A CRITICAL ANALYSIS OF THE PUBLIC AND PRIVATE COMPANY DICHOTOMY UNDER THE COMPANIES AND ALLIED MATTERS ACT 2004

INTRODUCTION

Nigeria's principal companies legislation[1] classifies all categories of incorporated companies into two broad groups, i.e. private companies and public companies.[2]

The CAMA has statutorily provided the distinction[3] between these two broad groupings of companies in Nigeria. Under the said distinction, limitations are placed on the private company, the absence of which is supposed to be the advantages of a public company. These limitations are to the effect that a private company unlike a public company must restrict its members' rights to freely transfer their shares, it cannot have members in excess of fifty persons and it cannot access the capital market for capitalization or otherwise.[4]

From the above limitations, it is obvious that the private company was designed by law to enable small business-men, their families or close associates the privilege of doing business as an incorporated company. This is to accord them a commercial status higher and more secure than that of a sole trader or partnership. The private company is therefore a business concern intended for a person or few persons and not the public in general. This type of company may operate away from public scrutiny or concern as its membership and management is the private affair of its owners. It is therefore not intended for achieving the ambitious business objectives of an elaborate investment usually (but not always) typical of a public company.

To buttress this point, the CAMA statutorily shields the affairs of the private company from public scrutiny. This it did by exempting the private companies from publishing their financial statements, as required of public companies.[5]

Section 24 of CAMA defines a public company in a residual capacity; it provides that any company which is not a private company shall be a public company. Since a private company is meant for the achievement of business objectives of a person or group of persons devoid of public scrutiny or involvement, a public company would by implication be one connected with, owned by or for the public and in that respect, whose affairs is known to people in general. It is in the above regard that the CAMA makes it mandatory for a public company to conduct its affairs under public scrutiny. This is done by the compulsion of the public company to cause its financial statements to be published for general knowledge including even the notices of its general meetings.[6]

It is clear from the above analysis that the rationale or justification for the separation and distinction of a private company from a public company is pointedly to separate the two based on private and public investment compartments.

A person or group wishing to do business away from public interference or meddling has no business incorporating a public company. On the other hand, the price such business will pay for investing as a private company is the statutory limitations which their business faces.[7]

However, a person or group that wishes to establish an elaborate business which could benefit from the vast resource available in the capital market must be willing to submit such business to public scrutiny. Ordinarily the idea is simply that the vast resources in the capital market, which are easily accessible by public companies come from the investing public.

It follows therefore that benefiting public companies must in return be publicly accountable. This is the price a public company pays for accessing the capital market for investible long and short-term funds. The private company does not enjoy this very important advantage.

Inspite of the rationale behind the provisions of Law for the separation of the private from the public company, the CAMA strangely does not entirely enforce this separation even though it recognizes it as a requirement of law.

Section 23 of CAMA clearly states that a private company which violates the statutory limitations placed on it shall lose its private status and be saddled with the publicity requirement incumbent on public companies. Despite the above provisions emphasizing the need for clear separation, the CAMA as earlier noted continues to treat both types of companies as different species of the same genus instead of treating them as different genus entirely.

This assertion is evident by the fact that the same number of members i.e. two persons is required to form both type of companies, the same minimum number of directors i.e. two persons are required to run the companies. Both types of companies have similar rules for the administration of their affairs as required by law and the Corporate Affairs Commission. It is only in respect of accounts, audit and financial disclosure that the CAMA provides different rules of operations.

In their book, "Elements of Commercial Law"[8] the learned authors[9], in view of the above situation submitted[10] that this approach of the law does not fully reflect the varied and distinct needs of, or demands on the two kinds of companies in the practical world of commerce, and the equally different challenges of public regulation which they pose to the relevant supervisory authorities.

The above position of the law therefore has given rise to several ingenious manoeuvres by businessmen such as in the famous Salomon Vs Salomon's Case which challenges the very basis of the continued retention of the statutory dichotomy between the private and public company in our statute books. The above is also made possible and applicable to Nigeria due to the inadequacy of the CAMA to sustain the need for the said dichotomy.

HISTORICAL ATTEMPTS TO REMOVE THE DICHOTOMY

The concept of the private company was first introduced in England by the Companies Act 1907 (later repealed and consolidated with other amendments into the Companies (consolidation) Act 1908 and was intended for the incorporation of family businesses. The idea was to afford people the opportunity of doing business as a partnership or association and still enjoy the limited liability benefit that incorporation brings.

Since private companies were small businesses run by private persons, they were given certain privileges, such as, exemptions from filing annual accounts with the registrar of companies. These companies were not subject to the rigours of public scrutiny and disclosure. This was allowed because the private company was considered as private investment. The price private companies paid for enjoying the status of "private investment" was that they must not involve the public in their investment. For this purpose the law prohibited them from public solicitation for investment and restricted the ability of members to freely transfer their shares to other persons of their choice.

Public companies however continued to be subject to public regulations and had to publish their financial accounts and also file same with the registrar of companies. This disclosure was to exhibit the financial health of the public company, to serve as advice to prospective investors as to the viability or otherwise of the company concerned. The public was to judge from the published financial statements and determine which companies were healthy enough to attract investment. As a result of the 1908 Act, Public companies wanting to escape too much public scrutiny soon started incorporating private companies as subsidiaries and were using them as fronts to carry on the businesses of their parent public company thereby escaping public scrutiny.[11] The 1948 companies Act (of England) came in partly to correct this anomaly. The Act divided private companies into two classes. The "exempt" and "non exempt" private companies.

Exempt private companies could not have corporate membership and could not be a subsidiary of another company, only non-exempt private companies could. Thenceforth, only exempt private companies could enjoy the privilege of not publishing their financial statements to the public. The non-exempt companies which had corporate membership and directors could not enjoy the privilege granted the exempt private companies. They also had to make limited disclosures of their financial statements to the registrar of companies. This however did not stop corporate abuses resulting from non-disclosure of financial dealings by exempt private companies and from the limited disclosure requirement on non-exempt private companies.[12]

Ten years after the supposed reform on the private company non-disclosure or limited disclosure requirement as the case may be, the British Government reacted. On the 10th of December 1959, the President of the British Board of Trade set up a Company Law Reform Committee headed by Lord Jenkins to review among other Acts, the 1948 Companies Act in the light of modern conditions and practices and recommend desirable changes in the law where desirable to meet the challenges of the times.[13]

The report of the Company Law Reform Committee was submitted in June 1962, often referred to as the Jenkins Report. The report among other things recommended the abolition of the classification of private companies into exempt and non-exempt categories. It further recommended that all types of companies be treated equally by removing the distinction between the public and private companies. Their feeling perhaps was that the only condition upon which the privilege of limited liability status could be granted to a company, whether private or public is full financial and other requisite disclosures in public interest.

As a result of this Jenkins report, the British parliament in 1967 enacted the companies Act 1967. The Act incorporated part of the Jenkins report. Section 2 of the 1967 Act required all companies to file their financial reports with the registrar of companies. However only public companies were required to go further to publish their financial statements.

The above position has been adopted in Nigeria by the CAMA. Private companies too must, like public companies file their financial statements with the Corporate Affairs Commission, except that public companies as will be seen in this paper are required to go further by publishing the said financial statements in National Newspapers. These requirements are entrenched in sections 354 and 355 of CAMA, 1990 and covered fully by part XI of the said CAMA.

THE BASIS FOR THE DICHOTOMY

The main idea or rationale behind the dichotomy between the public and private company is the need to protect the investing public.

A public company as distinct from the private company can access the capital market to raise investible funds through the issuance or sale of its securities. Its stakeholders may be and are usually diffused across the country or even the world. The funds invested in the company are therefore entrusted to be managed by a Board of Directors who are responsible for the daily management of the company. This situation gives rise to several implications.

First, the resultant separation of ownership from control in public companies requires some form of regulation to protect the investors. The disclosure requirements especially in financial matters in public companies is to provide a means by which the diffused investors could know what is happening to their investment.

Secondly, the disclosure requirement has the potential to create public confidence in the capital market. This will therefore encourage people with dormant capital to expose it at the capital market. This is done by way of investing such funds in public companies that are in need of the funds, thus promoting investment and economic prosperity.
Thirdly, enormous amount of money is available in the capital market for public companies which are viable to access for expansion or ambitious business projects. This therefore potentially makes every viable public company capable of expanding their scope to touch the lives of several and numerous people. This fact alone makes the regulation of such public companies imperative in public interest.
Further, because the activities of public companies of necessity involve or are connected to the general public, there is the need for imposing clear rules of regulation requiring public accountability and responsibility.

Professor Gower put the matter more squarely when he said

> On the basis that forewarned is forearmed the fundamental principle underlying the companies Acts has been that of disclosure. If the public and the members were enabled to find out all relevant information about the company, this thought the founding fathers of our company law would be a sure shield...[14]

Disclosure here fundamentally relates to financial disclosure. The financial statements of a company act as its most reliable and visible bill of health. They reveal the state or viability of the company. The publication of these financial statements is vital to both the company's membership and the general public. This is true of the financial statements of a public company which has the right to solicit investment from the general public. For the membership, it tells them whether their investment is yielding profits or depreciating. This is necessary because, as earlier noted, in public companies, shareholding is diffused and therefore separate from management. Usually the Board of Directors is different from the shareholders who in practice do not take part in the management of their investment in the company. They may not even attend General meetings where the financial account of the company is presented. The published financial statements therefore readily provide a forum for members to freely access these statements.

For the members of the public, they are potential investors. The statements provides information which could either persuade or discourage prospective investment.
A public company therefore must make public financial disclosure as price for the privilege of being allowed unlimited access to solicit investment from the general public.

The above privilege is indeed very fundamental. It means public companies have access to a potential pool of investors estimated at about 120 million people in Nigeria. Because of the large number and significance of these potential investors, the 1999

Constitution has taken steps to introduce further regulation of the public company to protect the interest of Nigerians.

In this regard, the Constitutions mandates the Federal Character Commission to "ensure that every public company or corporation reflects the federal character in the appointment of its directors and senior management staff"[15].

From the above, it is clear that even the Constitution recognizes public companies to be organizations within public domain. The requirement to comply with the federal character provision in the appointment of its Board of Directors and senior management staff is to ensure that public interest of Nigerians is protected. Under the 1999 Constitution, therefore, the management of public companies is not the private affair of its corporators. It is legally and constitutionally a public affair. The reflection of federal character in the management of public companies therefore is partly to be regulated by the Federal Character Commission as well as the CAMA. This form of dual regulation may not be desirable but because it is partly a constitutional requirement, it has to be so until an amendment to the Constitution is done to remove the requirement.

The 1999 Constitution, therefore, recognizes that public companies are organizations within public domain requiring statutory regulation. This fact clearly distinguishes a public company from a private company. Since the private company is the exclusive preserve of its owners, the need for restriction on the activities of such private companies becomes imperative.

Section 23(1) of the CAMA has in the above regard provided that for a private company to enjoy its privacy, it must observe all restrictions placed on it by the CAMA otherwise it will he stripped of its private company status and be subjected to the rigorous regulations imposed on public companies.

The CAMA in line with the need to clearly distinguish a private company from a public company has made provisions in that regard. These provisions clearly differentiate a private company from a public company by laying down the yardstick for the distinction.

By this criteria or yardstick, public companies can be distinguished from private companies for the purpose of proper application of the relevant regulatory measures as provided by law by the following criteria.[16]

i The private company shall by its articles restrict the transfer of its shares;
ii. The total number of members of a private company shall not exceed 50;
iii. A private company shall not unless authorized by law invite the public to subscribe for any of its shares or debentures or deposit money for fixed periods payable at call whether or not bearing interest.

Only restrictions (ii) and (iii) above pose any great danger to the ability and desire of a private company to grow and expand its business. This is because the private company is restricted from freely marketing its securities to raise the much-needed funds with which to expand its business. This restriction it is opined will prevent a private company achieving an elaborate structural expansion characteristic of public companies. Thus the restriction would quite naturally limit the private company to a small size that is just right for a small trader, who has no desire for ambitious or elaborate expansion typical of a public company.

Recent commercial practices however have made nonsense of the existing legal literature on the distinction between private and public companies. Private companies have by the ingenuity of their management circumvented the legal distinction between them and the public company. By this practice, the private company is able to enjoy the benefits of the public company without violating the law that requires the enforcement of the distinction. Aside from the above, this circumventions of the restriction on the private company to enjoy the benefits of the pubic company has exposed the inadequacy of the law to enforce the legal distinction between the public and private company.

The above anomalies are evident in the legal requirements for incorporation, the restriction on number of members and the range and size of companies.

THE LEGAL REQUIREMENT FOR INCORPORATION

One of the very fundamental requirements for the incorporation of any company, is the requirement of at least two persons[17] as subscribers to its memorandum of Association. The law also requires a minimum of two persons as directors[18] for the formation of any company in Nigeria.

It is a very serious omission for the law to ignore the economic functions of both types of companies and the legal basis for their dichotomy. While the private company is the exclusive concern of its members and management which is usually fused in the same persons, the public company is a concern of the general public.

One would have thought that the minimum requirement for incorporation in terms of members should reflect the legal differences of the two types of companies. The minimum of two members may be alright for a private company considering the need to maintain its privacy, however for a public company a minimum of two members undermines its purpose. The repealed 1968 Companies Act provided for a minimum of seven members for a public company. This could have been permissible under the 1990 CAMA, in the absence of an increase from the seven members provided under the 1968 Act.

The consequence of requiring only a minimum of two members for incorporation of a public company as in private companies could be subject to manipulation that is capable of eroding the intended dichotomy envisaged by law between the two types of companies. . For example, a public company may be incorporated with two members and directors both of whom will be the only members and directors at the same time. It is also possible that the other member/director may be a mere nominee of the other.[19] If the active member/director in this type of situation does not expand the share holding base of the company to welcome new members, there is no way this type of company could in deed be a public company as contemplated by law.
It is also impossible to see how this type of public company with only two members who double as its directors could reflect federal character[20] in the appointment of its board of directors and senior management positions as required by Law.

With this lax position of the law, such public companies typified above will continue to exist as public companies in private company clothing, without incurring any legal sanctions.

Another differential requirement in the process of incorporation distinguishing a public company from a private company is the minimum authorized share capital requirement. Section 27(2) (a) of CAMA provides that a private company shall have a minimum authorized share capital of ₦10,000 while a public company shall have a minimum authorized share capital of ₦500,000. This differential in share capital requirement provides another criteria for distinguishing a private company from a public company.

It is however pertinent to note that the differential in share capital stipulation is only a minimum requirement. There is therefore no limitation on the extent and volume of initial share capital for incorporation beyond the minimum required. A private company may as well incorporate with an initial share capital of ₦500,000 like a public company. It may even incorporate with an initial share capital in excess of the minimum stipulated for public companies. The minimum share capital stipulation is therefore not a proper yardstick for distinguishing a private company from a public one. The stipulation of ₦10,000 as minimum authorized share capital for private company is therefore not a disadvantage, nor limitation on the extent of share capital a private company may have.

The argument would have been different if a statutory limit was placed on the extent of authorized share capital a private company may have. If this were the case, the limitation on the extent of share capital requirement would have been a very clear distinction. This is particularly true if it were placed on the private company in favour of the public company. Alternatively, the Corporate Affairs Commission or the Minister in charge of Trade could have been empowered to fix a maximum limit on the extent of share capital of private companies from time to time, as the need arises.

MEMBERSHIP LIMITATIONS

The limitation for a private company not to exceed fifty persons in its membership is seen as an effective check to prevent such companies from passing off as public companies. This will also prevent the private company from access to greater funds which it could have had, supposing it could attract larger membership like the public company.

Scholars like Professor I. A. Ayua hold the view that the fifty members limitation is to make the private company suitable in the Nigerian context. In this regard he argued that the limit to 50 members takes care of the extended family system as this promotes investment at the family level.[21]

The yardstick of two to fifty members for private companies and two to infinitum for public companies as a distinction between the two types of companies serves no useful purpose. This is because the limitation of membership in a private company to 50 persons can no longer serve as a distinguishing factor. A public company could have a minimum membership of two persons without a maximum limit. A public company may therefore limit itself to fifty members and still be a public company. The conclusion here is that the characteristic of between two to fifty members is not exclusive to a private company as it could also apply to a public company.

If the law had meant otherwise it could have provided for between two to fifty members as an exclusive provision applicable only to a private company. It could have in the same vein, by way of a clear distinction prescribed, say a minimum of 51 persons and above for public companies. In this way, number of members would have become a clear yardstick for distinguishing a private company from a public company.

Private companies wishing to covert to public companies could then apply to the Corporate Affairs Commission for conversion as prescribed in section 50 of the CAMA. However, in view of the current position of the law, the above suggestion may even not work. This is because the formula for computing the maximum number of 50 members for a private company lends itself to the possibility of over stretching the number beyond 50 persons. Section 22(3) of the CAMA provides that present employee shareholders and past employee shareholders who continue to hold the company's shares acquired while in its employment are not to be counted among the fifty. Joint shareholders of the company are to be counted as one member even if they are, say 50 etc. This is despite the fact that each of such joint shareholders are shareholders in their own right and are entitled to have their names listed in the company's register of members.[22] This is however without prejudice to the fact that they are jointly entitled to only one vote.[23]

A careful analysis of the above position of the law reveals that a private company may infact and indeed have more than 50 members without breaching the limitation to 50 members rule for private companies. For example PTL Ltd may have 1000 employees who also hold the company's shares as incentive for being its employees. The company may have 50 former employees who still hold their shares in the company. 20 other persons may hold some of the company's share as joint owners under a will from a former holder. Applying the provisions of section 22(3) and (4) and section 227(2) of CAMA, this private company has 1,120 members without violating the statutory limit of 50 members for a private company.

It is even useless to argue that a public company has no limit to the number of members it could have unlike the private company. It is practically impossible for a public or any company at all to have an infinite number of shareholders or members. The number must be limited to a given member per time depending on its share capital. While placing a limitation on the number of members a private company may have, the CAMA has omitted to equally place a limitation on the number of debenture holders a private company may have. By this omission, a private company may obtain through the issuance of private debentures i.e. by private placements what it may not adequately get through its membership due to the limitation placed by law.

The fundamental significance of a company's membership lies in the finance they supply to the company's share capital for it to do business. This same money may be sourced through the issue of debentures or a combination of both shares and debentures. It is therefore argueable that the private company suffers any serious disadvantage by the limitation imposed on the number of members it may have. The private company may increase its funding by exploiting the lacuna in the law to increase its shareholding beyond fifty persons. This may then be complimented by the issuance of debentures to as many persons as are willing to privately subscribe to the company's debentures.

PROHIBITION FROM PUBLIC OFFER OF SECURITIES

Section 22(5) of CAMA prohibits private companies from soliciting investment from the public unlike the public company. Akaa Imbwaseh opines that in economic theory, the above said prohibition is the most significant difference between a private company and a public company[24]. By this limitation, it is believed that the extent and scope of growth of a private company will be significantly limited. If such private companies desire bigger growth, they may then apply to convert to public companies under section 50 of CAMA. In this way, the growth of a private company is not stalled since it could convert to a public company and continue its growth, since it serves the economy no good to permanently stall the growth of private companies. Their growth being a blessing to the economy.

This limitation it is believed will make a private company less attractive to an ambitious investor who has in mind a large corporation with a wide network of investment or conglomeration. The basis for the above thinking is that conglomerate investment requires large capital which may be out of the reach of a small investor typical of those who invest in a private company. The reason for the above being the fact that, a private company shall not go to the public i.e. the capital market to raise money. This regime of limitation from public offer and sale of securities by private companies is however not sacrosanct.

First, this limitation is not applicable to private companies that are permitted by law to enjoy some level of exemption.[25] Private company Banks and finance houses for example which are licenced to carry on deposit and lending services may invite the public to deposit money for fixed periods or payable at call with or without interest.[26] A private company in the above exempted category may be heavily capitalized from deposits it receives from the public.

In this regard, it is for example currently very difficult to distinguish between banks that are private companies such as Habib Nigeria Bank Ltd., Citizens Bank Ltd., etc and those that are public companies such as NAL Bank Plc, Standard Trust Bank Plc, and First Bank of Nigeria Plc, etc. This is especially true if access to capitalization or otherwise is used as a yardstick for distinguishing between private and public company Banks.

The recent directive by the Central Bank for commercial banks to recapitalize to the tune of N25 billion does not change the argument. The Banks that are private companies are not bound to convert to public companies. All they are required to do is recapitalize. They could do this by private placement of their securities and only convert to public companies if they desire to recapitalize through the capital market.

The limitation is also not strictly enforceable in respect of other categories of private companies. Section 46(2) of the Investments and Securities Act 1999, defines what prohibition from public solicitation by private company means. For the avoidance of doubt, the said section clearly states that public solicitation does not include invitation targeted directly at individuals or private organizations. The same is true if the offer and purchase of securities of a private company is done in circumstances that can be regarded as the domestic concern of the persons making or receiving the offer. A good example is an offer made to existing share holders irrespective of their number. This is even advantageous where a private company as earlier discussed is able to manipulate the law to enlarge its share holding base beyond 50 members without violating the provision for the limitation to 50 members.[27]

It is also possible for a private company to embark on credit marketing strategies. This is done by privately soliciting individuals to subscribe for the company's securities.

The company may by these methods reach as many prospective investors as it can. It is also possible for the company to manipulate the employment and dismissal of its staff to whom shares have been allotted while in the company's employment. By this ingenuity, the private company could reach as many prospective investors with time, as much as the public company may do through public offer. The only snag is that it may take the private company a longer time than it would the public company to reach the desired number of investors.

The limitations on membership or the prohibition from public offers and sale of the securities of a private company is even not relevant when such a company is the subsidiary of a powerful transnational corporation. It is the author's submission here that such corporations with huge foreign capital may finance a nominee to join it in forming a private company in Nigeria. The corporation may then use this private company to establish an elaborate investment. Such type of subsidiary does not therefore need much membership since it may be controlled from its international headquarters by the financing parent company. In such heavily financed subsidiaries incorporated as private companies, the issue of capitalization is not a problem. Such companies do not depend on much shareholding for finance rather, the limitation on its membership or prohibition from public solicitation of its securities is an advantage because they need not expand their shareholding thereby enabling the parent company to consolidate its hold and control of the subsidiary.

Further to the above, a private company may resort to massive capitalization of its profits with much more ease than public companies.

Corporators of private companies have corporate stake in the company that transcends mere business interest. As a result of the above, it is usual to find that the corporators of such private companies double as its main shareholders as well as its board of directors and management team. The realization of dividends on their shares is not their initial pre-occupation as the growth of the company.

The shareholders who are also the directors are adequately compensated for loss of dividends by the payment to them of good salaries. In this case, the profits are easily capitalized to increase the company's volume of business and asset base. The asset base when substantial, forms collateral for loan capital for further expansion. With time the company is able to expand without the need of going to the stock market to raise funds. The author's private investigation and research reveals examples of private companies that have grown into conglomerates through this method in Nigeria to include the Dangote Group and the Doyin Group of companies, which today have several subsidiaries spread across the country without going public. Such private companies are able to source for capital today with much ease without going public and this will enhance the growth and expansion of private companies as if they are public companies. It is therefore difficult today to distinguish between a private and a public company in terms of range and size of the company concerned. The CAMA has not fixed a limitation on the range and size of a private company. It is therefore possible for a private company to engage in ambitious expansion as much as a public company can despite the limitation on its capital.

CONCLUSION

The above analysis of the law providing for the dichotomy between private and public companies clearly reveals the challenge against its continued relevance.

The limitations placed on private companies were designed to meet the desire of private persons needing to invest on a small scale but on a status higher than that of a sole trader or partnership. Events in the corporate world however show that there has been a shift away from the dichotomy provided by law. Businessmen by their practice have completely removed the sting from the purpose the law intended to achieve by the dichotomy prescribed. This shift is made possible by manipulating or rather exploiting the inadequacies in the law prescribing the dichotomy.

The private company today is able to overcome the limitations prescribed by the dichotomy. It thereby enjoys the benefits of a public company without being subject to the regulations public companies are subjected to. Some scholars have opined that, the position of the law as it is, compounds the issue by continuing in some cases to treat both the private and public companies as different species of the same genus.[28]

In the above regard, they commented that

> This approach does not fully reflect the varied and distinct needs of or demands on the two kinds of companies in the practical world of commerce and the equally different challenges of public regulation which they pose to supervisory authorities.[29]

Private companies today are no longer the small family business of old. They are today capable of large and ambitious objectives. Some have gone on to become conglomerates based on very sound structural organization that was characteristic only of public companies.

It is therefore difficult today to distinguish between a private company and a public company in terms of number of members, share capital, asset base, capitalization, and range and size of the company. It seems that the only distinguishing factor between a private and a public company which is quite visible is the statutory descriptive words that they each have to carry at the end of their corporate names.

The law requires that private companies shall carry the word limited (Ltd) at the end of their names, while the public companies shall carry the words public limited company (Plc)[30] at the end of their corporate names. This is, however, not enough. A private company which makes an appearance in the clothing of a public company must be treated as such. This is proper other wise private companies which operate in the world and class of public companies may deliberately do so and enjoy the benefits but escape the challenges of regulation by the relevant authorities. For example, a private company may grow into an elaborate and well-structured conglomerate. Its activities may span the length and breadth of the country. Such a company in terms of range and size may qualify as a public company, yet it is a private company. The Federal Character Commission for example may not be able to enforce the provision of the 1999 Constitution that this company observe the federal character in the appointment of its board of directors and senior management staff. Being a private company puts it outside the scope of the regulatory powers of the Federal Character Commission.

There is the need, therefore, to review the legal basis for the dichotomy between private and public companies with a view to making the dichotomy more meaningful and contemporary. On the other hand, the classification of companies into private and public companies should be restructured to remove the dichotomy by collapsing both types of companies into just one type.

This restructuring should be strategic enough to ensure that clear limitations are placed on the private companies to effectively distinguish them from public companies otherwise the dichotomy should be removed. The number of membership should be clearly and distinctly provided and limited, the range and size of the two types of companies should also be clearly stipulated. This should be so effective that when for example a private company achieves a certain stipulated capitalization, or range and size etc, it should either re-register as a public company or be deemed to have converted into one, if it fails to willingly convert.

The range and size should be determinable from the value of its ascertainable assets base.

The law should be made to effectively distinguish a private company in terms of capitalization, range and size, number of membership required for initial formation etc.

This type of regulation is not new to the CAMA. For example, in providing for the degree of disclosure to be contained in the financial statements of companies, CAMA provides limited exemption for private companies that qualify as small companies. This is because there are private companies that are actually big and have attained a conglomerate status characteristic of public companies, who should not enjoy the privilege granted private companies that qualify as small companies. Small private companies are allowed the privilege of filing a modified statement of Account that makes only limited disclosure. To enjoy this privilege, a private company must meet certain criteria prescribed by the Section 351 of CAMA in terms of range, size, capitalization and ownership as follows:

The turn over of the company for the year it seeks to enjoy the exemption must not exceed ₦2million,

Its net asset value shall not exceed ₦1million or such amount as the Corporate Affairs Commission shall fix,

None of its members shall be as alien,

None of its members shall be a government or its corporation, agency or nominee,

The directors shall hold between them not less than 51% of its equity share capital

Any private company which exceeds the above requirement does not cease to be a private company; rather it loses the privilege of being treated as a small company. The consequence being that it must deliver the full accounts as required by law. Thus, any private company which grows beyond the stipulated limits knows what the risks are, since the criteria for qualifying as a small company as reproduced above, are clear and specific.

It is suggested that similar yardstick could be stipulated for qualifying as a private company for the purpose of enjoying the attendant privileges. The yardstick should be specific and not open to be stretched. Private companies which outgrow the set yardstick must be made to convert by re-registering as public companies. This is to ensure that these companies are properly regulated. It will also ensure that private companies no longer manipulate the law to make them enjoy the benefits of public companies.

Another example of a specific stipulation is section 19 of CAMA. The Section pegs 20 persons as the maximum members an unregistered company or partnership may have. The number is specific and not subject to manipulations like the maximum limit of 50 persons fixed for private companies, which has exceptions that could be manipulated to increase membership beyond 50 members.
When the limitations are specific and direct, they are easy to enforce. In the case being discussed, it will prevent private companies from enjoying the benefits of a public company without being subject to public disclosure.

This manipulation is possible because, as K. Smith and D. J. Keenan put it, "the distinction between the public and private company remains, though the consequences of the distinction are not great."[31]

Where however a more meaningful distinction cannot be drawn, a more radical approach should be adopted. There should be no distinction in the treatment of both private and public companies in terms of financial disclosure and other regulations. This policy should apply to all categories of private companies that attain a certain range, size, capitalization and organizational structure. In this way, the concept of the private company remains, but it runs the risk of incurring public regulation and financial disclosure if its corporators do not keep it below certain prohibited limits.

If this is the case, the rules will be very clear so that private companies could be clearly distinguished from public companies. Private companies that choose to cross the distinction will thereby be treated as public companies though they are private companies. The loopholes being presently maneuvered by private companies to enjoy the benefits of Public companies would have been properly closed.

ENDNOTES AND REFERENCES

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1.Companies and Allied Matters Act, Cap C20 laws of the Federation of Nigeria, 2004 herein referred to as "CAMA".
2.Ibid. Section 21(2)
3.Ibid, Section 22- 24
4.Ibid, Section 22(2-5)
5.Ibid, Section 334(3),250 – 253 and 359(3)
6.See footnote 5 ante. See also Section 222, Ibid
7.See footnote 4 ante.
8.994 Tamaza Publishing Company Ltd., Zaria, Nigeria
9.T.A.T Yagba, B.B. Kanyip and S.A. Ekwo
10.Ibid. p. 223 las
11.K. Smith and D.J. Keenan, Company Law, 3rd ed. 1976 Pitman Publishing Ltd, London, U.K. p. 5
12.Ibid.
13.K. Smith and D.J. Keenan Op. cit P. 479.
14.L.C.B Gower; Principles of Modern Company Law, 1979, Stevens and Sons London 4th Ed. p. 495
15.Schedule 3 part 1 heading c paragraph 8(3), Constitution of the Federal Republic of Nigeria, 1999.
16.Section 22(2), (3) and (5), CAMA 1990
17.Section 18. Ibid.
18.Section 246, Ibid
19.Salomon V. Salomon and Co. (1897) AC 22
20.See footnote 14 ante
21.I. A. Ayua, Nigerian Company Law (1984) Graham Burn, Bedfordshire, England p. 10
22.Section 227(2) and 227(2) CAMA 1990
23.Section 22(4) Ibid
24.Akaa Imbwaseh Esq.: "The legal and Economic relevance of the key requirements for incorporat a company in Nigeria" Benue State University Law Journal vol. 1 No. 1, 2002 p. 142
25.Section 22(5) CAMA, 1990
26.Section 22(5)(b) Ibid and Section 1(5) and (6) Banks and other Financial Institutions Act 1991 as amended by Decrees NO. 4 of 1977, NO. 38 of 1998, NO. 40 of 1999 and Act No. 10 of 2002.
27.See page 18 ante, and section 46(2) and (3), Investments and Securities Act No. 45 of 1999
28.Elements of Commercial Law, Tamaza Publishing Company Ltd., Zaria, Nigeria, 1994 p. 22
29.Ibd
30.Section 29(1) and (2) CAMA, 1990
31.K. Smith and D. J. Keenan, Loc. cit.t