AN ASSESSMENT TO THE LEGAL STATUS OF COMPANY SECRETARY UNDER NIGERIAN COMPANY LAW

By

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Abstract

This paper establishes that the status and role, respectively, of the Company Secretary, in Nigeria, are still evolving. It argues that whereas, going by judicial and statutory authorities and opinions of academic experts, the status of the Company Secretary has, nearly fully evolved, those authorities and opinions affirm that his role is still emerging. It contends that although the past status of the Company Secretary was ignoble, his present status is, certainly, noble and that this can only get better in the future. It submits that, on the other hand, the past role of the Company Secretary was ignoble, his contemporary role is quasi-noble and his future role can be noble, only, if the Company Secretary himself refrains from being a threat to his own role. The paper argues further that whether the duty of the Company Secretary is ministerial or administrative or managerial or executive is a question of fact which should be determined on the merits of each case and that the demarcation between the administrative role of the Company Secretary and his executive role is thin, indeed and will even become thinner and thinner in the future. It equally contends that although the executive role of the Company Secretary is derivative in nature, presently, in the future, the courts will, likely, ascribe direct or primary executive role to him, especially if the Articles of Association of companies reserve such role for him and that such direct executive role may also be reserved for the Company Secretary through future statutory intervention. The paper concludes that whether increasing derivative executive or managerial role will be ascribed to and reserved for the Company Secretary in the future will depend, to a large extent, on the personality of the Company Secretary.

1.1 Introduction

The formidable contribution of company to the economic growth and development of nations,[1] and by implication, of the entire world, is phenomenal.[2] The

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[1] Economists insist that though similar, there is profound difference between the terms: "economic growth" and "economic development". They argue that whereas "economic growth" means a rise in national or per capita income and product, which manifests, solely, by increase in the value of goods and services produced by each sector of the economy and by increase in overall Gross Domestic Product ("GDP"), "economic development" means the development of the economic wealth of a country, which is aimed at the overall well-being of the citizens of the country, since those citizens are the ultimate beneficiaries of the development of the economy of the country. "Economic development", they add, manifests by improvements in health, education, transport system, critical infrastructure, regional competitiveness, environmental sustainability, social inclusion, and other aspects of human welfare, which, in turn, result in high standard of living, increase in life expectancy, reduction in mortality, increase in literacy, improved quality of human capital, and so on. They further argue that: (i) "economic growth" is narrower than "economic development";

strategic position occupied by the company[3] is complemented by the alluring benefits intrinsic in it as a business medium, particularly, when compared with the other two renowned and frequently utilized business vehicles,[4] that is, sole proprietorship and partnership. Naturally, these attributes make company a much more attractive business medium than the two other business vehicles, and thus, preferable. The huge benefits of company include its investiture as "a person", *albeit* "a legal person" or "a legal fiction", separate and distinct from its owners.[5] This legal convenience, otherwise known as "corporate personality", was enunciated in the *locus classicus* of *Aaron Salomon v A. Salomon and Co. Limited*;[6] and it, ordinarily,[7] represents a "shield" or "veil", of the owners of the company. In that case,[8] *Macnaghten, L. J.* had enthused as follows:

(ii) "economic development" is more of a vague measure, usually, incorporating social indices; and (iii) whereas "economic growth" is a quantitative economic measure, "economic development" is qualitative; see, A. Sen, "Development: Which Way Now?" Vol. 93, Issue 372 *Economic Journal*, 745 - 762; see also, Questions and Answers, http://wiki.answers.com, Economic Development, http://wikepedia.org/wiki/economic_development, accessed on 3 December, 2017 and Economic Development versus Economic Growth, http://www.diffen.com/difference/Economic_Development_vs_Economic_Growth, accessed on 3 December, 2017. As regards the meaning of GDP, see, *infra* (fn. 25).

2. See, Bolaji Owasanoye, "Power Sharing between Shareholders and Directors in Company Management", I.E., Sagay and Olusesan Oliyide (eds.); *Current Developments in Nigerian Commercial Law* (Throne-of-Grace Pubs. Ltd., Lagos, 1998) 153, 153. In realization of this, the Cadbury Committee asserts that Britain's "economy depends on the drive and efficiency of its companies", see, Report of Committee on Financial Aspects of Corporate Governance otherwise called Cadbury Committee, http://www.ecgi.org/codes/documents/cadbury.pdf, accessed on 3 December, 2017, p.10.

3. In legal parlance, the word "company" is vague and this is because the word "has no strictly technical meaning"; see, Buckley, J. in *Re Stanley* [1906] 1 Ch.D. 131, 134. Nonetheless, over the years, it has become endemic that "company", simply, refers to a well-known association of a number of people formed for a primary economic reason, namely, to make profit; see, Eniola Sanu, "Status and Duties of Legal Advisers of Nigerian Companies" I.E., Sagay and Olusesan Oliyide (eds.), *Current Developments in Nigerian Commercial Law, supra*, 176, 176, and, ultimately, to create wealth; see, Bolaji Owasanoye, "Power Sharing between Shareholders and Directors in Company Management", *supra*, 153, 153.

4. In *Black's Law Dictionary*, "company" is defined as a medium for carrying on "commercial or industrial enterprise"; see Bryan A. Garner (ed.), *Black's Law Dictionary* (9th ed., West Pub. Co., Minnesota, 2004), 318.

5. In *Black's Law Dictionary, supra*, "company" is also defined as synonym for "corporation". "Corporation" is, in turn, defined as "an entity having authority under the law to act as a single person distinct from the shareholder ..." and as having "the right to exist indefinitely ..."; alternatively, it is defined as "a group ... of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up and exist indefinitely apart from them ..."; see Bryan A. Garner (ed.), *Black's Law Dictionary, supra*, 391; see also, *Trustees of Dartmouth College v. Woodward* 17 U.S. (4 Wheat) 518; 636 (1819), per Marshall, J., where "corporation" is defined as "an artificial being, invisible, intangible and exists only in contemplation of law ..."

6. [1897] A.C. 22; [1895 - 1899] All E.R. 33; 13 T.L.R. 46.

7. It is noteworthy that this shield can be removed in some circumstances. In this connection, in *Bank Voor Handel En Scheepvaart N.V. v. Slatford and Another* [1953] 1 Q.B. 248, 278, Devlin, J. declared that "the legislature can forge a sledgehammer capable of cracking open the corporate shell" and L.C.B. Gower compliments this by declaring that "... even without the aid of a legislative sledgehammer, the courts have sometimes been prepared to have a crack ...": see, L.C.B. Gower, *Gower's Principles of Modern Company Law* (4th ed., Stevens, 1979), 112. The circumstances in which the shield may be removed include the

following: (i) where the company is a mere sham or simulacrum or is a puppet or a mask on the face of its biological owners, see, *Prince Lanre Adeyemi v. Lan and Baker (Nigeria) Limitedand Another, infra* (fn. 13) and *Nigerite Limited v. Dalami Nigeria Limited* [1992] 7 N.W.L.R. (Pt. 253) 288, 304; (ii) where the company engages in fraud and improper conduct, see, *Public Finance Securities Limited and Another v. Sir Chief Harrison Jefia, infra* (fn. 16) 602, *Pioneer Laundry and Drycleaners Limited v. Minister of National Revenue* [1940] A.C. 127, *Re Bulge Press Limited* [1961] Ch. D. 270, per Buckley, J., particularly, at 288 and *Gilford Motors v. Horne* [1993] Ch. D. 935; (iii) where there is illegality, see, *Merchandise Transport Limited v. British Transport Commission* [1962] 2 Q.B. 173; (iv) where it defeats public convenience or justifies wrong, see, *Daimler Co. Limited v. Continental Tyre and Rubber Co.(Great Britain) Limited* [1916] 2 A.C. 307; (v) where it is necessary for the purpose of ascertaining agency relationship, see, *Re F.G. (Films) Limited* [1953] 1 W.L.R. 483, [1953] 1 All E.R. 615, per Vaisey, J.; (vi) where it is apt for seeing, clearly, a trust relationship, see, *Abbey Malvern Wells Limited v. Ministry of Local Government and Planning* [1951] Ch. D. 728, per Danckwerts, J. and *Littlewoods Mail Order Stores Limited v. Inland Revenue Commissioners* [1969] 1 W.L.R. 1241; (vii) where it is appropriate for determining tax liability, see, *Marina Nominees Limited v. Federal Board of Inland Revenue* [1986] 2 N.W.LR. (Pt. 20) 48 and *Pioneer Laundry and Drycleaners Limited v. Minister of National Revenue, supra*; and (viii) where it is necessary for determining the relationship between a holding company and its subsidiary, see, *Merchandise Transport Limited v. British Transport Commission, supra* and *FDB Financial Services Limited* and *Others v. Ambassador O.O. Adesola and Others, infra* (fn. 10). Statutorily, the veil of incorporation should be lifted in the following circumstances, among others: (i) where the number of members of a company falls below the minimum of two and the company carries on in that position for more than six months, see, *section 93, Companies and Allied Matters Act, 1990, infra* (fn. 19); (ii) where the number of directors of a company falls below the minimum of two and the company carries on business after sixty days of such depletion, see, *section 246 (3), Companies and Allied Matters Act, infra* (fn. 19); (iii) where a company receives loan and fails to apply it for the purpose for which the loan was received, see, *section 290, Companies and Allied Matters Act, infra* (fn. 19); (iv) where the affairs of companies and their subsidiaries or related companies are being investigated, see, *sections 314 to 329, Companies and Allied Matters Act, infra* (fn. 19); see also, C.O. Okonkwo, "The Corporate Affairs Commission", O. Akanki (ed.), *Essays on Company Law* (University of Lagos Press, 1992), 20; (v) where one of subsidiaries of a company is a trustee of the other in respect of some properties in issue relating to a group account, see, *sections 314 to 329, Companies and Allied Matters Act, infra* (fn. 19); (vi) where, in the course of winding-up, it appears that any business of a company has been carried on in a reckless manner or with intent to defraud, see, *section 506 (1) Companies and Allied Matters Act, infra* (fn. 19); and (vii) where a company issues or authorizes the issue of a Bill of Exchange, Promissory Note, and so on, without mentioning the name of the company, see, *section 631 (1) (c) and (4), Companies and Allied Matters Act, infra* (fn. 19); (viii) for the purpose of determining officers of a company who may be held personally liable for an offence created under *Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act,* Cap. F2, Laws of the Federation of Nigeria, 2004; see, *section 15(1)* of the Act; (ix) where a company is guilty of an offence created in *Money Laundering Act,* Cap. M18, Laws of the Federation of Nigeria, 2004, for the purpose of determining officers of the company who may be held personally liable for the offence, see, *sections 15 (1) (a) and 17 (1)* of the Act; and (x) where a company is guilty of an offence created in *Advanced Fee Fraud and other Fraud Related Offences Act,* Cap. A6, Laws of the Federation of Nigeria, 2004, for the purpose of determining officers of the company who may be held personally liable for the offence, see, *section 10 (1)* of the Act. It is noteworthy, too, that the doctrine by which the shield may be removed is known as "the doctrine of lifting or piercing the corporate veil" and that it is a doctrine of equity, the essence of which is to ensure that the end of justice and fairness is met in deserving circumstances; see, respectively, *FDB Financial Services Limited* and *Others v Ambassador O.O. Adesola and Others, supra* and *Prince Lanre Adeyemi v Lan and Baker (Nigeria) Limitedand Another, infra* (fn. 13) per Aderemi, J.C.A., at 51. The veil is less readily lifted in Anglo-Nigerian law than it is in American law. Therefore, more literature on the subject is available in the United States; see, Cohn and Simitis, "Lifting the Veil in the Company Law of the European Continent" (1963) *Commercial Law Quarterly* 189, cited by L.C.B. Gower, *supra*, 112.

8. That is, *AronSalomon v A. Salomon and Co. Limited, supra.*

> ... The company is at law, a different person altogether from the subscribers to the Memorandum and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them...[9]

It requires emphasis that this decision has been followed in a plethora of decisions across the common law border. In *FDB Financial Services Limited and Others v Ambassador O.O. Adesola and Others*,[10] for instance, the Court recognized as follows:"... the consequence of recognizing the separate personality of a company is to draw a veil of incorporation over the company ..."[11]

The Court also enthused as follows:

> ... One is therefore generally not entitled to go behind or lift this veil. However, ... a statute will not be allowed to be used as an excuse to justify illegality or fraud, it is in quest to avoid the normal consequences of the statute which may result in great injustice that the court as occasion demands have to look behind or pierce the corporate veil.[12]

Furthermore, in *Prince Lanre Adeyemi v Lan and Baker (Nigeria) Limited and Another*,[13] the Court observed that an "incorporated limited liability company is always regarded as a separate and distinct entity from its shareholders and directors"[14] and that in "effect, the consequence of recognising the separate personality of a company is to draw a veil of incorporation over the company generally";[15] and in *Public Finance Securities Limited and Another v Sir Chief Harrison Jefia*,[16] the doctrine was explained in the following words:"the doctrine of the legal personality of a company appears to cast a veil over the personality of a limited liability company through which the court cannot see ..."[17]

The overwhelming affirmation of this decision in common law jurisdictions has solidified the law in this regard and this has been accentuated by the supporting opinion

9. *Supra*, [1897] A.C. 22, 51.
10. [2000] 8 N.W.L.R. (Pt. 668) 170.
11. *Supra*, at 183.
12. *Supra*, at 183, per Aderemi, J.C.A., reading the judgement of Court.
13. [2000] 7 N.W.L.R. (Pt. 663) 33.
14. *Supra*, at 51.
15. *Supra*, at 51.
16. [1998] 3 N.W.L. (Pt. 543) 602.
17. *Supra*, at 614; see also, *Nigerite Limited v Dalami Nigeria Limited, supra*, at 304.

of academic lawyers in these jurisdictions,[18] and has, since 1990, become even statutorily entrenched in Nigeria.[19]

The consequential benefits of this principle to company include capacity to own property;[20] perpetual succession;[21] limited liability;[22] capacity to sue in its name;[23] transferability of its shares;borrowing powers; inviolability of contract of employment entered into with any person;[24] and so on.

From massive job creation, to colossal subscription to Gross Domestic Product ("GDP"),[25] to human capital development through rigorous and sometimes expensive training and re-training of its workforce, to immense bestowment unto the revenue pool by way of payment of various forms of taxes and levies,[26] to encouraging Research and Development necessary for growing the real or manufacturing sub-sector of the economy, the contributions of company to socio-economic growth and development in any nation, Nigeria inclusive, is enormous.

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18. See, for example, L.C.B. Gower, *Gower's Principles of Modern Company Law, supra*, 112.

19. See, *section 18 (1)* (that is, the interpretation section) *of the Interpretation Act*, Cap. 123, Laws of the Federation of Nigeria, 2004, which is a re-enactment of *section 3 of the Interpretation Act, 1939*; see also, *section 38 of the Companies and Allied Matters Act, 1990* now known as Cap. C20, Laws of the Federation of Nigeria, 2004 ("*CAMA*"). This is the current statute that regulates the primary affairs of companies in Nigeria and has been, generally, acclaimed as reflecting profound reforms in corporate law and practice in Nigeria; for instance, see, generally, J.O. Anifalaje, "Derogation from the Common Law in the Companies and Allied Matters Act, 1990", I.E., Sagay and Olusesan Oliyide (eds.), *supra*, 142.

20. See*Macaura v Northern Assurance Co. Limited* [1925] A.C. 619.

21. *CatherineLee v Lee's Air Farming Limited* [1961] A.C. 12; [1960] 3 W.L.R. 722; 103 S.J. 391; [1959] 2 All E.R. 300. See also, the Australian case of *Re Noel Tedman Holding Property Limited* (1967) Qd. R. 561.

22. Limited either to the unpaid nominal value of owners' shares (in the case of company limited by shares) or limited to the amount that owners have agreed to contribute to the assets of the company in the event that the company is being wound-up (in the case of company limited by guarantee).

23. See, *Foss v Harbottle* [1843] 2 Hare 461 and the Nigerian Supreme Court decision in *Ramanchandani v Miss Bassey Ekpeyong* [1975] 5 S.C. 29.

24. See, *Nokes v Doncaster Amalgamated Collieries Limited* [1940] A.C. 1014.

25. GDP is, primarily, a concept of Economics, which represents a way for measuring the size and depth of an economy. The GDP of an economy is defined as the market value of all officially recognized final goods and services produced within the economy in a given period of time. Alternatively, it is considered as the sum of the value added at every stage of the production process of all final goods and services produced within an economy at a particular time. Until the 1980s, the term: Gross National Product ("GNP") was used in the United States in place of GDP. However, both terms: GDP and GNP are almost identical; and yet, they are entirely different because while GDP (or Gross Domestic Income ("GDI")) is concerned with the economy in which income is generated, GNP (or Gross National Income ("GNI") is a measure of the accrual of income to that economy; see generally, *Wikipedia, Free Encyclopedia*, accessed on 8 March, 2012. The Expenditure Approach, which is the most common for measuring GDP is to the following effect: GDP = consumption + investment + (government expenditure) + (exports - imports); see, *Wikipedia*, http://en.wikipedia.org/wiki/Gross_domestic_product, accessed on 3 December, 2017.

26. For instance, Nigerian companies are liable to companies' income tax pursuant to *Companies Income Tax Act*, Cap. C 21, Laws of the Federation of Nigeria, 2004 and to education tax pursuant to *Education Tax Act*, Cap. E4, Laws of the Federation of Nigeria, 2004. Some are liable to tax pursuant to *Petroleum Profits Tax Act*, Cap. P 13, Laws of the Federation of Nigeria, 2004.

Being a former colony of Britain, Nigeria has close legal nexus with Britain[27] and substantial part of the Nigerian law, including company law, was foisted on Nigeria as an integral part of the process of colonization of Nigeria by Britain or is, otherwise, influenced by or derived from Britain.[28] By way of specificity, the common law of England,[29] the doctrines of equity[30] and statute have had dominant impact on the Nigerian company law. This is by virtue of both Sections 24 of the Judicature Act, 1873 (U.K.), which is a statute of general application in Nigeria and section 45 of the Interpretation Act, 2004.[31]

Therefore, from Companies Ordinance, 1912,[31] to Companies (Amendment and Extension) Act, 1917,[32] to Companies Act, 1922,[33] to Companies Act, 1968,[34] and finally, to Companies and Allied Matters Act, 1990,[35] the Nigerian legislation on company have been deeply rooted in the English common law and English company law statutes, such as English Companies Act, 1908, English Companies Act, 1948 and English Companies Act, 1978. Being a *persona ficta*, created, recognised and nurtured by law, company is of a complex nature and this necessitates the regulation of its affairs and activities,[36] through statutes, and lately, through corporate governance rules.[37]

Up till 1990, one of the most predominant vestiges of colonialism in the Nigerian company law was the law on Company Secretary. The focus of this paper is to appraise the role, powers and responsibilities of the Nigerian Company Secretary[38] in relation to

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27. See, Nkiru-Nzegwu Danjuma, *The Role of the Company Secretary in Corporate Management* (Heinemann Educational Books Nig. Plc., Ibadan, 1991), 1.
28. See, Nkiru-Nzegwu Danjuma, *supra*, 1.
29. Common law of England refers to that bundle of English laws, which, originally, evolved from the ethos and idiosyncracies of the English people and, which, as Anifalaje observed, was hitherto, administered by the English common law courts; see, J.O. Anifalaje, "Derogation from the Common Law in the Companies and Allied Matters Act, 1990", *supra*, 143.
30. Doctrines of equity were, originally, canonical laws, which emerged in England to mitigate the perceived rigidity of common law and was administered by the Court of Chancery at Lincoln's Inn; see, Anifalaje, *supra*, 143.
31. *Supra* (fn. 19).
31. This applied, only, to the former colony of Lagos, which was created in 1861; see, Nkiru-Nzegwu Danjuma, *supra*, 1.
32. This was applicable to the whole country; see, Nkiru-Nzegwu Danjuma, *supra*, 1.
33. This repealed and replaced the 1912 and 1917 Acts; see, Nkiru-Nzegwu Danjuma, *supra*, 1 and much later, it became Cap. 37, Laws of Nigeria, 1958.
34. *Infra*.
35. *Supra*.
36. See, Bolaji Owasanoye, *supra*, at 153.
37. It is noteworthy that Company Secretary is known and referred to in the United States of America as Corporate Secretary; see, Rufai Khalid, *Company Secretary and Legal Adviser* (Roozis Perfections Co., 2011), 1.
38. Cadbury Committee describes "corporate governance" as "the system by which companies are directed and controlled"; see, Report of Committee on Financial Aspects of Corporate Governance, *supra* (fn. 2). I.O. Agbede distinguishes statutes from corporate governance principles and underscores the particular pertinence of the latter in relation to regulation of company when he opines that whereas "what natural legislation offers in each nation of the world, is the skeleton of company management structure, what corporate governance provides is flesh and blood to give that structure life, nourishment and vibrancy"; see, I.O Agbede,

governance of companies. Because the performance of his role, the discharge of his responsibilities and the exercise of his powers are integrated with his status, the status of the Company Secretary shall also come under scrutiny in this paper. In examining the status of the Company Secretary, the paper shall lay credence upon the personality of the Company Secretary in recognition of the truism that the stipulation of the law may be morbid unless it is enlivened by the right personality of the Company Secretary and this personality determines the impact that a Company Secretary would, invariably, make in corporate management, particularly, in the rapidly evolving world. The paper is divided into six parts. These introductory remarks constitute Part 1. Conceptualization of pertinent terms is in Part 2. Significance of efforts at ascertaining the status and role of the Company Secretary is underscored in Part 3. The status and role of the Company Secretary is discussed under two heads in Part 4, namely: (i) status and role in the pre-1968 period, and (ii) status and role since 1968. What this writer considers as the status and role of the Company Secretary in contemporary times is examined in Part 5. Conclusion is in Part 6.

1.2 Conceptualization of Key Words

The impact of conceptualization in the understanding of an intellectual discourse is monumental, indeed. The word "conceptualization is synonymous with "philosophy",[39] "jurisprudence", "theory" or "deep thinking", which underscores a subject in discourse. A most admirable description of "philosophy" is provided by Ogundere as follows:

> A methodical, meditative, intellectual activity or enquiry into the grounds for fundamental principles, an analysis of the basic concepts employed in the expressions of such principles ... An examination of the values of truth, goodness, and beauty in relation to man's will and consciousness ... a promotion of rationality and clear thinking in the subjects of its enquiry.[40]

From the foregoing, it becomes imperative that we engage in conceptualization of certain words or terms that are central to bringing the issues in discourse in this paper

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39. "Philosophy" originated from the Greek Language. Its Latin translation is "philosphia", which means "love of wisdom". Descartes describes "philosophy" as "nothing but the study of wisdom and truth"; see, Descrates, Principal Philosophae (1644), at IXB14 (SM 1186, Paris). Rene Descartes, who is one of the most influential thinkers in human history, was born on 31 March, 1566, in La Haye, France; see also, G. Berkeley, Three dialogues: 103 Between Hydas and Philonous (1977), both cited by J.D. Ogundere, *The Nigerian Judge and His Court* (University Press Plc. Pub., 1994), 103. See, generally, Olusesan Oliyide, "The Nigerian Judiciary and the Nigerian Banking Sector" (2011) Vol. XXXVII, Nos. 1 and 2, *Indian Socio-Legal Journal*, 1, at 1.

40. See, J.D. Ogundere, *supra* (fn. 35), 103 and O. Oliyide, *supra* (fn. 35), 1.

in proper perspective and which will aid clear appreciation and understanding of those issues.

Some of the key words in this discourse are patent while some are merely latent. Those that are patent are "Company Secretary" and "role". The latent ones are "function", "responsibility" and "status". Conceptualization of these words shall, therefore, now, engage our attention.

1.2.1 Company Secretary

One of the pitfalls in existing literature on the Company Secretary is that they scarcely define the Company Secretary. This drawback often makes the Company Secretary appear nebulous and discussions regarding him somewhat esoteric. In this connection, the definition of "Company Secretary" provided by the learned authors of Black's Law Dictionary, namely, "a Corporate Officer in charge of official correspondence, Minutes of Board meetings and records of stock ownership and trust"[41] or "a clerk of the Corporation",[42] is unhelpful for being grossly inadequate. This situation has been exacerbated by the omission to define "Company Secretary" in CAMA.[43] Happily, a working description of "Company Secretary" is provided by L.C.B. Gower[44] as an officer of a company, usually, appointed by the Board of Directors, not by members in General Meeting[45] and charged with the following primary responsibility:

> ... ensuring that the documentation of the company is in order, that the requisite returns are made ..., and that the company's registers are properly maintained[46] ... it is he that is referred to in order to obtain authenticated copies of contracts and resolutions decided upon by the board,[47] and in the presence of whom the company's seal must be affixed to documents.[48]

From the foregoing, therefore, it is apparent that a Company Secretary is an appointee of the Board of Directors and is charged with the primary responsibility of

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41. *Black's Law Dictionary, supra*, 144.
42. *Supra*, 144.
43. This is unlike in *the Companies Act (U.K.)*, where "Company Secretary" is defined in ***section 2 (45)*** to mean "any other individual possessing the prescribed qualification and appointed to perform the duties which may be performed by a Secretary under this Act and other ministerial or administrative duties".
44. See, L.C.B. Gower, *supra*, 157 - 158.
45. *Supra*, 158.
46. These registers will include register of members, register of debenture holders, register of creditors, and so on. But as Gower, *supra*, observes, sometimes, a separate professional firm is appointed to act as registrar to maintain the register of members and debenture holders; see Gower, *supra*, 157. It should be added that sometimes, too, especially in large companies, a separate unit within the company is created to act as registrar to maintain these registers. Whichever it is, the Company Secretary must still be instrumental in acting as nexus between the company and the registrars and between the registrars and members or debenture holders.
47. See, *Mahony v East Holyford Mining Co.* (1875) L.R. 7, H.L. 869.
48. See, generally, L.C.B. Gower, *supra*, 157.

ensuring: (i) that the documentation of the company is in order; (ii) that the requisite returns are made to appropriate authorities; (iii) that the company's registers are properly maintained; (iv) that authenticated copies of contracts and resolutions decided upon by the board, which must be in his custody, are provided, when such is required; and (v) that the company's seal must be affixed to documents in his presence, in line with the usual provisions of the Articles of Association, and so on.

Although this definition is defective for being inadequate, particularly, in relation to the modern-day Company Secretary, nevertheless, it, at least, provides us with an idea of who a Company Secretary is, in the corporate management structure.

1.2.2 Role

The word "role" has been defined either as "a function, or part played or taken on by someone or something in life or business" or as "someone's characteristic or expected function within a particular social setting".[49] It has also been defined, simply, as synonymous with "function".[50] Finally, it has been defined as "the way in which someone or something is involved in an activity or situation and how much influence he has on it".[51]

1.2.3 Function

The word "function" has been defined as "a duty particular to someone in a particular job"[52] and as meaning "to serve or act as something".[53] Secondly, it has been defined as "the activity characteristic of a person or thing"[54] or "the specific purpose of a certain person or thing";[55] or "to perform a function;[56] or "to act, operate".[57] Finally, it has been defined as meaning "to work in the correct or intended way".[58] Interestingly, it has been asserted that for something to function in a particular way, that thing must work in that particular way.[59]

1.2.4 Responsibility

The word "responsibility" has been defined as "the state of being responsible or of having important duties";[60] as meaning an obligation or duty;[61] and as "a duty to be in

49. See, *Chamber's 21st Century Dictionary* (Allied Chambers (India) Ltd., New Delhi, 2007).
50. See, *Webster's Universal Dictionary and Thesaurus* (Greddes and Grosset, Scotland, 2003).
51. See, *Longman Dictionary of Contemporary English* (4th ed., Pearson Educational Services Ltd., Essex, 2008).
52. See, *Chamber's 21st Century Dictionary, supra.*
53. Ibid
54. See, *Webster's Universal Dictionary and Thesaurus, supra.*
55. Ibid
56. Ibid
57. Ibid
58. See, *Longman Dictionary of Contemporary English, supra.*
59. Ibid
60. See, *Chamber's 21st Century Dictionary, supra.*
61. See, *Webster's Universal Dictionary and Thesaurus, supra.*

charge of someone or something, so that you make decisions and can be blamed if something bad happens".[62]

1.2.5 Status

The word "status" has been defined as "rank or position in relation to others, within society or an organisation"[63] or "legal standing"[64] or "level of importance".[65]

The above conceptualization exercise, clearly, establishes five incontrovertible facts that are very crucial to this discourse; namely: (i) the words; "role", "function" and "responsibility" are, simply, synonyms - they all mean "duty"; (ii) there is a world of difference between the letter and spirit of the words "role", "function" and "responsibility" on the one hand and the life of those words, because, more than the letters and spirit of the law in relation to the Company Secretary, it is the impact, the influence, the activity, the functionality that the Company Secretary brings-to-bear in carrying out the letters of the law in relation to his office that actually give life and meaning to those letters and make him relevant and strategic in corporate management; (iii), flowing from (ii) above, the "status" of the Company Secretary is the bedrock, the chief-cornerstone and the major determinant of his role in corporate management; (iv) the words "role", "function" and "responsibility", which we have agreed, mean "duty", on the one hand and the word 'status", on the other hand, are integrated and one can, hardly, be discussed without the other; and (iv) it is the personality, the calibre, the ability, the endowment and the talent of the Company Secretary, more than anything else, that will consummate his role, shore-up his impact and ultimately advance his status in corporate management.

The derived basic facts above, naturally, impose an obligation on us to examine the status and role of the Company Secretary. This will, therefore, presently engage our attention, sequentially, under two heads, namely: (i) the pre-1968 period; and (ii) the period since 1968. In the interim, however, it is important to examine the significance of ascertaining the role and status of the Company Secretary.

1.3 Significance of Ascertaining the Roleand Status of Company Secretary

The significance of ascertaining the role and status of the Company Secretary derives from the truth that the company, being an artificial person, cannot act on its own but must act through natural beings whose acts and omissions would then be attributed to the company, not only under the general principles of agency and vicarious liability,[66] but under a separate principle that the thoughts and acts of those people are those of the

62. See, *Longman Dictionary of Contemporary English, supra.*
63. See. *Chamber's 21st Century Dictionary, supra.*
64. Ibid
65. Ibid
66. See. L.C.B. Gower, *supra*, 205. Note that the common law principle of vicarious liability has, now, been codified as *section 66 (3), CAMA, supra* Thus, statutorily, in Nigeria, a company is still vicariously liable for acts of its employees which are done within the scope of their employment. In this context, therefore, a company will be vicariously liable for acts of its Company Secretary carried- on within the scope of the employment of the Company Secretary.

company.[67] This principle, which is otherwise known as the "Organic theory",[68] was foreshadowed in the opinion of *Neville, J.* in *Bath v Standard Land Co. Limited*,[69] to the following effect:"The board of directors are the brains and the only brains of the company which is the body, and the company can and does act only through them".[70]It was, however, enunciated and espoused by Viscount Haldane, L.C.[71] in*Lennard's Carrying Co. Limited v Asiatic Petroleum Co. Limited*,[72] in his dictum, which is as follows:

> ... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation[73]... who is not merely a servant or agent from whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself.[74]

The profoundness of above maxim underpins the frequency with which it has been applied in Anglo-Nigerian law. In England, it was applied in *Continental Tyre and Rubber Co. (Great Britain) Limited v Daimler Co. Limited*,[75] in *H.M.S. Truculent*,[76] where a Third Sea Lord was held to be the "directing mind" of the Admiralty, in *H. L. Bolton (Engineering) Co. Limited v T. J. Graham and Sons Limited*,[77] and in *The Lady Gwendolen*,[78] where *Willmer* and *Winn, L.JJ.*, emphasized that the person whose fault is to be ascribed to the company need not be a director. In *H. L.Bolton (Engineering) Co.*

67. L.C.B. Gower, *supra*, 205.
68. It is so called because the law regards those persons whose thoughts and acts are attributed to the company as "organic parts of the company".
69. [1910] 2 Ch.D. 408.
70. *Supra*, at 416, cited in Gower, L.C.B., *supra*, 207.
71. Delivering the judgement of the House of Lords.
72. [1915] A.C. 705.
73. At 713; emphasis supplied.
74. Ibid.
75. [1915] 1 K.B. 893, particularly per Buckley, L.J., at 916, where His Lordship said as follows: "The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions, It cannot wear weapons nor serve in the wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators". The acts of the shareholders in that case were, therefore, ascribed to the company.
76. [1952] P. 1; see Gower, L.C.B., *supra*, 206.
77. [1956] 3 All E.R. 624, 630; [1957] 1 Q.B. 159, 172.
78. [1965] P. 294; see Gower, L.C.B., *supra*, 206.

Limited v T. J. Graham and Sons Limited,[79]*Denning, L.J.* personified the company in the following words:

> A company is in many ways to be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such ... [80]

In this connection, too, in *The Lady Gwendolen,*[81]*Winn, L.J.* declared thus:"Wherever the fault either occurs in a function or sphere of action which the owner has retained for himself or is that of a manager independent of the owner to whom the owner has surrendered all relevant powers of control, it is 'actual fault of' the owner ..."

In Nigeria, the dictum has been applied, for instance, in *Trenco (Nigeria) Limited v African Real Estate and Investment Co. Limited and Another,*[82] where Aniagolu, J.S.C.,[83] observed as follows:"... a company although a legal person, is an artificial one which can only act through its human agents and officers".[84]

The issue, therefore, is who are those human officers of the company whose acts and omissions will be deemed to be the acts and omissions of the company? Would they include the Company Secretary? It is pertinent to state that this all-important question is still moot as it has not been directly answered by the courts both in England and Nigeria and this has rendered Anglo-Nigerian case-law on this point uncertain.

It is also noteworthy that the courts have adopted differing tests for the purpose of discovering those officers whose acts or omissions are attributed to the company. For instance, in *John Henshall (Quarries) Limited v Harvey,*[85] in establishing the criminal responsibility of a company, Lord Parker, C.J., Marshall and Widegry, JJ.[86]adopted the "brains of the company" or "responsible officers" test by which they attributed to the company, actual knowledge of responsible officers of the facts out of which an offence arose. The same test was adopted in *Magna Planet Limited v.*

79. *Supra.*
80. [1956] 3 All E.R. at 630; [1957] 1 Q.B. at 172.
81. *Supra.*
82. [1978] 1 L.R.N. 146.
83. Delivering the judgement of the Supreme Court, at 153 and citing Viscount Haldane, L.C. in *Lennard's Carrying Co. Limited v Asiatic Petroleum Co. Limited, supra* and *Denning, L.J.* in *H. L.Bolton (Engineering) Co. Limited v T. J. Graham and Sons Limited, supra.*
84. *Supra*, at 153.
85. [1965] 2 Q.B. 233.
86. At Queen'sBench Division.

Mitchell,[87] where the Court held that corporate liability is to be imposed for the act of responsible officer who forms "the brain" of the company.

The "brains of the company" or "responsible officers" test is, however, subject to the "scope of authority" doctrine which presupposes that the act of the responsible officer must be within his capacity.[88] Therefore, in *Moore v I. Bresler Limited*,[89] Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ., ascribed to a company, the fraudulent act of its Company Secretary in selling some goods of the company with the intent of defrauding the company and the company was, accordingly, convicted of the act.

Furthermore, the courts have distinguished between "directive employees" and "executive employees" for this purpose.[90] In this connection, Welsh has, also, suggested that liabilities should be imposed in respect of actions of persons enjoying primary constitutional authority over the company's affairs,[91] whom, the learned authors identifies as: (i) Directors being the "brain" of the company; and (ii) responsible officers enjoying managerial functions.

In *Continental Tyre and Rubber Co. (Great Britain) Limited v Daimler Co. Limited*,[92] where a Company Secretary instructed the company's Solicitors to issue a writ to recover a debt due to the company, the House of Lords held that the Company Secretary had no power to do so and that even if the Articles of Association of the company empowered the Directors to authorize the Company Secretary to bring actions on behalf of the company, the evidence before the court did not indicate that the Directors, indeed, so authorized the Company Secretary. Therefore, the Company Secretary's action was held not to be such as could be ascribed to the company.

But the latent implication of the decision in *Tesco Supermarkets Limited v Nattrass*,[93] which is about the leading English case on the matter, is that the Company Secretary is, certainly, an officer for whose acts the company would be liable. In that case, the persons for whose acts the company would be liable are listed to include the following: (i) the Board of Directors, the Managing Director and other superior officers of the company who carry out management functions and speak and act as the company; (ii) persons who are in actual control of the company or part of them and who are nor responsible to other persons in the company for the manner in which they discharge their duties; and (iii) persons who, by the Memorandum and Articles of Association or as a

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87. (1996) C.L.R. 194.

88. See, *Daimler Co. Limited v Continental Tyer and Rubber Co. (Great Britain) Limited* [1916] 2 A.C. 307, per Lord Parker of Waddington, at 339, where His Lordship posed the following question: "How are rules relating to a natural person being an enemy of the King applied to artificial persons ...?" and he proffered answer to the question as follows: "As far as active adherence to the enemy goes, there can be no difference, except such as arises from the fact that *a company's acts are those of its servants and agents acting within the scope of their authority*", emphasis supplied; see also, *Director of Public Prosecutions v. Kent and Sussex Contractors Limited* [1944] 1 K.B. 146, 156, per Viscount Caldecote, C.J.

89. [1944] 2 All E.R. 515.

90. See, O. A. Owoade, "Corporate Criminal Liability" Vol. 1 (1997) *Nigerian Journal of Private Law*, 25.

91. See, Welsh, "The Corporate Criminal Liability of Corporation" (1946) 62 *Law Quarterly Review* 345; see also, L.H. Leigh, "By Whom Does A Company Permit" (1966) *Modern Law Review* 568.

92. *Supra* (fn. 75).

93. (1972) A.C. 153.

result of action taken by the Directors of the company in General Meeting pursuant to the Articles. are entrusted with the exercise of the powers of the company.

However, *CAMA* has streamlined the scope of liability of company for acts of natural human beings. Only acts of the following are attributable to the company and they are the only acts for which the company will be criminally or civilly liable;[94] namely: (i) Members in General Meeting, (ii) Board of Directors or acts of the Managing Director which they carry-out while carrying-out the business of the company in the usual way; and (iii) officer or agent of company who has been expressly or impliedly authorized to act in that manner by the company acting through its members in General Meeting, Board of Directors or Managing Director.[95]

1.4 Status and Role in the Pre-1968 Period

In the pre-1968 era, the Nigerian companies' legislation merely followed their English counterparts in relation to the status and role of the Company Secretary. In essence, the provisions of the Anglo-Nigerian companies' statutes in this era were, largely, a codification of the English common law on the subject-matter.[96] Also, the provisions of those legislation were terse, allowing for frequent recourse to English common law. In this period, the status of the Company Secretary was sordid because it was lowly and quite contemptuous. He was regarded as a mere servant,[97] or, in the analogy of a merchant adopted by Brett, L.J.,[98] "only a clerk",[99] or, in the disdainful description adopted by Baggallay, L.J.,[100] "merely a secretary".[101]

In terms of role, he had none. He was subordinate to the management of the company, and was allowed to do only those things that he was specifically instructed by

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94. See, *section 65, CAMA*. Note, however, that the company will escape liability if a person had actual knowledge that, at the time of the transaction with him, the General Meeting, Board of Directors or Managing Director, as the case may be, had no power to act in the matter or had acted in an irregular manner or if by virtue of his relationship to the company, he ought to have known about the absence of such power or irregularity; see, *proviso (a) tosection 65, supra*. Also, once it is established that a business is carried on by a company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorized by the company's Memorandum; see, *proviso (b) to section 65, supra*.

95. See, *section 66 (1)(a), CAMA*. Note that in order for the company to be taken to have authorized an officer or agent, he shall have represented the officer or agent ashaving its authority to act in the manner; see, *section 66 (1) (b), CAMA*.

96. *Supra*.

97. See *Newlands v The National Employers' Accident Association, infra*, per Brett, M R., at 432; *Barnett, Hoares and Co. v South London Tramway Co., infra*,per Lord Esher, M.R., at 817; and E.M. Asomugha, "Company Secretary/Legal Adviser As a Vital Link in Corporate Governance", Vol. 2, No. 12, Dec., 1991, *Justice* 17, at 17.

98. See *Newlands v The National Employers' Accident Association Limited, infra*, per Brett, M.R., at430.

99. Ibid

100. See *Newlands v The National Employers' Accident Association Limited, infra*, per Baggallay, L.J., at 431.

101. Ibid.

the management to do.[102] He had purely administrative role and no managerial powers. He was hardly regarded as an agent of the company. This is because he would hardly ever be entrusted with any actual or express authority[103] and he, readily, lacked apparent or ostensible authority.[104] As such, he could not, in connection with the doctrine of *qui facit per alium, facit per se,*[105] bind the company, at all.

Thus, in *Patridge v The Albert Life Assurance,*[106] it was held that a reply made by a Company Secretary to enquiries about the state of affairs of the company, which induced the Plaintiff to buy shares in the company, did not fall within the business of the company that was delegated to the Company Secretary and that no action for misrepresentation, could, consequently, be maintained against the company.

In consonance with the decision in *Patridge v The Albert Life Assurance,*[107] in *Newlands v The National Employers' Accident Association Limited,*[108] the Court of Appeal (U.K.) held that a Company Secretary had no general authority to make representations which could induce persons to take shares in a company. In the latter case, Baggallay, L.J. declared thus:

> It appears to me that it is impossible to infer any authority on the part of the secretary to make this representation; the facts of this case do not establish any, and there is no general principle which establishes that a secretary has any such authority. No case has been found ...; but no case lays down that a company is responsible for misrepresentations made, as this misrepresentation was, *by one who is merely a secretary.*[109]

In the same case, Brett, M.R. enthused as follows:

> ... from the knowledge which the Court has of regular business it cannot say that a secretary has, as a general practice, authority to make people to take shares, it follows that it cannot hold that this secretary had any such authority. A secretary is a mere servant; his position is that he is to do what he is told, and no person

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102. See *Newlands v The National Employers' Accident Association Limited, infra,* per Brett, M.R., at 432 and *Barnett, Hoares and Co. v. South London Tramway Co. ,infra,* per Lord Esher, M.R., at 817.

103. Actual or express authority is expressly given to a person to perform specific acts; see, E.O. Akanki (ed.), *Commercial Law in Nigeria* (University of Lagos Press, 2005) 228.

104. Ostensible authority exists when a company manifests to a third party that an officer may act on its behalf; and such third party, in good faith, believes that such authority exists. When the court finds that ostensible authority exists, the company is bound by the acts of the officer, even though such officer did not have actual authority from the company to do such ac act; see Kiser D. Barnes, "The Status of Company Secretaries Revised" (1988) 2 *Gravitas Review of Business and Property Law*, 15.

105. This doctrine, literally, means he who does something through another, does it himself. It is noteworthy that this is the foundation upon which the whole law of agency is founded.

106. (1872) S.J. 199.

107. *Supra.*

108. [1885] 54 L.J. Q.B. 428.

109. *Supra,* at 431. Emphasis supplied.

> can assume that he has any authority to represent anything at all; nor can anyone assume that statements made by him are necessarily to be accepted as trustworthy without further enquiry, ... in all such cases it is clearly the duty of persons who wish to be accurately informed on matters which are of importance to refer to the principal. If in such a case, application is made to a secretary, and trust is reposed in the assertions of a secretary, then the person who so applies and so reposes his trust must take the risks attendant on his course of conduct ...[110]

Following on-line, in this plethora of decisions depicting judicial disdain and ignominy for the Company Secretary, is *Barnett, Hoares and Co. v South London Tramways Co.*,[112] a case decided in 1887, in which the court, again, declined to infer any form of authority on the part of a Company Secretary to bind the company in obligation to third parties.

The dictum of Lopes, L.J. in that case is illustrative; and it is as follows:

> In this case we are asked to infer from the mere fact that a person was the secretary of a tramway company that he had authority to make representations with regard to the financial situation and relations of the company, although there was no evidence whatsoever of any express authority nor any evidence that the making of such representations was within the scope of his duty. It seems to me that it would be most unreasonable to make the inference which we are asked to make.[113]

This demeaning status and role reserved for the Company Secretary by the English courts was accentuated by a string of subsequent decisions, such as *George Whitechurch Limited v Cavanagh*;[114]*Ruben and Another v Great Fingall Consolidated and Others*;[115]*Houghton and Company v Nothard, Lowe and Wills Limited*;[116] and *Re Cleadon Trust Limited.*[117]

110. *Supra*, at 430.
112. [1887] 18 Q.B.D. 815; see, particularly, the dictum of Lord Esher at 817.
113. *Supra*, at 818.
114. [1902] A.C. 117.
115. [1906] A.C. 439; [1904 - 1907] All E.R. 460.
116. [1927] 1 K.B. 246 (C.A.); [1928] A.L. 1 (H.L.).
117. [1939] Ch. D. 286; see also, *Chida Mines Limited v Andersen* [1905] 22 T.L.R. 27, where it was held that a Company Secretary could not even register transfers of shares without the authority of Directors.

1.4.1 Status and Role Since 1968

The era since 1968 has witnessed two interesting developments in respect of the status and role of the Company Secretary in corporate management. The first development was statutory intervention and the second was judicial activism. The first development, that is, statutory intervention, took place in two forms. The first form shall be discussed under the head: "First Statutory Intervention" and the second shall be discussed under the head: "Second Statutory Intervention". In-between these two heads, the second development, that is, judicial activism, shall be discussed.

a) First Statutory Intervention

The first statutory intervention manifested in the promulgation, in 1968, of the Companies Act of that year.[118] This was, by and large, an improvement on the Pre-1968 era. The Act made it mandatory for every company in Nigeria to have a Secretary and, in line with the dictates of sound corporate governance principles, prohibited a sole Director from doubling as Secretary.[119] In this connection, too, it stipulated that wherever a provision required an act to be done by a Secretary and a Director, one person was precluded from acting as both Director and Secretary, at the same time.[120]

Although, his specific functions were still not stated in the Act, the Company Secretary was, nevertheless, recognized as an Officer of the company,[121] with the attendant power to apparently and ostensibly bind the company in tort and contract.

The Act also empowered the Company Secretary's Assistant or Deputy to act for him in his absence;[122] and where the Company Secretary and his Assistants and Deputies are all absent, the Act empowered the Directors to authorize any other Officer to act for the Company Secretary.[123] The Company Secretary was made to be an appointee of the Directors and his remuneration was fixed by them.[124]

From the above, it would be observed that whereas the 1968 Act attempted to improve on the common law position regarding the status and role of the Company Secretary, it, nevertheless, scratched same on the surface. In effect, common law was still, largely, resorted to on this subject-matter, the implication of which was that the Company Secretary was, still, susceptible, as at common law, to being "tossed around" by the management of his company, which might instruct him to do anything at all, however lowly and demeaning, at their whims. The 1968 Act succeeded, therefore, in effecting, in Anifalaje's words, "minor and mild derogation from the common law".[125]

b) Judicial Activism

The post-1968 period has, also, witnessed tremendous improvement in case-law relating to the status and role of the Company Secretary; in terms of progressive and

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118. It is noteworthy that this statute was modelled along *the Companies Act, 1948* (U.K.).
119. See, *section 169* of the Act.
120. See, *sections 170* and *171* and *Articles 110* and *111*.
121. See, *section 395* (that is, the Interpretation Section) of the Act, in which "officer" in relation to a company was defined as including a Secretary.
122. See, *section 169(2)* of the Act.
123. See, *section 169(2)* of the Act, *supra*.
124. See, *Article 109* to the Act, *supra*.
125. See, Anifalaje, *supra*, 143.

salutary judicial activism. Incidentally, this improvement took place in the interregnum between the first and second statutory intervention in Nigeria.

The legendary judicial activist and forwarding-looking jurist, Denning, L.J. had taken the novel bold step at aligning the common law on the status and role of the Company Secretary with contemporary social, economic and legal realities when, in 1971, in *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited*,[126] His Lordship declared s follows:

> But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in modern Companies Act, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business. So much that he may be regarded as held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of the company's affairs, such as employing staff, and ordering cars, and so forth. All such matters now come within the ostensible authority of the company's secretary ... a company secretary had ostensible authority to enter into contracts for the hire of ... cars, and therefore, the company must pay for them ...[127]

In the same case,[128] Salmon, L.J. enthused as follows:

> ... I think there can be no doubt that the secretary is the chief administrative officer of the company. So far as matters concerned with administration ... the secretary has ostensible authority to sign contracts on behalf of a company ... The hiring is part of his administrative functions. Whether the secretary would have an authority to sign a contract relating to the commercial management of the company, for example, a contract for the sale or purchase of goods in which the company deals, does not arise for decision in the present case and I do not propose to express any concluded opinion on the point; but contracts such as the present fall within the ambit of administration and I entertain no doubt that the

126. [1971] 3 All E.R. 16, at 19; [1971] 2 Q.B. 711, at 716, 717.
127. [1971] 3 All E.R. at 19.
128. That is, *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited*, *supra*.

> secretary had ostensible power to sign on behalf of the company.[129]

In the same case,[130] Salmon, L.J. enthused as follows:

> ... whatever the position of a company's secretary may have been in 1887, I am quite satisfied that it has altered a great deal from what it was then. At the end of the last century a company secretary still occupied a very humble position - very little higher, if any, than that of a minor clerk. Today, not only has the status of a company secretary been much enhanced, but that state of affairs has been recognised by the statutes.... I think there can be no doubt that the secretary is the chief administrative officer of the company.[131]

Despite this tremendous progress recorded in English case-law regarding th status and role of the Company Secretary, curiously, the Nigerian courts did not immediately, embrace the progressive approach, choosing, instead, to cling unto th nineteenth-century regressive position of the English courts. Thus, in 1977, in *Migliori and Mangili v Metal Construction (West Africa) Limited, Okeowo and Ayoola*[132] Belgore J. stated thus:

> ...what strikingly came to mind about it is the pontifical role ... the third respondent[133] had assumed which appears contrary to his duties as described by Lord Macnaghten in *George Whitechurch Limited v Cavanaugh* ..... as those 'of a limited and of a somewhat humble character'. He is not a shareholder nor a director of the company. He is only a secretary ... no more than an administrative officer of the company and his primary function is to carry out the decisions of the directors. Does not vest him with any power to take an independent decision regarding the management of the company. This has been well established by law and it was clearly stated by Lord Esher, M.R. in *Barnett v South London Tramways Co.* ...

129. *Supra*, [1971] 3 All E.R. at 19; [1971] 2 Q.B. at 718.
130. That is, *Panorama Developments (Guildford) Limited v. Fidelis Furnishing Fabrics Limited, supra*.
131. *Supra*, [1971] 3 All E.R. at 19; [1971] 2 Q.B. at 717. His Lordship proceeded to emphasise that in all matters regarding administration, the Company Secretary possesses ostensible authority to sign contracts on behalf of the company, see, *supra*, at 717.
132. [1977] 3 F.R.C.R. 117, 120; [1978] N.C.L.R. 274, 279. This is a decision of the defunct Federal Revenue Court (now known as Federal High Court).
133. That is, the Company Secretary.

Such decisions as that in *Migliore v Metal Construction (West Africa) Limited,*[134] must have prompted Anifalaje to declare that "the Nigerian courts have relentlessly been applying the relevant common law principles in their decisions concerning company law matters for many decades".[135]

Happily, this attitude of the Nigerian courts soon gave-way to more modern, progressive and realistic stance in the semblance of the modern English common law on the subject-matter,[136] beginning in 1979, when the Nigerian Supreme Court, in *Taiwo Okeowo and Others v D.A. Migliore and Others,*[137] affirmed that the Company Secretary is a "principal officer of the company". Six years later, in *Ashibogun v Afprint Limited,*[138] Longe, J. held as *ultra vires*, the action of a Managing Director, which, purportedly, removed a Company Secretary from office, contrary to the company's Articles of Association. In the course of His Lordship's judgement, His Lordship had declared as follows:

> The Articles of Association as required by law has, impliedly taken note of the important status of a secretary to the company that it specifically provides a clause for its appointment and removal. Nobody can deny the fact that in an incorporated body, there are three important personalities. These are: 1. The Chairman; 2. The Managing Director; and 3. The secretary ...

His Lordship also stated thus:"The Companies Act provides that the Secretary in addition to his normal administrative duties, has special duties in respect of meetings, books and returns. In fact, one is bold to say that he shares equal responsibilities with the Managing Director as the life-wire of the company".[139]

The Court of Appeal affirmed this progressive approach a year later, in *Wimpey (Nigeria) Limited and Another v Alhaji Kelani Balogun.*[140] In that case, the Court declared thus:

> It was stated in the Ruling that the company secretary is not a member of the management of any company. Learned counsel for the respondent also echoed this view in his brief. Unfortunately no authority was cited for this proposition. I hope a company secretary is not being confused with a secretary/typist. They are two different things. A company secretary is indeed a high

134. *Supra.*
135. See, Anifalaje, *supra*, 146.
136. Represented, mainly, by the English House of Lords decision in *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited, supra.*
137. [1979] 11 S.C. 87, 102, per Idigbe, J.S.C.
138. (1985) .H.C.N.L.R. 400, 419.
139. *Supra.*
140. [1986] 3 N.W.L.R. (Pt. 28) 324.

ranking officer in the company set up and is indeed part of the management of the company.[141]

The above therefore, establishes that in the period beginning in 1968, the preponderance of Nigerian courts adopted the modern and progressive stance in England regarding the status and role of the Company Secretary.

c) **Second Statutory Intervention**

The second statutory intervention in this period took place with the promulgation of the Companies and Allied Matters Act, 1990 ("CAMA"). Certainly CAMA has guaranteed the ascendancy of the status and role of the Company Secretary in Nigeria and given the Company Secretary a new lease of life.[142] It has achieved this through "sweeping and profound"[143] statutory derogation from regressive and unrealistic common law position regarding the Company Secretary.

First, it retains the provisions of the Companies Act, 1968 to the effect that every company must have a Company Secretary.[144] This, therefore, endorses the recognition which the legislature accords to the Company Secretary in relation to company management. CAMA also re-enacts the provision of the Companies Act, 1968, which allowed the Assistant or Deputy of the Company Secretary or any other officer to act either where the office of the Company Secretary is vacant or if the Company Secretary is, otherwise, incapable of acting.[145]

Furthermore, CAMA re-enacts the provision in the Companies Act, 1968 to the effect that where a provision requires an act to be done by the Secretary and a Director, one person cannot act as both Secretary and Director at the same time[146] and that to the effect that the Company Secretary shall be appointed and may be removed by the Directors.[147]

Novel and quite revolutionary provisions of CAMA in relation to the Company Secretary include prescription of qualification[148] for the Company Secretary and for his functions and duties.[149]

In connection with qualification, he must possess the requisite knowledge and experience necessary to discharge the duties of a Company Secretary[150] and if he is the Company Secretary of a public company, he must, in addition, be one of the following:

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141. Per Ogundare, J.C.A. at 337.
142. See, E.M. Asomugha, "Company Secretary/Legal Adviser As a Vital Link in Corporate Governance", *supra*, at 18.
143. See, Anifalaje, *supra*, 143.
144. See, *Section 293, CAMA.*
145. See, *Section 293(2), CAMA.*
146. See, *Section 294, CAMA.*
147. See, *Article 109, Table A, Companies Act, 1968* and *Section 296 (1), CAMA*. The specific procedure for removing the Company Secretary of a public company is provided in *Section 296 (2), CAMA.*
148. See. generally, *section 295, CAMA.*
149. See. *Section 298, CAMA.*
150. See. *Section 295, CAMA.*

(i) a member of the Institute of Chartered Secretaries and Administrators;[151] or (ii) Legal Practitioner;[152] or (iii) a member of the Institute of Chartered Accountants of Nigeria or other bodies of accountants as are established, from time to time, by statute;[153] or (iv) any person who has held the office of the Secretary of a public company for at least three years of the five years immediately preceding his appointment in a public company;[154] or (v) a body corporate or firm consisting of members each of whom is qualified under heads (i) to (iv) above.[155]

His functions and duties are: (i) to attend the meetings of the company, Board of Directors and its Committees, rendering all necessary secretarial services in respect of the meetings and advising on compliance by the meetings with applicable rules and regulations;[156] (ii) to maintain the registers and other records required to be maintained by the company under CAMA;[157] (iii) to render proper returns and give notification required under CAMA to be given to Corporate Affairs Commission;[158] and (iv) to carry out such administrative and other secretarial duties directed by the Directors of the company.[159] The use of the words: "shall include the following"[160] in prescribing the functions of the Company Secretary, clearly, indicates that his duties are open-ended.[161] This is coupled with the provision allowing the Company Secretary to exercise the power of a Director once that is authorized by the Board.[162]

Although, ordinarily, the Company Secretary owes no fiduciary duty to the company; nevertheless, where he acts as the company's agent, he is deemed to owe fiduciary duties to the company; as such, he is liable to the company in the following circumstances: (i) where he makes secret profits; (ii) allows his duties to conflict with his personal interests; or (iii) uses confidential information he obtains from the company to

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151. See, *Section 295 (a), CAMA*. This is the same as the position in United Kingdom and India; see, R. Khalid, *supra*, 4.
152. Within the meaning of *the Legal Practitioners Act*, No. 15, 1975, now Cap. L 11, Laws of the Federation of Nigeria, 2004; see, *section 295 (b), CAMA*.
153. See, *Section 295 (c), CAMA*.
154. See, *Section 295 (d), CAMA*.
155. See, *Section 295 (e), CAMA*. The implication of this provision is that, just as in India, a body corporate may be a Company Secretary in Nigeria. This contrasts with the position in the United Kingdom where only individuals may be Company Secretary; see, Khalid, R., *supra*, 4 and section 2 (45) of the Companies Act (U.K.), *supra*, which defines "Company Secretary" as meaning "any other individual..." It is noteworthy that a learned author has criticized this provision; see A. Abdullahi, "A Critique of the Law Reform Commission's New Companies Decree Proposals" (1989) Vol. 2, No. 2 *Gravitas Review of Business and Property Law* 73, 80.
156. See, *Section 298 (1) (a), CAMA*.
157. See, *Section 298 (1) (b), CAMA*.
158. See, *Section 298 (1) (c), CAMA*. The Corporate Affairs Commission is the body established by virtue of *Section 1, CAMA*, for the purpose of coordinating the regulation of companies in Nigeria; see, *Section 7, CAMA*.
159. See, *Section 298 (1)(d), CAMA*.
160. That is in *Section 298, CAMA, supra*.
161. See, *the Interpretation Act, 1990*.
162. See, *Section 298(2), CAMA*.

his benefit;[163] or (iv) being an officer of the company, if he defaults in discharging his duties as an officer, he is liable for all the penalties prescribed in CAMA for a defaulting officer.

The above provisions,[164] clearly, indicate that CAMA advanced the status of the Company Secretary in corporate management and make his role, pre-eminent, indeed.[165]

1.5 Contemporary Status and Role of the Company Secretary

The discussion, so far, reveals that, in contemporary times, the Company Secretary is neither humble[166] nor lowly; rather, he is an important and highly placed figure in corporate management.[167] Also, he is not a servant, or, to allude to the allegory of *Lord Esher, M.R.*, a mere clerk,[168] or, in the words of *Salmon, L.J.*, a "minor clerk", or a "secretary/typist";[169] rather, he is so well-placed that he is the Chief Administrative Officer[170] or a principal officer of the company.[171] He is so important that he is the third most important person in the company after the Chairman and the Managing Director;[172] and may even be said to be on the same pedestal with the Managing Director in the hierarchy of the company.[173]

Whereas he would never ever be entrusted with actual authority in respect of non-administrative matters and he, clearly, lacked ostensible authority by which he could bind the company with third parties, in contemporary times, he may be imbued with actual, authority in certain cases and he, certainly, has ostensible authority.

As regards role, his role is ministerial or administrative in nature. The activities that make up this role are non-exhaustive but they will include the following: (i) acting as representative of the company for the purpose of signing documents and correspondence on behalf of the company; (ii) acting as link between the shareholders and the directors; (iii) advising the Board of Directors on legal matters[174] and ensuring compliance with legal requirements in all matters involving the company, including compliance with corporate governance codes;[175] (iv) providing secretarial services at the meetings of the

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163. See, *Section 297, CAMA.*

164. That is, both the provisions of *the Companies Act, 1968* that were re-enacted and the novel provisions.

165. See, Danjuma, N., *supra*, 44.

166. Per Salmon, L.J. in*Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited, supra*; *Migliore v Metal Construction (West African) Limited*, per Belgore, J.

167. See, Gower, *Gowers' Modern Principles of Company Law, supra*; see also, *Wimpey vBalogun*, per Ogundare, J.C.A., *supra*.

168. See, Lord Esher, M.R. in *Barnett, Hoares and Co. v South London Tramways Co., supra*, 632.

169. *Wimpey v. Balogun, supra.*Per Ogundare, J.C.A.

170. Salmon, L.J. in *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited, supra.*

171. Supreme Court in *Okeowo v Migliore, supra.*

172. *Ashibogun v Afprint*, per *Longe, J.*

173. *Ibid.*

174. This is, particularly, where he doubles as Legal Adviser.

175. *Supra* (fn. 38). Agbede submits that, in contemporary times, corporate governance principles are so fundamental that they are deemed, universally, as a most significant indicator of the credibility of the economy of a nation, particularly, in the estimation of potential foreign investors; see, Agbede, *supra*, 3. In view of this importance of corporate governance principles, the contemporary Company Secretary must play

Board of Directors and its Committees and of the shareholders; (v) maintenance of the various statutory registers and records as required by CAMA[176] and the Articles of Association of the company; (vi) filing periodic statutory information with the Corporate Affairs Commission, particularly, where changes occur in the critical aspects of the company, including capital, Board of Directors, and so on; (vii) acting as link between the Executive Directors and the Non-Executive Directors; (viii) guiding the Directors to comply with their obligations under CAMA,[177] Nigerian Stock Exchange Rules and Regulations, Abuja Securities and Commodity Exchange Rules, Abuja Securities and Commodity Exchange Membership Requirements, Nigerian Stock Exchange Listing Requirements, Investors' Protection Trust Fund Rules, 2007, Securities and Exchange Commission Rules and Regulations, 2007,[178] Central Bank of Nigeria/Securities and Exchange Commission Guidelines and Rules on Margin Lending, Anti-Money Laundering/Combating Financing of Terrorism Compliance Manual for Capital Market Operators, 2010 and other procedures, for instance, disclosure of share interest and share dealings, and disclosure of interest when contracting with the company; (ix) coordinating and executing payment of honourarium to directors; (x) generally, ensuring compliance with the provisions of Investments and Securities Act, 2007,[179] Trustee Investments Act, 2004[180] and other statutes in relation to dealings in shares and other securities; (xi) advising the Directors regarding their obligations to the company, especially fiduciary obligations and the application of the doctrine of *ultra vires*, which has now been modified for the protection of third parties;[181] (xii) maintaining the company's register of members and dealing with transfers and other matters affecting shareholders and queries

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a major role in ensuring strict adherence to them. In Nigeria, deliberate efforts at subjecting Nigerian companies to corporate governance rules began in 2003, with the issuance, by the Securities and Exchange Commission, of Code of Corporate Governance for Public Companies in Nigeria, 2003. This was followed by the Corporate Governance Code for Banks, 2006, issued by the Central Bank of Nigeria, the Corporate Governance Code for Pension Companies, 2008, issued by the Pensions Commission and the Corporate governance Code for Insurance Companies, 2009, issued by the National insurance Commission. It should be noted that experts have observed that this proliferation of corporate governance codes and the consequent inconsistency inherent in them are unhealthy for Nigeria's economic development and have consequently advocated a streamline of the codes; see, for instance, G.O. Demaki, "Proliferation of Codes of Corporate Governance in Nigeria and Economic Development" Vol. 1 (6) August, 2011*Business and Management Review*, 1, 1. Happily, Daisy Ekineh, has, now, hinted that a conglomerate-body of financial services regulatory organs in Nigeria - Financial Services Regulation Coordination Committee (FSRCC) is currently working on harmonizing these Codes into a single Code of corporate governance rules; see, Daisy Ekineh, "Reform Agenda for Corporate Governance in Nigeria: Disclosure and Reporting Requirement", paper presented at Roundtable on Demystifying Corporate Governance, organized by the Institute of Directors of Nigeria, Centre for Corporate Governance, held at Protea Hotel, Ikoyi, Lagos State, on 27 October, 2009, 3.

176. *Supra.*

177. *Supra.*

178. As amended by Securities and Exchange Commission (Amendment) Rules and Regulations, 2008, Securities and Exchange Commission (Amendment) Rules and Regulations, 2009, Securities and Exchange Commission (Amendment) Rules and Regulations, 2010 and Securities and Exchange Commission (Amendment) Rules and Regulations, 2011.

179. Which became law on 25 June, 2007.

180. Cap. T22, Laws of the Federation of Nigeria, 2004.

181. See, *section 39(3), CAMA.*

and requests from shareholders;[182] (xiii) monitoring and identifying "stake-building" in the company's shares by potential take-over bidders; (xiv) co-ordinating company's share and loan capital related issues, such as increase and further issues including application for listing of additional issues; (xv) maintaining communication with and discharging other obligations to shareholders in relation to circular, payment of dividends, issuing documentation regarding rights issues and capitalization, servicing institutional shareholders and other investment protection committee; (xvi) coordinating the preparation, printing and distribution of company's interim report and annual report and accounts; (xvii) ensuring compliance with the company's Memorandum and Articles of Association; and (xviii) providing advice, guidance and other services where the company is involved in take-over or acquisition.

Since 1971, preponderance of judicial and statutory authorities have been emphatic that, in general terms, the role of the Company Secretary does not include managerial or executive role.[183] Although in *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited,*[184] Salmon, L.J. raised this issue but refused to proffer opinion on it because it was not an issue before the court. In this regard, His Lordship said:

> Whether the secretary would have authority to sign a contract relating to the commercial management of the company for example, a contract for the sale or purchase of goods in which the company deals do not arise for decision in the present case and I do not propose to express any concluded opinion on the point ...[185]

Also, the decision of the Court of Appeal in *Wimpey Ltd. v Balogun*[186] that the Company Secretary is part of the management of the company merely begged this issue. The decision was imprecise on whether the Company Secretary, by being part of management of the company, possessed managerial and executive role, automatically, or whether his being part of the company's management is to the extent of his ministerial or administrative role or to the extent of only those executive or managerial derived from the Board of Directors.

While the earlier decisions on this matter were somewhat prevaricating, some more recent ones are more precise. Thus, in *Re* Maidstone Buildings Provisions Limited,[187] Pennycuick, V.C. declared as follows:"so far as the position of secretary as such is concerned, it is established beyond all question that a secretary is not concerned in

182. As we indicated earlier, in some big companies, a separate registrars' unit may be established or external registrars may be retained for this purpose, in which case, the Company Secretary acts as liaison between these registrars and the shareholders, particularly in resolving very sensitive matters.

183. See, for instance, *section 298, CAMA.*

184. *Supra.*

185. *Supra,* [1971] 3 All E.R. at 19.

186. *Supra,* per Ogundare, J.C.A.

187. [1971] 3 All E.R. 363.

the management of the company ... he is not concerned in carrying on the business of the company ...".[188]

This rule forms the rationale for common law recognizing only two organs for company, namely; (i) Members in General Meeting; and (ii) Board of Directors.[189] This common law position was also codified in the Companies Act, 1968.[190] The scope of organs for company has, now, been enlarged in CAMA, to include officers or agents appointed by or under authority derived from Members in General Meeting or the Board of Directors.[191] It is submitted that the officers or agents appointed by or under authority derived from Members in General Meeting or the Board of Directors,[192] will include the Company Secretary where he is so authorized to exercise managerial or executive power.

First, in Re Maidstone Buildings Provisions Limited, Pennycuick, V.C.[193] asserted thus: follows:" ... on the other hand, it is equally well established, indeed it is obvious, that a person who holds the office of secretary, may in some other capacity be concerned in the management of the company's business".[194]

Second, section 298 (2) of CAMA provides as follows:"The secretary shall not without the authority of the board exercise any powers vested in the directors".[195]

Finally, the learned authors of Palmer's Company Law advanced the following position:"... in practice, the functions of the secretary often exceeds those contemplated by the Act and he is sometimes given considerable managerial responsibility".[196]

1.6 Conclusion

The foregoing has established that the status and role, respectively, of the Company Secretary, are still evolving. Whereas, going by judicial and statutory authorities and opinions of academic experts, the status of the Company Secretary has, nearly fully evolved, those authorities and opinions affirm that his role is still evolving. In other words, although the past status of the Company Secretary was ignoble, his present status is, certainly, noble and this can only get better in the future. On the other hand, the past role of the Company Secretary was ignoble, his contemporary role is quasi-noble and his future role can be noble, only, if the Company Secretary himself refrains from being a threat to his own role. By way of emphasis, no other role can threaten the role of a Company Secretary in corporate management; only the Company Secretary can successfully, threaten his role.

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188. *Supra*, at 368.
189. See, Nkiru-Nzegwu Danjuma, *supra*, 29; see also, 'Bolaji Owasanoye, *supra*, 155.
190. *Supra*.
191. See, *section 63 (1), CAMA*.
192 *Supra*.
193. *Supra*, at 368.
194. The unambiguous implication of this provision is that the Company Secretary is empowered to carry carry-out any executive role which the Board of Directors may authorize him to carry-out.
195. The unambiguous implication of this provision is that the Company Secretary is empowered to carry-out any executive role which the Board of directors may authorize him to carry-out
196 See, *Palmer's Company Law* (21st ed), at 369, cited by learned author, Nkiru-Nzegwu Danjuma.

Whether the duty of the Company Secretary is ministerial or administrative or managerial or executive is a question of fact to be determined on the merits of each case. The demarcation between the administrative role of the Company Secretary and his executive role is thin, indeed and it is submitted that this will become thinner and thinner in the future. Although the executive role of the Company Secretary is derivative in nature, presently, it will not be a surprise if the courts, in the future, begin to manifest willingness to ascribe direct or primary executive role to the Company Secretary, particularly if the Articles of Association of companies reserves such role for the Company Secretary. It will, also, not be entirely a surprise if such direct executive role is reserved through future statutory intervention.

Whether increasing derivative executive or managerial role will be ascribed to the Company Secretary in the future and whether direct executive or managerial role will be reserved for him will depend, to a large extent, on the personality of the Company Secretary.

In other to attract direct executive or managerial role in addition to the indirect or derivate executive or managerial role and ministerial or administrative role which he currently has, the Company Secretary must possess a very respectable and dependable personality.

Diligence, greatest level of ideals, versatility, forthrightness, deep knowledge of corporate law and practice,[197] particularly and other matters including the specific matters relating to the operational aspects of the business engaged-in by the company, honesty, integrity courage, dignity candour, and so on, must be part of his virtues. In all, he must be able to earn and sustain the respect of the Directors and shareholders. The days of such Company Secretary as *Mr. Bayne* in *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited*,[198] who caused great misfortune for him company through various frauds perpetrated in the name of his company on an innocent third party, should, truly, be over, if the contemporary Company Secretary must enhance his status and role.

The contemporary Company Secretary must see himself as a potential Managing Director and must carry himself as such, even from his first day in office. The Nigerian Company Secretary must make up his mind that no longer will he be reduced to the old status of "a mere clerk" or "servant" by being sent on several demeaning errands. He must, first and foremost, see himself as a professional whose status must be enhanced on each day in office.

The Chartered Institute of Secretaries and Administrators, also, has a role to play. It must come up with a Code of Conduct for Company Secretaries, detailing what kind of assignments that Company Secretaries may engage in that will constitute professional

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197. See, for example, Nollah O. Edun, "Company Secretaries in Public Companies" (1989) Vol. 2, No. 2 *Gravitas Review of Business and Property Law* 1, 12.

198. *Supra*. See, particularly, the dictum of Salmon, L.J. at 718 to the following effect: "...if you employ a company secretary you certainly have to take the risk whether he is going to be honest in transactions ... Whenever it is a question of which two innocent parties has to bear a loss caused by a rogue, one cannot help having great sympathy for the man on whose shoulders the burden falls".

misconduct and providing sanctions for same. It must also engage in training and re-training programmes for Company Secretaries such as would enhance their knowledge, skills and professionalism.

On the part of companies, the tremendous positive impact that the Company Secretary may have on attaining the objectives of the company impose an obligation on them to ensure that only suitable persons are chosen for that office from a rigorous selection process.

Only very few Company Secretaries in Nigeria have risen to the topmost executive positions of companies. It is hoped that the present crop of Company Secretaries will make up their mind to do all that need to be done to break-into the elitist circle of executives of companies and make their mark as such.

The strategic socio-economic positioning of the company makes power-play among contending forces; that is, shareholders and directors, a reality, the very fundamental subject-matter of control being a step towards tapping the company's vast social, economic and other potentials.[199]

The role of the Company Secretary as a stabilizing force in this contending corporate regulation scenario cannot be over-emphasized. In this connection, it will be imperative, in the future, to allow members in General Meeting, of both public and private companies to have input into the appointment and removal of the Company Secretary. The argument that this will be hazardous for its capability to elevate the Company Secretary to a rivalling position with the Directors and shareholders appears to have no basis, whatsoever.[200]

This should engender dual merits. First, it would create some fairness and balancing effect which should guarantee the neutrality of the Company Secretary in the power-play between the Directors on the one and members on the other hand for the control of the company; and second, it should enhance greater accountability, transparency and probity on the part of Directors, who are likely to see the Company Secretary as a "watch-dog" of some sort and this should, in turn, advance the cause of corporate governance.

The qualification reserved for the Secretaries of public companies must be extended to those of private companies. It is submitted that this will improve the standard of company secretarial practice in relation to private companies and will impact, positively, on overall company management quality in Nigeria.

The specific procedure for removing the Secretary of a public company, which is specified in *section 296(2)* should, also, be extended to Secretaries of private companies. In this context, "what is good for the goose" ought, also, to be "good for the gander".

199. Owasanoye, *supra*, 153. Nollah Edun harped on intermediation between the company and its shareholders and other investors as a fundamental responsibility of the Company Secretary; see, Nollah O. Edun, "Company Secretaries in Public Companies", *supra*.

200. See A. Abdullahi, "A Critique of the Law Reform Commission's New Companies Decree Proposals", *supra*.

Also, as it is in *the Companies Act (U.K.)*, it is apposite for the term: "Company Secretary" to be defined in CAMA. This statutory definition will provide an unequivocal guide as regards who a Company Secretary, really, is.

Finally, the provision allowing a company to qualify as Company Secretary serves no useful purpose and it should be expunged, such that only individuals and partnerships may qualify as Company Secretary, just as it is in other established professions.