whose-actions-led-adeboyes-exit-rccg-leader.html>> (accessed 11 March 2017); 'Adeboye: FG fires Jim Obazee, FRC boss' *Vanguard*, 10 January 2017, available at <<http://www.vanguardngr.com/2017/01/adeboye-fg-fires-obazee-frc-boss/>> (accessed 11 March 2017)

² Whilst the author is aware that the Financial Reporting Council of Nigeria often uses 'FRC' as its abbreviation, FRCN has been chosen for ease of reference and convenience of both the author and the reader as even the Central Bank of Nigeria appears to be more comfortable with 'FRCN' as opposed to 'FRC.' See for instance Central Bank of Nigeria (Financial Policy and Regulation Department), FPR/DIR/CIR/GEN/01/006, Letter to All Banks and Development Banks titled 'Exposure Draft of the National Code of Corporate Governance Issued by the Financial Reporting Council of Nigeria (FRCN)' dated 18 March 2016 <<http://www.cbn.gov.ng/Out/2016/FPRD/LETTER%20TO%20ALL%20BANKS%20AND%20DEVT%20BANKS%20-%20EXPOSURE%20DRAFT%20OF%20THE%20NATIONAL%20CODE%20OF%20CORPORATE%20GOVERNANCE%20ISSUED%20BY%20THE%20FRCN.pdf>> (accessed 11 March 2017)

³ Financial Reporting Council of Nigeria 'National Code of Corporate Governance 2016: Private Sector Code' available at <<https://drive.google.com/file/d/0BxBI-bqclt35aXVjMEY3c2NyYnc/view>> (accessed 11 March 2017)

⁴ Financial Reporting Council of Nigeria 'Draft Exposure Draft of the Public Sector Governance Code in Nigeria 2016' <<https://drive.google.com/file/d/0BxBI-bqclt35dHN3MXNmSmxMWIE/view>> (accessed 11 March 2017)

⁵ Financial Reporting Council of Nigeria 'Not-For-Profit Organisations: Governance Code 2016' available at <https://drive.google.com/file/d/0BxBI-bqclt35dTdLT3NhUUdqUVU/view> (accessed 11 March 2017)

⁶ A.C. Godwin, 'Adeboye's 'retirement'; Minister of trade, FRC boss, Obazee at war over controversial law' *Daily Post*, 9 January 2017, available at <http://dailypost.ng/2017/01/09/adeboyes-retirement-foreign-affairs-minister-frc-boss-obazee-war-controversial-law> (accessed 11 March 2017)

For most, Obazee's removal was long overdue as the FRCN had become synonymous with controversial news. First was the suspension of the registration of four Stanbic IBTC directors and that of its audit engagement partner, KPMG Professional Services over alleged misstatement of financial reports⁷ and the Central Bank of Nigeria (CBN) expressing concern about the 'apparent failure' of the FRCN to 'follow due process as laid down by its own FRCN Act and Regulations, in arriving at the Regulatory Decision.'⁸ Second was the threat by Obazee to sanction even the CBN Governor if the errors identified by the FRCN turned out to be true.⁹ Third was the CBN's public outcry that most of her inputs/observations, submitted during the public hearing held on 30 June 2015, in respect of the drafts on the NCCG, for Private, Public Sectors as well as NFPOs, which she considered critical to the smooth operation of the banking industry were not considered in the released NCCG drafts.¹⁰ In its letter, the CBN

⁷ M. Tijani, 'FRC suspends Stanbic IBTC directors, KPMG' *The Cable*, 26 October 2015 available at <https://www.thecable.ng/frc-asks-cbn-efcc-probe-stanbicibtc-kpmg> (accessed 11 March 2017)

⁸ O. Emmanuel, 'FRC lacks the 'authority' to suspend Stanbic IBTC's directors, says CBN,' *Premium Times*, 4 November 2015, available at <http://www.premiumtimesng.com/news/192612-frc-lacks-the-authority-to-suspend-stanbic-ibtc-directors-says-cbn.html> (accessed 11 March 2017)

⁹ Financial Reporting Council of Nigeria, 'Reply to CBN Governor's Letter on FRC Regulatory Decision on Stanbic IBTC Holdings Plc' (FRC/2015/Dim/REGULATORY.002, Letter addressed to the Governor of the Central Bank of Nigeria, Dated 10 November 2015 titled 'Re: Regulatory Decision in the Matter of Financial Statements of Stanbic IBTC Holdings Plc for Years Ended 31st December 2013 and 2014' signed by the Executive/Secretary/Chief Executive Officer of the Financial Reporting Council of Nigeria) available at <http://www.financialreportingcouncil.gov.ng/clarification/reply-to-cbn-governors-letter-on-frc-regulatory-decision-on-stanbic-ibtc-holdings-plc/> (accessed 11 March 2017)

¹⁰ Central Bank of Nigeria (Financial Policy and Regulation Department), FPR/DIR/CIR/GEN/01/006, Letter to All Banks and Development Banks titled 'Exposure Draft of the National Code of Corporate Governance Issued by the Financial Reporting Council of Nigeria (FRCN)' Dated 18 March 2016 <http://www.cbn.gov.ng/Out/2016/FPRD/LETTER%20TO%20ALL%20BANKS%20AND%20DEVT%20BANKS%20-%20EXPOSURE%20DRAFT%20OF%20THE%20NATIONAL%20CODE%20OF>

underscored to the FRCN, the need to ensure that 'relevant inputs that would enhance the status of the codes as well as facilitate the efficient and effective operation of the financial system are factored-in by the FRCN before the codes are finalised.'¹¹ The CBN equally observed that other significant contributions from a number of banks and other financial institutions on the private sector code were not also considered.¹² However, CBN's appeal to the FRCN to allow wise counsel prevail, act in accordance with best practices and ensure that the concerns of the major stakeholders are duly considered and reflected in the NCCG, fell on the FRCN's deaf ears.¹³

Worthy of mentioning also is the failure of the FRCN to publish comments received from stakeholders on its website to allow for a robust critique and contribution from a wide range of stakeholders¹⁴ and Obazee, who incidentally is/was a zonal pastor in RCCG, threatening to remove Pastor Adebayo,¹⁵ and rebuffing all entreaties from stakeholders to shelf the regulation until a wider consultation is done.¹⁶

[%20CORPORATE%20GOVERNANCE%20ISSUED%20BY%20THE%20FRCN.pdf](#) (accessed 11 March 2017)

¹¹ Supra note 10

¹² *ibid*

¹³ C. Nweze, 'FRC ignores CBN's contributions to Corporate Governance Code' *The Nation*, 21 March 2016, available at <http://thenationonline.net/frc-ignores-cbns-contributions-corporate-governance-code/> (accessed 11 March 2017)

¹⁴ M. Otuedon, 'KPMG Comments – A Point of Order Schedule' *LinkedIn*, 30 September 2015, available at <https://www.slideshare.net/McLeishOtuedonMScBSc/kpmg-comments-a-point-of-order-schedule> (accessed 11 March 2017)

¹⁵ I. Uwugiaren, 'Corporate Governance Code: The Intrigues, Politics and Untold Story' *ThisDay*, 15 January 2017, available at <http://www.thisdaylive.com/index.php/2017/01/15/corporate-governance-code-the-intrigues-politics-and-untold-story/> (accessed 11 March 2017)

¹⁶ N. Uche, 'NECA backs FG on suspension of FRC's code or corporate governance,' *Business Day*, 7 November 2016, available at <http://www.businessdayonline.com/neca-backs-fg-on-suspension-of-frcs-code-of-corporate-governance/> (accessed 11 March 2017)

In the same vein, thought leaders and leading professionals like PricewaterhouseCoopers raised concerns that: the time allowed for comments on the NCCG drafts was too short and should be extended from one month to six months; compliance with the NCCG should not be mandatory; the NCCG is more of a compendium of rules than a code and does not conform to international best practices.¹⁷ There were also concerns by several entities, individuals and the general public that the NCCG is a product of 'unilateral decision'¹⁸ of the FRCN devoid of due/proper consultation.¹⁹

Rebuffing all entreaties to tread with caution, strive towards making 'good regulation' and ensure that the NCCG is truly representative of 'public interest',²⁰ the FRCN released the unpopular NCCG that had become the subject of discourse in many quarters in recent time.²¹ Fast forward to January 2017, the news came through that Obazee was in a 'cold war' with the Hon. Minister of Industry and Investment, Mr. Okechukwu Enelamah,

¹⁷ PwC 'Exposure Draft: United Code of Corporate Governance, PwC (22 April 2015) available at <http://www.pwc.com/ng/en/assets/pdf/exposure-draft-unifiedcode-corporategovernance.pdf> (accessed 11 March 2017)

¹⁸ T. Olasinde, 'NECA hails suspension of FRCN's corporate governance code' *The Guardian*, 8 November 2016, available at <http://guardian.ng/news/neca-hails-suspension-of-frcns-corporate-governance-code/> (accessed 11 March 2017)

¹⁹ Supra note 16

²⁰ B. Yandle, 'Bootleggers and Baptists in the theory of regulation' in David Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Limited: United Kingdom, 2013) 28; S. J. Balla 'Institutional design and the management of regulatory governance' in D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Limited: United Kingdom, 2013) pp. 71-72; J. G. Christensen 'Competing theories of regulatory governance: reconsidering public interest theory of regulation in D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Limited: United Kingdom, 2013) pp. 96-110; M. O. Igiehon, 'Law, economics, public interest and the theory of regulatory capture' (2004) 8(2) *Mountbatten Journal of Legal Studies* 2-19

²¹ Deloitte Nigeria, 'Nigeria: FRC Issues National Code of Corporate Governance' *Mondaq*, 3 November 2016, available at <http://www.mondaq.com/Nigeria/x/540300/Corporate+Governance/FRC+Issue+s+National+Code+Of+Corporate+Governance+Deloitte+Tax+Alert> (accessed 11 March 2017)

who had initially directed him to suspend the NCCG,²² which requires heads of religious groups to 'step aside' after twenty years of leadership and the 'national confusion' that followed Pastor Adebayo's resignation as the National Overseer of the RCCG in compliance with the NCCG.²³

2.0 THESIS STATEMENT

It is against the foregoing background that this article seeks to review the NCCG for NFPOs ('the **NCCG**') and tests same against the five criteria of a 'good regulation' highlighted by Prof. Robert Baldwin *et al.*²⁴ This article argues that the NCCG falls short of a 'good regulation' and that the FRCN could have averted the confusion it created, had it acted in line with best practices and allowed good judgement to prevail.

It should be noted, however, that this article does not attempt to consider 'all' the legal issues triggered by the NCCG; neither does it seek to pass a 'full judgement' on the age-long debate on prescriptive and performance-based²⁵ or goal-setting regulation²⁶ given the casual reference to the term 'prescriptive' in the NCCG.

²² Supra note 6; , 'Questions on FRC, Jim Obazee, his minister and FG' *The Cable*, 14 January 2017, available at; <https://www.thecable.ng/questions-frc-jim-obazee-minister-government> (accessed 11 March 2017)

²³ 'Adebayo's resignation and the FRC Code' *The Sun*, 11 January 2017, available at <http://sunnewsonline.com/adeboyes-resignation-and-the-frc-code/> (accessed 11 March 2017)

²⁴ R. Baldwin *et al*, *Understanding Regulation: Theory, Strategy and Practice* 2nd ed. (Oxford University Press: Oxford, 2012) pp. 26-31

²⁵ P. J. May, 'Performance-based regulation' in D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Limited: United Kingdom, 2013) pp. 373-384

²⁶Supra note 24 at) 259-310; D. Pesendorfer, 'Risk regulation and precaution' in D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Limited: United Kingdom, 2013) pp. 283-394; G. Majone, 'Strategic issues in risk regulation' in D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Limited: United Kingdom, 2013) pp. 295-307; P. J. May, 'Performance-based regulation' in D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Limited: United Kingdom, 2013) pp. 373-384

The article does not also consider the NCCG for Private and Public companies as the author is only concerned, in the present article, with the NCCG for the NFPOs.

The foregoing said, starting with an overview of the NCCG, the article proceeds to consider some of the legal issues triggered by the NCCG, and more importantly, tests the NCCG against the five criteria of a 'good regulation' as alluded to by Prof. Robert Baldwin *et al.*²⁷ The article concludes with recommendations for the FRCN as well as other regulators (in Nigeria).

3.0 THE NCCG AT A GLANCE

The present writer, upon a review of the NCCG, is minded to submit that the NCCG was maliciously made to 'get rid' of Founders or Leaders of various religious bodies and various NFPOs (who seem to have stayed two decades or more, 'become too powerful' that it is 'so hard to get rid of them' and 'have amassed much wealth by virtue of their positions'). Flowing from the foregoing position, the present writer respectfully disagrees with the assertion of *The Cable* that the NCCG is 'not for general overseers';²⁸ nothing could be farther from the truth! The reason for this submission will be examined subsequently.

First, of great importance is *paragraph 7.1 of the NCCG* which specifically provides that '**[t]he Code is applicable to all NFPOs in Nigeria, whatever the description or nomenclature adopted.**' (Emphasis supplied) It is the contention of the present writer that a read of the foregoing paragraph reveals that the FRC contemplated regulating ALL NPFOs in Nigeria, including churches, mosques and other religious body, mission or society. This submission is further

²⁷ Supra note 24 at 26-39

²⁸ *The Cable*, 12 January 2017, "This law is not for general overseers' and other things you should know about the FRC Code" available at <https://www.thecable.ng/this-code-is-not-for-general-overseers-and-other-things-you-should-know-about-the-frc-code> (accessed 11 March 2017)

bolstered by *paragraph 7.2 of the NCCG* which reveals the scope of the NCCG which *inter alia* includes: charitable bodies such as philanthropic organisation, human rights group, and any other charitable organisation; educational institutions such as schools, libraries, and other educational organisations; professional and scientific bodies; **religious bodies which includes, churches, mosques, relief or charitable group with religious base and any other religious body, mission or society.**

Second, paragraph 9 of the NCCG requires a Founder or Leader to cease to occupy any of the three governance positions of Chairmanship of the Board of Trustees, the Governing Board or Council, and the Headship of the Executive Management (or their governance equivalents) simultaneously from 16 October 2016. While the present writer is not unaware of the need to ensure that there is no over-concentration of powers in just one individual and proper separation of power/functions should be encouraged, the point must be made that good intention is not enough for a regulator in a democratic dispensation - due process must be followed.

It equally needs no telling that a regulator in a democratic dispensation is, by default, expected to have '**reasonably consulted**' both the stakeholders and the general public in passing any regulations capable of overhauling a system and introducing substantial changes as well as not exceed its statutory limits. Otherwise, the efforts of such a regulator is bound to be met with stiff opposition, both from the stakeholders and the 'office of the citizen' as seen in the FRCN case.

Ultimately, the whole essence of regulating should be for 'public good',²⁹ so, there comes a problem when a regulator decides to go 'solo' and is under the illusion and/or delusion that it is the

²⁹ Supra note 24 at 40-43; M. O. Igiehon, 'Law, economics, public interest and the theory of regulatory capture' (2004) 8(2) *Mountbatten Journal of Legal Studies* 2-19

only 'constituted authority' that can determine what is really in 'public interest' and/or 'for public good' without due regard for its statutory limits.

Furthermore, in the opinion of the present writer, the most controversial provision of the NCCG is arguably paragraph 9.3, which provides that where the Founder or Leader has **occupied all or any of the three governance positions** alluded to in the previous paragraph **for more than twenty (20) years as from 10 October 2016**, or is aged seventy years or above from the same date, the Founder or Leader **may only be considered for 'advisory or spiritual role by creating a Board of Trustees (BOT) for which the original Founder or Leader can become the First or Life Chair' and no more.**

One would then understand why a read of paragraph 9.3 of the NCCG leaves the present writer convinced that the FRCN did set out to 'get rid' of all Founders or Leaders (including church leaders) who have occupied the position of Founder or Leader or any of the positions of Chairmanship of the Board of Trustees, the Governing Board or Council, and the Headship of the Executive Management (or their governance equivalents) from 16 October 2016. It is for this reason that the present writer struggles with *The Cable's* position that the NCCG is not for general overseers.³⁰

The foregoing submission notwithstanding, the present writer is mindful of the *proviso* contained in paragraph 9.3 of the NCCG which reads:

In the case of religious or cultural organisations, nothing in this code is intended to change the spiritual leadership and responsibilities of Founders, General Overseers, Pastors, Imams and Muslim Clerics, Presidents, Bishops, Apostles, Prophets, etc. which are distinguishable from purely

³⁰ Supra note 28

corporate governance and management responsibilities and accountabilities of the entities.

A calm reading of the foregoing *proviso* alongside paragraphs 7.1 and 7.2 (which provide that the NCCG is 'applicable to all NFPOs in Nigeria, whatever the description or nomenclature adopted)' as well as other relevant provisions, will reveal FRCN's intention to ensure that all Founders or Leaders of religious bodies (churches inclusive), who have occupied all or any of the three governance positions earlier alluded for more than twenty (20) years as from 10 October 2016, or are aged seventy years or above from the same date, compulsorily retire from such positions. It can also be deciphered, **from a community reading of the *proviso* to Paragraph 9.3 with paragraphs 7.1 and 7.2, that such Founders or Leaders can: (a) only be considered for 'advisory or spiritual role by creating a Board of Trustees (BOT) for which the original Founder or Leader can become the First or Life Chair;' and (b) retain only 'spiritual leadership and responsibilities' that are distinguishable from the three governance positions of Chairmanship of the Board of Trustees, the Governing Board or Council, and the Headship of the Executive Management (or their governance equivalents).**

Consequently, one needs no soothsayer to come to the realisation that most Founders or Leaders of some churches in Nigeria would fall victim to this seemingly malevolent requirement. This perhaps explains why some Nigerians have seen the issue as an attack on the church by the State³¹ and was on the verge of stimulating religious violence but for the 'timely' removal of Obazee³² as well as the legislative oversight intervention of the

³¹ 'FG aims to attack church leaders with FRC law – Fayose' *The Punch*, 9 January 2017, available at; <http://punchng.com/fg-aims-attack-church-leaders-frc-law-fayose/> accessed 11 March 2017

³² F. Nnabugwu and L. Nwabughioqu, 'Adeboye: FG fires Jim Obazee, FRC boss', *Vanguard*, 10 January 2017, available at;

National Assembly.³³ It is also for this reason that the Christian Association of Nigeria (CAN) has tagged the removal of Obazee as “good riddance to bad rubbish”.

4.0 TESTING THE NCCG AGAINST THE FIVE CRITERIA OF A GOOD REGULATION

The foregoing said, it becomes imperative to test the NCCG against the five criteria of a ‘good regulation’ as captured by Prof. Robert Baldwin *et al* in *Understanding Regulation: Theory, Strategy, and Practice*.³⁴ The five key tests are:

- 1) ***Is the action or regime supported by legislative authority?***
- 2) ***Is there an appropriate scheme of accountability?***
- 3) ***Are procedures fair, accessible, and open?***
- 4) ***Is the regulator acting with sufficient expertise?***
- 5) ***Is the action or regime efficient?***

4.1 *Is the NCCG supported by legislative authority?*

In answering this question, recourse will be made to the enabling statute established the *Financial Reporting Council of Nigeria Act 2011* (hereinafter referred to as the ‘FRCN Act’). While it could be argued that there is a seemingly conflict between the FRCN Act and Part C of the *Companies and Allied Matters Act (CAMA)*³⁵

<http://www.vanguardngr.com/2017/01/adeboye-fg-fires-obazee-frc-boss/>
(accessed 11 March 2017)

³³ M. Abdullahi Krishi, ‘Reps probe FRC over church controversy’, *Daily Trust*, 11 January 2017, AVAILABLE AT: <http://www.dailytrust.com.ng/news/general/reps-probe-frc-over-church-controversy/180254.html> (accessed 11 March 2017)

³⁴ (2nd edn. Oxford University Press, 2012) pp. 26-31

³⁵ Cap. C20, Laws of the Federation of Nigeria (LFN) 2004; see O. Philips, M. Amadi, T. Emeifogwu, E. Abdul-Azeez and O. Omotoyinbo ‘Nigeria,’ W.J.L. Calkoen (ed), *The Corporate Governance Review* 7th ed. (The Law Reviews: United Kingdom, 2017) 319, 326-327, where it is argued that some provisions of the

(which relates to Incorporated Trustees duly registered with the Corporate Affairs Commission), the article examines mainly the FRCN Act, which is the enabling statute of the FRC, as well as the **Directorate of Corporate Governance**, the body established by *Section 49 of the FRCN Act*.

Notably, Section 50 of the FRCN Act stipulates the objectives of the Directorate of Corporate Governance to include the following:

[d]evelopment of principles and practices of corporate governance; promote the highest standards of corporate governance; promote awareness about corporate governance principles and practices; promote sound financial reporting and accountability based on true and fair financial statements duly audited by competent independent auditors; encourage sound systems of internal control to safeguard stakeholders' investment and assets of public interest entities; and ensure that audit committees of public interest entities keep under review the scope of the audit and its cost effectiveness.

Meanwhile, Section 51(a-e) of the FRCN Act also provides *inter alia* that the Committee on Corporate Governance shall:

- (a) assess the need for corporate governance in the public and private sector;**
- (b) organize and promote workshops, seminars and training in corporate governance issues;**
- (c) issue the code of corporate governance and guidelines, and develop a mechanism for periodic assessment of the code and guidelines;**

NCCG are inconsistent with the provisions of CAMA, which lays down minimum corporate governance standards.

- (d) provide assistance and guidance in respect of the adoption or institution of the code in order to fulfill its objectives and;
- (e) Establish links with regional and international institutions engaged in **promoting corporate governance**. [Emphasis supplied]

A reading of Sections 49, 50 and 51 of the FRCN will reveal, by no sheer of diligence, that there is an inconsistency in the choice of words used by the draftsmen to describe the relevant body empowered to issue the NCCG. In correcting this anomaly, the present writer believes that a court of competent jurisdiction is likely to adopt the 'slip rule' to the original error in the FRCN Act and correct the text in Section 51 to read as 'Directorate of Corporate Governance' as the correction is merely one correcting the text rather than the actual state of the law.

Upon a read of the foregoing provisions, one may be fast to conclude that the NCCG is supported by legislative authority. However, upon a careful review of both the relevant provisions of the FRCN Act and the NCCG, one may be tempted argue to the contrary. First, a cursory look at paragraph 1, the introductory section of the NCCG, reveals that the NCCG is an outcome of an additional directive given to the **Steering Committee on the National Code of Corporate Governance** on 29 November 2013 by the Honourable Minister of Trade and Investment with the remit of the committee being to extend corporate governance to NFPOs in Nigeria.

In the likely event that a court of competent jurisdiction is minded to adopt the 'slip rule' to correct the wordings of Section 51 of the FRCN Act to read 'Directorate of Corporate Governance' as opposed to the Committee of Corporate Governance, it is plausible to argue that given that the statutory power to issue the NCCG under the FRCN Act is vested in the Directorate of

Corporate Governance, the NCCG 'as is,' could not have been validly issued by the Committee of Corporate Governance.

On another note, assuming *arguendo* that the NCCG is a subsidiary legislation and given the National Assembly's position that the FRCN usurped its law-making power in issuing the NCCG,³⁶ that the FRCN or the issuing body ought to have complied not only with the FRCN Act in issuing the NCCG but also ensure that the NCCG does not conflict with any existing legislation or the Constitution of the Federal Republic of Nigeria, 1999 (as amended). This is very important given that the FRCN or the issuing body derives its authority from the FRCN Act and must not be seen to neither conflict nor expand the provisions of the enabling statute. The law is well settled that a subsidiary legislation cannot expand and must be within the authority derived in the main enabling statute.³⁷ Borrowing the words of learned jurist, Oputa, J.S.C. (as he then was) in the celebrated case of *Olaniyan v University of Lagos*:³⁸

A Corporation...which is created by or under a Statute cannot do anything at all, unless authorised expressly or impliedly by the Statute or instrument defining its powers. It simply has not got the *vires* or the powers or authority to act outside the Statute. If it so acts, the act will be held to be ultra vires and declared null and void.³⁹

In addition to the foregoing and as rightly pointed out by Dr. Sam Amadi, assuming *arguendo* that the NCCG is a subsidiary legislation made pursuant to the FRCN Act, the first challenge the NCCG would have to contend with is ensuring that the provisions of the NCCG (assuming the NCCG even qualifies as

³⁶Supra note 33; 'Reps to debate FRC's law on churches, mosques', *The Punch*, 10 January 2017, available at <http://punchng.com/rep-debate-frcs-law-churches-mosques/> (accessed 11 March 2017)

³⁷*Olanrewaju v. Oyeyemi* (2001) 2 NWLR (Pt.697) 229

³⁸ (1985) NWLR (Pt. 9) 599

³⁹ *Olaniyan v University of Lagos* (1985) NWLR (Pt. 9) 599

subsidiary legislation) must have been made within the clearly defined law-making powers that the National Assembly bequeathed to the FRCN (Directorate of Corporate Governance) through the FRCN Act.⁴⁰ He further opined that where the exercise of the FRCN's power to make a subsidiary legislation as 'donated' it by the National Assembly has exceeded that which was stipulated under the enabling statute, the NCCG, being a subsidiary legislation, is susceptible to being declared as 'unlawful.'⁴¹

Furthermore, Dr. Sam Amadi argued that a combined reading of Sections 7 and 8 of the FRCN Act would reveal that the FRCN exceeded the power to make subsidiary legislation delegated to it by the National Assembly. In his words:

The code is an example of Administrative regulation. It sources its legality from the powers of the National Assembly grants the Financial Reporting Council to regulate the financial transactions of organizations in Nigeria. But from reading of Sections 7 and 8 of the Act, dealing with the mandate and functions of the Council, it would appear that some of the provisions of the code are

⁴⁰ While Section 49 of the Financial Reporting Council of Nigeria Act 2011 (FRCN Act) establishes the Directorate of Corporate Governance, Section 51(C) FRCN Act empowers the Committee on Corporate Governance to issue the code of corporate governance and guidelines as well as develop a mechanism for periodic assessment of the code and guidelines. Section 50(a)-(c) FRCN Act further provides that the objectives of the Directorate of Corporate Governance include: development of principles and practices of corporate governance; promoting the highest standards of corporate governance; and promoting public awareness about corporate governance principles and practices. ; see also S. Amadi, 'Corporate governance for churches: A miscarriage of regulation' *The Cable*, 12 January 2017, available at <https://www.thecable.ng/corporate-governance-churches-miscarriage-regulation> (accessed 11 March 2017)

⁴¹ *Supra* note 40

not valid exercise of agency rulemaking powers by the Council.⁴²

Additionally, one cannot but agree more with Dr. Sam Amadi when he underscored the need for the executive arm of government or any other body or agencies belonging to the Executive branch of government to ensure that in taking any actions to implement an enactment or legislation through subsidiary legislation or ‘other forms of legislative interventions,’ they do not violate any constitutional provision or provision of the enabling statute or go as far as imposing duties that are outside the purview of that contemplated by the enabling legislation.⁴³ Putting this point more succinctly, Dr. Amadi opined thus:

Every exercise of legislative power, whether by a legislature or an administrative agency must comply with the [C]onstitution to be valid. The primary test of validity is compliance with the fundamental rights. These rights are guaranteed against the state because the idea of democratic governance is to secure for citizens a zone of non-interference where the citizen disposes his affairs, as he likes.⁴⁴

In providing a justification for his submission that the NCCG is unconstitutional, Dr, Amadi made recourse to Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the **Nigerian Constitution**) which guarantees the right of every person in Nigeria to assembly and associate freely

⁴² Supra note 40

⁴³ *Attorney-General of Ogun & Ors. V. Attorney-General of the Federation* (1982) 1 NCLR 166; *Attorney General of Bendel v. Attorney General of the Federation* 7 & Ors. (1982) ANLR 85.

⁴⁴ Supra note 40

with other person, 'in pursuit of lawful personal interests.'⁴⁵
Section 40 of the Nigerian Constitution specifically provides thus:

Every person shall be entitled to assembly and associate with other persons, and in particular, he may form or belong to any political party, trade union or any other association for the protection of his interests:

Provided that the provision of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.⁴⁶

Further to the above stated constitutional provision, Dr, Amadi submitted that 'there is no constitutional restriction to the right of association,' apart from the implied restriction on the exercise of the freedom of association and right to assembly with other persons imposed by the Nigerian Constitution, to wit, from joining or associating with any political parties that is yet to be duly registered with the Independent National Electoral Commission (INEC). It is also useful to add, that apart from the implied constitutional restriction from joining a political party that is yet to be registered with INEC contained in the *proviso* to Section 40 of the Nigerian Constitution and the limited instances provided for in Section 45(1)(a) & (b) of the Nigerian Constitution, with respect to any law made that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons,

⁴⁵ *Supra* note 40

⁴⁶ Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

neither the executive arm of government nor any its agencies can deprive any person of their fundamental right.⁴⁷

Having exhaustively examined the first test, the article now proceeds to consider the other tests in succeeding paragraphs.

4.2 Is there an appropriate scheme of accountability?

Before answering the question of whether there is an appropriate scheme of accountability, it is pertinent to mention that the NCCG has been suspended by the Federal Government.⁴⁸ That said, it would appear that the FRCN, under Obazee was under the illusion that it was untouchable, unstoppable and law unto itself as seen in several controversial issues it got caught up in. There seemed to be no one to call the FRCN Boss (as he then was) to order; starting from giving market leader firms like KPMG and Stanbic IBTC bad publicity;⁴⁹ threatening to sanction even the CBN⁵⁰ and going on a frolic-of-his-own in championing his 'NCCG agenda' against church leaders⁵¹ with no one appropriate authority to call him to order 'until there was need for a damage control,' one may be right to conclude that 'an appropriate scheme of accountability' is conspicuously missing. Consequently, it is respectfully submitted that the FRCN fails this very test.

4.3 Are the procedures fair, accessible and open?

In the present writer's opinion, the FRCN would arguably fail this test; not only for its conspicuous failure in making the regulatory

⁴⁷ *Ransome Kuti v. Attorney-General of the Federation* (1985) 2 NWLR (Pt. 6) 211; *Director, State Security Service (SSS) v. Agbakoba* (1999) 3 NWLR (Pt. 596) 314; Supra note 40

⁴⁸ K. Ugwuode , 'FG suspends Obazee's Code of Corporate Governance', *Business Day*, 7 November 2016, available at <http://www.businessdayonline.com/fg-suspends-obazees-code-of-corporate-governance/> (accessed 11 March 2017)

⁴⁹ Supra note 7

⁵⁰ Supra note 9

⁵¹ Supra note 6

process very fair, accessible and open to all in order to have substantial contributions from all but also for its failure to take on board, comments from major stakeholders. This much is evident from the feedback the CBN⁵² and even thought leaders like PwC⁵³ and KPMG⁵⁴ gave much earlier when the draft was made available. To a bystander, it would seem that the FRCN was very much in a hurry to get the NCCG passed. Hence, it is submitted that the NCCG falls short on this requirement as well.

4.4 Is the regulator acting with sufficient expertise?

In answering this question in the negative, I shall make recourse to paragraph 2 of the NCCG where even the FRCN notes that the sector encompassing NFPOs is extremely diverse and it is, therefore, “either impossible or procedurally inappropriate for a Code to be dogmatically prescriptive in defining characteristics for general Not-For-Profit sector governance.”⁵⁵

Upon a read of the foregoing provision, one would have thought that the FRCN would have taken a cue from this given that it recognized itself that it was nearly “**impossible**” or “**procedurally inappropriate for a Code to be dogmatically prescriptive.**” Strangely, the FRCN did exactly the opposite of the problem it identified as a closer look at the NCCG will reveal the provisions are largely prescriptive and prohibitory in nature, with little or no initiative allowed for the NFPOs, who hardly had any choice but to comply with the

⁵² Supra note 10; Supra note 13

⁵³ Supra note 17

⁵⁴ E. Ejoh, ‘KPMG seeks review of FRC’s unified corporate governance code,’ *Vanguard*, 17 February 2015, available at <http://www.vanguardngr.com/2015/02/kpmg-seeks-review-frcs-unified-corporate-governance-code/> (accessed 11 March 2017)

⁵⁵ Paragraph 2 (Distinctive Attributes of Not-for-Profit Organisations) Financial Reporting Council of Nigeria “Not-for-Profit-Organisations: Governance Code 2016”

NCCG, from 16 October 2016, until it was suspended in January 2017.⁵⁶

4.5. Is the action or regime efficient?

I would equally argue that the FRCN failed this very test. In coming to a determination as to whether a regulator is acting with 'sufficient expertise' and is running an 'efficient regime,' it is imperative to balance the legislative support it has, if any, with the costs to be incurred to achieve the result. In the instant case, the NCCG appears to be ill-timed as it was close to starting a religious crisis in Nigeria and seem to be devoid of even the support of the Supervising Minister and blessings of the National Assembly. One again would have thought that the FRCN Boss (as he then was) would have prevented this by managing the situation more effectively and not allowing it to degenerate to a potential national crisis - one that the Presidency never bargained for.

5.0 CONCLUSION

The foregoing notwithstanding, there seems to be brighter and better days ahead for FRCN as the newly appointed Executive Secretary, Mr. Daniel Asapokhai seems to be a perfect fit for the job given his antecedent as a partner and Financial Reporting Specialist at the PricewaterhouseCoopers, Nigeria.⁵⁷ Going

⁵⁶ 'FG suspends law that forced Adebayo to step down', *The Punch*, 9 January 2017, available at <http://punchng.com/breaking-adeboye-fg-suspends-code-corporate-governance/> (accessed 11 March 2017)

⁵⁷ 'Adebayo: Buhari sacks Jim Obazee as FRCN Executive Secretary, appoints Daniel Asapokhai', *Daily Post*, 9 January 2017, available at <http://dailypost.ng/2017/01/09/adeboye-buhari-sacks-jim-obazee-frn-executive-secretary-appoints-daniel-asapokhai/> (accessed 11 March 2017); 'President Buhari reconstitutes Board of FRN, appoints Chairman, Executive Secretary', *Daily Trust*, 9 January 2017, available at <http://www.dailytrust.com.ng/news/general/president-buhari-reconstitutes-board-of-frcn-appoints-chairman-executive-secretary/179866.html> (accessed 11 March 2017); 'Adebayo: Buhari Sacks Jim Obazee as FRCN Executive Secretary, Appoints Danieal Asapokhai,' *The Street Journal*, available at

forward, however, it is imperative that the FRCN, as well as other regulators, ensure that whatever regulation they contemplate on issuing meet these five criteria as anything less is likely to spell doom for their effective operations and continued existence.

Additionally, one thing is equally clear from this recent event and 'drama' involving the FRCN. There is an awakening in Nigeria. The 'office of the citizen'⁵⁸ and the power of the (social) media cannot be taken for granted. Bad publicity is very bad for business! Regulators can no longer afford to be on the 'bad side' of the news!! Gone are the days when you will leave the citizens speculating on the intention of the regulators;⁵⁹ people no longer appreciate being kept in the dark or second-guess what a regulator seeks to achieve. Citizens want to be part of the deliberation on what affects their 'public interest' and the earlier any regulator involves them, as well as find a suitable way to reach out to them, the better it is!

<http://thestreetjournal.org/2017/01/adeboye-buhari-sacks-jim-obazee-as-frn-executive-secretary-appoints-daniel-asapokhai/> (accessed 11 March 2017).

⁵⁸ T. Somander, 'The Most Important Title is "Citizen:" President Obama on the Significance of a Civil Society,' 23 September 2014, available at; <https://obamawhitehouse.archives.gov/blog/2014/09/23/most-important-title-citizen-president-obama-importance-civil-society> (accessed 11 March 2017)

⁵⁹ Supra note 39