



# IFE JURIS REVIEW

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# THE RELEVANCE OF THE COMPANY SECRETARY IN THE 21<sup>ST</sup> CENTURY

\*

S. A. Lawal\*

## Abstract

*This paper aims at examining the improved roles of the company secretary in the 21<sup>st</sup> Century which renders him an indispensable asset of the company. At doing this, the paper considers the status of the company secretary both under the common law and its current status, his appointment and what qualifies him to be appointed, his roles which embrace the roles that are statutorily and expressly provided for under CAMA, and those ethical roles which are impliedly and statutorily provided for, to enhance good corporate governance. Other contents of this paper are the fiduciary duties and liability of the secretary, as well as its removal as the company secretary. The paper concludes that the recent growing importance placed on corporate governance has really enhanced the role of the company secretary, while his status continues to be recognised and respected, even under the Companies Regulation, 2012. However, the procedures for the removal of public company secretary amongst others should also be made applicable to the private company secretary.*

## Introduction

Many wonder why there exist many females in the secretarial profession than their male counterpart. History has it that a school was founded in 1870 by a man called Sir Isaac Pitman, where students could qualify as shorthand writers to "professional and commercial men."<sup>1</sup> Originally, the school was meant only for male students. But, in the 1880s, with the invention of typewriter, "more women began to enter the field, and since World War I, the role of secretary has been primarily associated with women. By the 1930s, fewer men were entering the field of secretaries."<sup>2</sup>

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<sup>1</sup> See ADV K Malunga (Deputy Public Protector, South Africa) in his key note address titled: "Our Unsung Heroes", given on the occasion of the celebration of secretaries day in in the Public Protector, South Africa at Brooklyn, Pretoria, on September 30, 2013. Accessed at <[http://www.pprotect.org/media\\_gallery/2013/30092013\\_sp2.asp](http://www.pprotect.org/media_gallery/2013/30092013_sp2.asp)>, on January 12, 2014.

<sup>2</sup> *Ibid.* In this article therefore, both masculine and feminine attributes will be used simultaneously

Statutorily, a secretary is an officer of the company.<sup>3</sup> He is usually a personal assistant to a manager, director or executive. He is a communicator, facilitator, trainer and adviser to the Board of Directors, the company's shareholders and the regulatory bodies, such as the Corporate Affairs Commission (CAC)<sup>4</sup> and the Securities Exchange Commission (SEC).<sup>5</sup>

Gone are the years when the company secretaries are referred to as tea girls or mere administrative clerk of a company, with an image of him or her in spectacles, being subservient to dominant boss. In the 21<sup>st</sup> Century, the company secretary is efficient in a number of ways, and his roles have thus ceased to be a mere typing, record keeping, and keeping appointments. Rather, many roles have recently been exercised by him towards the proper and effective administration of the company. As such, he is the keeper of the company's conscience in relation to its abiding by fundamental rules and regulations, as well as proper code of ethics for the directors and members of the company.

The first legal regime which gave recognition to the important status of the company secretary is the *Companies Act, 1968*.<sup>6</sup> But, certainty in the status and duties of the company secretary was brought about by the *Companies and Allied Matters Decree, 1990*.<sup>7</sup> In the present 21<sup>st</sup> Century, the enabling law regarding the appointment, removal, duties, and qualifications of the company secretary is the *Companies and Allied Matters Act (CAMA), 2004*,<sup>8</sup> with references to his crucial position under the *Companies Regulation, 2012*.

<sup>3</sup> See Section 650 of CAMA which defines an "officer" in relation to a body corporate to include "... a director, manager or secretary."

<sup>4</sup> Corporate Affairs Commission, (hereinafter referred to as CAC).

<sup>5</sup> Securities Exchange Commission, (hereinafter referred to as SEC).

<sup>6</sup> The Act was based on the provisions of the English Companies Act of 1948. See, Dr. Olugbenga Shoyele, "Duties, Powers and Responsibilities of Company Secretaries to the Board and Management", pp. 120-129, at p. 120. By virtue of Companies Ordinances of 1929, 1948 and 1958, there was the position for someone to act in a secretarial capacity in nearly all registered companies, even though the appointment is not statutory. During this period, these persons were referred to as "Financial or Commercial Manager", Finance Controller or "Chief Administrative Officer". See, Chris A. Atoki, (1989) 2 GRBPL, No. 5, p. 17, cited in Justus Adedeji Sokefun, "Company Secretary Under the Companies and Allied Matters Decree" in J. A. Omotola (ed.), *Survey of Nigerian Laws*, Faculty of Law, Ogun State University, Ago-Iwoye, 1991, pp. 53-64, at p. 53.

<sup>7</sup> Companies and Allied Matters Decree No. 1, 1990.

<sup>8</sup> Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004, (herein after referred to as CAMA).

## The Status of a Company Secretary

### (a) Status under the Common Law

Under the common law, the company secretary had not always been conferred with the respect and recognition it deserves. Lord Esher, M.R. in *Barnett, Hoares and Co. v. South London Tramways Co.* succinctly summarised the position of the company secretary in England in the 19<sup>th</sup> Century thus: “... a secretary is a mere servant. His position is that he has to do what he is told, and no person can assume that he has any authority to represent anything at all, nor can anyone assume that statements made by him are necessary to be accepted as trustworthy without further inquiry.”<sup>9</sup>

According to Justus Adedeji Sokefun, “... the office was like that of a *servus ordinarius* whose position was special but did not hold a commensurate status”.<sup>10</sup>

Commenting on how the position of the company secretary was greatly ridiculed under the common law, a learned commentator noted:

*There is perhaps no other functionary in the corporate set-up who has suffered such a high degree of non-recognition by the common law as the secretary even when his influence is felt in the Boardroom .... Many company secretaries have experienced situations when the Board met in their absence and all they were asked to do was to prepare minutes handed out to them with no question asked. After all, they are supposed to act “By Order of the Board”*<sup>11</sup>

So, the position of the company secretary under the common law was on a low level with no respect and influence. However, this position has changed, and the era where the boss gets his secretary to run personal errands is highly disappearing, if not totally disappeared.

### (b) The Current Status of a Company Secretary

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<sup>9</sup> (1887) 18 QBD, 815 at 816.

<sup>10</sup> See Justus Adedeji Sokefun, “Company Secretary under the Companies and Allied Matters Decree”, *supra* note 6 at p. 54.

<sup>11</sup> Nolle Edun, “Company Secretaries in Public Companies”, (1989) 2 GRBPL (No. 3), p. 12 at 13.

In recent time, the status of the company secretary has been elevated from that of a mere servant as held by Lord Esher, M.R. in 1887,<sup>12</sup> to a more recognised and respected one. The modern view of the status of a company secretary was formulated by Denning L.J. in *Panorama Developments (Guildford) Ltd. v. Fidelis Furnishing Fabrics Ltd.* thus:

*But times have changed. A Company Secretary is a much more important person nowadays than he was in 1887.... This appears not only in modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He regularly makes representation on behalf of the Company and enters contracts on its behalf which come within the day-to-day running of the company's business....All such matters now come within the ostensible authority of a Company's Secretary.*<sup>13</sup>

Concurring with Lord Denning's judgement, Salmon, L.J. observed *inter alia* that:

*... Today, not only has the status of a company secretary been enhanced but this state of affairs has been recognized by Statutes. I think there can be no doubt the secretary is the Chief Administrative Officer of the Company,"*<sup>14</sup> *with ostensible authority to contract on behalf of the company regarding matters within the purview of administration.*<sup>15</sup>

In Nigeria, the modern day status of the company secretary was confirmed by Idigbe, JSC in *Okeowo v. Migliore*<sup>16</sup> by holding that a company secretary is "a principal officer of the company." In the same manner, Ogundare, JCA in *Wimpey Ltd. v. Balogun*<sup>17</sup> said that "A company secretary is indeed a high ranking officer in the company set up and is indeed part of the management of the company."<sup>18</sup>

Also commenting on the recent position of a company secretary, Edun said:

<sup>12</sup> See Lord Esher M.R, *supra*, note 9.

<sup>13</sup> (1971) 2 QBD. 711 CA., at p. 717.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> (1979) 11 S.C. 138.

<sup>17</sup> (1987) 2 NWLR pt. 28, p.322.

<sup>18</sup> *Ibid.*, at 337.

*We are now in the era in which Company Secretaries are usually among the most respected and the most highly paid officers of their companies and their appointment to such high office presupposes the possession of certain basic qualification and experience. Conception of a Secretary's role as that of a 'mere clerk or servant' now clearly borders on heresy<sup>19</sup>*

Gower also observed:

*It is arguable, therefore, that the secretary has also graduated as an organ of the company; he is an officer of the company with substantial authority in the administrative sphere and with powers and duties derived directly from the articles and the Companies Act. And in the performance of his statutory duties, he is clearly entitled to resist interference from the members, board of directors or managing director. Where he differs from them is that he has no responsibility for corporate policy as opposed to playing an administrative role in ensuring that the policy decisions are implemented.<sup>20</sup>*

While differentiating between the status of the old and new company secretary, Kachikwu pointed out as follows:

*We comically see the old company secretary through our minds eye as that shy, awkward disillusioned attendee of a meeting at which he says next to nothing, takes records and is supposed to shiver even when directors cough at the meetings. We see the new company secretary as the perfectly dressed female increasingly or male occasionally who is assertive, confident, qualified and hasty to be*

<sup>19</sup> Edun, "Companies Secretaries in Public Companies", *supra*, note 11 at 17.

<sup>20</sup> Davies, P. and Gower, L. (eds.), *Gower's Principles of Modern Company Law*, 6<sup>th</sup> Edition, (London, Sweet and Maxwell, 1997), p. 199.

*observed and taken serious at board meetings. Again, he ... would look a director straight in the face if that director coughs or sneezes in a manner outside the modicum of cultural etiquette.*<sup>21</sup>

Buttressing the above, Olinkar Koster noted:

*The traditional "take a letter Miss Jones" typist has evolved into a dynamic multi-skilled personal assistant enjoying a pivotal position at the heart of the company ... and earning up to €100,000 a year.*<sup>22</sup>

Statutorily recognising the importance of secretary in all companies, whether a private, or public company, CAMA provides that "Every company shall have a secretary."<sup>23</sup> It further states that no other officer, not even the director, can usurp the position of a company secretary by performing the assigned functions of the secretary in another capacity. Accordingly, it states that:

*A provision requiring or authorising a thing to be done by or of a director and the secretary shall not be satisfied by its being done by or of the same person acting both as director and as, or in place of the secretary.*<sup>24</sup>

Moreover, company secretaries are generally one of the company's named representatives on legal documents. Thus, Regulation 17 requires a company secretary and a director or two directors to sign any Resolutions delivered to the CAC for filing, where

<sup>21</sup> E.I. Kachikwu, "The Status, Functions and Duties of Company Secretaries" in E.O. Akanki (ed.), *Essays on Company Law*, (University of Lagos Press, Akoka, Lagos, 1992), pp.151-60 at p.154.

<sup>22</sup> Olinkar Koster, "€100,000 secretary: Relentless rise of the Pas who are better qualified than the boss", *Mail Online*, Thursday, January 03, 2013, available online: <<http://www.dailymail.co.uk/news/article-532313/100-000-secretary-Relentless-rise-PAs-better-qualified-boss.html#ixzz2GuHuReCd>>, accessed on August 12, 2013.

<sup>23</sup> Section 293(1) of CAMA. This section has been reinforced recently by the Directive of the Corporate Affairs Commission (CAC) which gave all Companies the deadline of December 31, 2010 to comply with this section, section 293(1), and to file the particulars of same at CAC. See, Toni Ngoladi, "Company Secretary Under the Companies and Allied Matters Act, Cap. C20 LFN 2004", p. 1, available online: <http://akehindeandco.com/files/COMPANY%20SECRETARY%20UNDER%20THE%20COMPANIES%20AND%20ALLIED%20MATTERS%20ACT.pdf>, accessed on February 10, 2013.

<sup>24</sup> *Ibid*, Section 295.

there exists more than two directors in such company. According to the Regulation, "Resolutions delivered to the Commission for filing by a company having more than two directors shall be signed by a director and the secretary or two directors."<sup>25</sup> The implication of the Regulation is that even where the company has three directors, it is either two of them sign the Resolution, or one of them in addition to the secretary signs the resolutions. The provision of the new *Companies Regulation, 2012* in effect thereof elevates the status of the company secretary. The elevation of the position of the company secretary cannot however be possible without the intellectual ability and the calibre of persons who may occupy such position. In this regard, the qualifications and appointment of company secretary is discussed next.

### **Appointment and Qualifications of the Company Secretary**

A company secretary stands in a crucial position in any company because, while acting, he can either make the company avoid or incur liabilities for the company. As such, the position of a company secretary requires a lot of knowledge and skill in the administration of corporate matters. This is probably one of those reasons why CAMA stipulates the potentials of those who may act as company secretaries.

According to section 295:

*It shall be the duty of a director of a company to take all reasonable steps to ensure that the company secretary of the company is a person who appears to have requisite knowledge and experience to discharge the functions of a secretary of a company.*<sup>26</sup>

This provision seems to be the only requirement that a private company secretary must satisfy, as there is no other statutory requirement to have professional qualifications or any previous experience. With regard to the secretary of a public company, and in addition to the above provision, the secretary of a public company must be a member of the Institute of Chartered Secretaries and Administrators; or a legal practitioner; or a member of the Institute of Chartered Accountants of Nigeria or such other bodies of accountants as are established by an Act or Decree from time to time.<sup>27</sup>

Furthermore, and in accordance to Section 295(d), any person that has held the office of a secretary of a public company for at least three (3) years of the five (5) years

<sup>25</sup> Regulation 17(2) of the Companies Regulation, 2012.

<sup>26</sup> Section 295 of CAMA.

<sup>27</sup> See Section 295(a)-(c), *ibid*.

immediately preceding his appointment in a public company may also be appointed as a company secretary, notwithstanding that he is neither a member of the Institute of Chartered Secretaries and Administrators, Chartered Accountant, nor a legal practitioner. But, we opine that this provision seems to be cosmetic in the light of the status of today's company secretary. This assertion is based on the fact that in the contemporary days, no one could have been a secretary of a public company in the first place, unless he or she is a member of the professional groups as enlisted under section 295.

From another angle, Kachikwu queried the position of an existing company secretary of public company who does not belong to the list of professionals as enshrined in section 295(a)-(c), but had no requisite years of experience under section 295(d)? Would her appointment be terminated? He however concluded that the provision seems theoretical, as there is no provision regarding its enforceability or "*mechanisms to ensure compliance with this requirement.*"<sup>28</sup> We also align ourselves with the position of the learned writer.

In addition to the above group of persons that are qualified to be the secretary of a company, a body corporate or firm that consists of members who are qualified under section 295(a) to (d) may be qualified as such.<sup>29</sup> The appointments of the above qualified people are done by the Board of Directors, and not by individual director. Thus, in *Arewologun v. Metro Motors Ltd.*,<sup>30</sup> Karibi Whyte, J. (as he then was) held *inter alia* that:

*In the absence of any power in the Article of Association of the company authorising the powers of the Board of Directors to be so delegated to the individual director, neither the chairman of the board nor the managing Director of the board can on his own authority appoint a solicitor to act for the company and the resolution of the board is necessary to make the appointment.*

When a person has been appointed as the company secretary in line with section 295 of CAMA, he has some obligations to discharge for and on behalf of the company. These duties may either emerge from the statutory duties as provided for under CAMA, or any other ethical roles he may perform to enhance productivity and corporate governance.

<sup>28</sup> E.I. Kachikwu, "The Status, Functions and Duties of Company Secretaries", *supra*, note 21 at pp. 155-56.

<sup>29</sup> Section 295(e) of CAMA.

<sup>30</sup> 1978 2 L.R. p. 46.

## The Duties of the Company Secretary

In spite of the fact that the 1968 Act made the appointment of a company secretary mandatory, it however did not spell out the general duties of a company secretary. In 1979, Aniagolu, J.S.C. pointed out that "*Apart from certain statutory duties ... the duties of the secretary of a company are not fixed by law.*"<sup>31</sup> Also, commenting on this lacuna, Olakunle Orojo said that the duties of the company secretary, "*... were left to the Directors, the general meetings, and sometimes, the Courts to determine as circumstances required.*"<sup>32</sup>

However, in the *Companies and Allied Matters Act, 2004*, there has been a significant change to the duties of company secretaries, as reflected in its all-embracing provision.<sup>33</sup> Although traditionally, the company secretaries could be said to have been performing purely a *ministerial rather than a managerial function*,<sup>34</sup> and that his functions were "*to be primarily that of record taking, record keeping and record analysis,*"<sup>35</sup> but recently, with the performance of other duties that are not expressly spelt out under CAMA, his functions have grown over a mere correspondence related issues, such as the typing out of letters, "*record taking, record keeping and record analysis.*"<sup>36</sup> This assertion is based on the statutory provisions as set out under section 298 of CAMA, which reflects the duties of company secretary as an unfolding one, which is non-exhaustive, and the roles performed by the Company Secretary in enhancing corporate governance.

Accordingly, this part will discuss the expressly provided duties of the company secretary, and the roles played by virtue of the all-embracing clause adopted under section 298 with regard to corporate governance.

### *Express Statutory Duties of the Company Secretary*

According to section 298:

<sup>31</sup> Aniagolu, JSC in *Okeowo v. Migliore*, *supra*, note 16.

<sup>32</sup> Dr. J. Olakunle Orojo, *Company Law and Practice in Nigeria*, 5<sup>th</sup> Edition, (LexisNexis, Butterworths, 2008), pp. 285-85.

<sup>33</sup> Section 298 of CAMA.

<sup>34</sup> See Justus Adedeji Sokefun, "Company Secretary Under the Companies and Allied Matters Decree", *supra*, note 6 at p. 58. Also in *Re Maidstone Buildings Provisions Ltd.* [1971] 1 W.L.R. 1085 at 1092, Pennycuik V.C. said "So far as the position of a secretary as such is concerned, it is established that a secretary, while performing the duties appropriate to the office of secretary, is not concerned in the management of the company. Equally, I think he is not concerned in carrying on the business of the company."

<sup>35</sup> E.I. Kachikwu, "The Status, Functions and Duties of Company Secretaries", *supra*, note 21 at 157.

<sup>36</sup> *Ibid.*

*The duties of a secretary shall include<sup>37</sup> the following:*

- (a) attending the meeting of the company, the board of directors and its committees, rendering all secretarial services in respect of the meeting and advising on compliance by the meetings with the applicable rules and regulations;*
- (b) maintaining the registers and other records required to be maintained by the company under this Decree; and*
- (c) rendering proper returns and giving notification to the Commission...; and*
- (d) carrying out such administrative and other secretarial duties as directed by the director, or the company.<sup>38</sup>*

Going by section 298 (a), statutorily, there are three types of meetings that a company secretary must attend. These are: Statutory Meeting, Annual General Meeting, and Extraordinary General Meeting. These meetings are briefly discussed hereunder.

### *Statutory Meeting*

This is provided for under sections 211 and 212, and applies only to public companies. According to the enabling section, *“Every public company shall, within a period of 6 months from the date of its incorporation, hold a statutory meeting of the members of the company.”*<sup>39</sup> Nonetheless, 21 days prior the holding of the meeting, the directors must have forwarded a copy of the statutory report to every member of the company,<sup>40</sup> a certified copy of which must be delivered to the Corporate Affairs Commission for registration.<sup>41</sup> Failure to comply with the requirements of section 211 is an offence, of which the company and any officer in default shall be guilty, and liable to a fine of N50:00 for every day during which the default continues.<sup>42</sup> This penal section is however subject

<sup>37</sup> Emphasis supplied.

<sup>38</sup> See generally, Section 298 (1) of CAMA.

<sup>39</sup> *Ibid*, Section 211(1).

<sup>40</sup> *Ibid*, Section 211(2). This Secretary is always authorized by the directors to perform their duty of sending statutory report to the members of the company.

<sup>41</sup> *Ibid*, Section 211 (3) and (7).

<sup>42</sup> *Ibid*, Section 212.

to section 408 under which a company may be wound up by court for failure to deliver the statutory report to the Commission, or in holding the statutory meeting amongst others.<sup>43</sup>

### *Annual General Meeting*

This is fondly referred to as "AGM". It is obligated on all companies to hold AGM. According to CAMA, "Every company shall in each year hold ... annual general meeting in addition to any other meeting in that year, and shall specify the meeting as such in the notices calling it; and not more than 15 months shall elapse between the date of one annual general meeting of a company and that of the next."<sup>44</sup> However, the first annual general meeting after the incorporation of a company may be held within 18 months after its incorporation.<sup>45</sup> In this instance, the company need not hold any AGM in the year of its incorporation, or in the following year.<sup>46</sup> Olakunle Orojo<sup>47</sup> gave an illustration of how the provision of section 213 (1)(a) works. According to him, "...if a company was incorporated on September 1, 1989, it may hold its first annual general meeting in February 1991."<sup>48</sup> In default of this section, the company and every officer of the company who is in default shall be guilty of an offence and be liable to a fine of N500.<sup>49</sup>

### *Extraordinary General Meeting*

Any other meeting other than annual general meeting is an extraordinary general meeting. This meeting is always convened by the Board of Directors whenever they deem fit, in particular, to deal with urgent matters which cannot be delayed till the next annual general meeting, and if at any time there are not sufficient within Nigeria, capable of acting to form a quorum, any director may convene an extraordinary general meeting.<sup>50</sup> All businesses transacted at this meeting are deemed special.<sup>51</sup>

<sup>43</sup> *Ibid*, Section 408(b).

<sup>44</sup> *Ibid*, Section 213(1).

<sup>45</sup> *Ibid*, Section 213(1)(a).

<sup>46</sup> *Ibid*.

<sup>47</sup> J. Olakunle Orojo, *Company Law and Practice in Nigeria*, 3<sup>rd</sup> Edition, (Lagos, Nigeria, Mbeyi & Associates (Nig.) Ltd., 1992).

<sup>48</sup> *Op cit.*, at p. 275.

<sup>49</sup> Section 213(5) of CAMA.

<sup>50</sup> *Ibid*, Section 215(1).

<sup>51</sup> *Ibid*, Section 215(8).

In all the above mentioned meetings, it is the duty of the company secretary to issue notices to the members of the company and appropriate parties calling on any of the meetings.<sup>52</sup>

In the discharge of his duties as the company secretary in accordance with section 298 (1) (b) and (c), he is statutorily required to maintain some documents and file some returns. These documents are: register of members;<sup>53</sup> register of substantial interests in shares;<sup>54</sup> register of charges;<sup>55</sup> register of Debenture holders;<sup>56</sup> and the Minutes Book.<sup>57</sup> Others are: register of Directors' shareholding;<sup>58</sup> register of Directors and Secretary;<sup>59</sup> Accounting records;<sup>60</sup> and index of members where there are more than 50 members. This index must be kept at the same place as the register of members.<sup>61</sup>

The returns to be filed by the secretary to the CAC include: notice indicating the place where the register of members is kept;<sup>62</sup> notice of increase in share capital;<sup>63</sup> Certified True Copy of Court Order confirming reduction of capital;<sup>64</sup> return of allotment of share;<sup>65</sup> notice of consolidation, division, sub-division, conversion reconversion and cancellation of share capital;<sup>66</sup> notice of the amount of commission payable in respect of issue of share;<sup>67</sup> registration of charges created by the company;<sup>68</sup> notice of particulars of charge upon acquisition of property;<sup>69</sup> and memo of complete satisfaction of charge.<sup>70</sup> Other returns to be filed by the company secretary to CAC include statutory report by a public

<sup>52</sup> In respect of his other duties regarding meetings, see: Dr. J. Olakunle Orojo, *Company Law and Practice in Nigeria*, 5<sup>th</sup> Edition, *supra*, note 32 at pp. 288-89.

<sup>53</sup> See Section 83 of CAMA.

<sup>54</sup> *Ibid*, Section 97.

<sup>55</sup> *Ibid*, Section 191.

<sup>56</sup> *Ibid*, Section 195.

<sup>57</sup> *Ibid*, Section 241.

<sup>58</sup> *Ibid*, Section 275.

<sup>59</sup> *Ibid*, Section 292.

<sup>60</sup> *Ibid*, Section 331.

<sup>61</sup> *Ibid*, Section 85.

<sup>62</sup> See Section 84 (2).

<sup>63</sup> *Ibid*, Section 102 (2).

<sup>64</sup> *Ibid*, Section 109 (1).

<sup>65</sup> *Ibid*, Section 129 (1)(a).

<sup>66</sup> *Ibid*, Section 101 (1).

<sup>67</sup> *Ibid*, Section 131 (1).

<sup>68</sup> *Ibid*, Section 197.

<sup>69</sup> *Ibid*, Section 200.

<sup>70</sup> *Ibid*, Section 204.

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company;<sup>71</sup> filing of certain resolution;<sup>72</sup> notice of change in particulars of directors and secretary;<sup>73</sup> copies of the balance sheet, profit and loss account as well as note on the financial statement;<sup>74</sup> notice of the appointment, removal, and resignation of auditors;<sup>75</sup> annual returns;<sup>76</sup> notice of appointment of receiver or manager;<sup>77</sup> notice of resolution to wind up voluntarily;<sup>78</sup> and notice of the change of situation of the registered office.<sup>79</sup> All the records, registers and returns must be kept, filed and returned in accordance to the provisions under CAMA.

In accordance with section 298(1)(d), a director or the company may direct the company secretary to discharge any other administrative and secretarial duties. Also, the secretary has power to execute any of the powers of the directors, but such must be authorised by the board, as CAMA provides that "*The secretary shall not without the authority of the board exercise any of the powers vested in the directors.*"<sup>80</sup> Nevertheless, there is no penal provision attached for violation of the section by the secretary. This may however cause usurpation of power where such power has been authorised by the board severally, and the company secretary, dealing with third party may presume subsequent authorisation of such power. We humbly suggest that penalty for violation of this provision must be statutorily provided to deter the secretary from acting without authority.

#### *The Roles of the Company Secretary at enhancing Corporate Governance*

Further to the statutory provisions as stipulated under section 298 regarding the duties of the company secretary, and as a result of the non-exclusive nature of the section, there are also various provisions of the Articles of Association of the company and letter, appointing the company secretary which stipulates duties to be performed by the company secretary, although the contents may vary from one public company to another.

As earlier noted, the role of the secretary in the company is highly essential, and cannot be done without. This is basically true of his duties towards ensuring good

<sup>71</sup> *Ibid*, Section 211 (6).

<sup>72</sup> Such resolution include: special resolution, resolution requiring a company to be wound up voluntarily, and resolution which has been agreed to by all members of the company. See Section 237 (1), *ibid*.

<sup>73</sup> *Ibid*, Section 292 (4).

<sup>74</sup> *Ibid*, Section 345 (3).

<sup>75</sup> *Ibid*, See Sections 357(4), 362 (2), and 365 (3)(a) respectively.

<sup>76</sup> *Ibid*, Section 370.

<sup>77</sup> *Ibid*, Section 392.

<sup>78</sup> *Ibid*, Section 458 (1).

<sup>79</sup> *Ibid*, Section 630.

<sup>80</sup> *Ibid*, Section 298(2).

corporate governance, and proper implementation of its principles.<sup>81</sup> In recent years, the growing importance placed on corporate governance has enhanced the role of company secretary. The company secretary updates the board of directors on their obligations and responsibilities, advises them, and ensures compliance with regulations, code of ethics, and the best practices. Failure to advise the Board of Directors properly or to file the necessary returns could lead to a delay in a disclosure that is to be made. This would be contrary to one of the principles of the Organisation for Economic Cooperation and Development (OECD),<sup>82</sup> being, principle of disclosure and transparency. It is also the responsibility of the company secretary to communicate with shareholders and other third party stakeholders transacting business with the company. To this extent therefore, the company secretary “has a central role in the governance and administration of an organization’s affairs.”<sup>83</sup> The Cadbury Report of 1993,<sup>84</sup> stressing the importance of the roles of the company secretary at enhancing corporate governance, said:

*The company secretary has a key role to play in ensuring that board procedures are both followed and regularly reviewed. The chairman and the board will look to the company secretary for guidance on what their responsibilities are under the rules and regulations to which they are subject and on how these responsibilities should be discharged. All directors should have access to the advice and services of the company secretary and should recognise that the chairman is entitled to strong support from the company secretary in ensuring the effective functioning of the board.*

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<sup>81</sup> There are five principles attached to this doctrine: first, fair and equitable treatment of shareholders, second, interests of other stakeholders, third, roles and responsibilities of the Board, fourth, integrity and ethical behaviour, and fifth, disclosure and transparency. See, the Organisation for Economic Cooperation and Development (OECD), *Principles of Corporate Governance*, 2004, Preamble, and Articles I-VI.

<sup>82</sup> See the five principles on note 81 above.

<sup>83</sup> The Secretary, Institute of Certified Public Secretaries of Kenya, “Role of the Company Secretary in Corporate Governance”, p. 1, available online: <[http://www.icpsk.com/pdfs/Guideline\\_company\\_secretary\\_corporate\\_governance.pdf](http://www.icpsk.com/pdfs/Guideline_company_secretary_corporate_governance.pdf)>, accessed February 10, 2013.

<sup>84</sup> The Cadbury Report of 1993.

Buttressing the above point on how crucial the role of the company secretary is, and emphasising the need for the existence of a secretary in a company, Olatunde Busari<sup>85</sup> said:

*The way and manner a company is managed will determine whether such company will succeed or fail. The most recent cases of corporate failure involving Nigerian Companies and Banks revealed unbelievable corporate fraud..., regulatory complacency and generally, non-compliance with the acceptable codes of corporate governance. A company must have a corporate governance in place and most importantly someone who must oversee the implementation of the structure. This is the role of the Company Secretary.*<sup>86</sup>

According to the basic definition provided by the Organisation for Economic Cooperation and Development (OECD), Corporate Governance means:

*... system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company's objectives are set, and the means of attaining those objectives and monitoring performance.*<sup>87</sup>

Corporate governance therefore implies the rules and regulations that ensure that a company is governed in a transparent and accountable manner such that the company

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<sup>85</sup> President/Chairman of Council, Institute of Chartered Secretaries and Administrators of Nigeria (ICSAN).

<sup>86</sup> Olatunde Busari, "The Company Secretary – Never an Office Girl", p. 3, available online: <http://akinwunmibusari.com/new/wp-content/uploads/2012/08/The-Company-Secretary-Never-an-Office-Tea-Girl.pdf>, accessed on March 02, 2013.

<sup>87</sup> OECD Principles on Corporate Governance, April 1999.

survives and meets the expectation of its shareholders, creditors and stakeholders, of which society forms a large part of.

This doctrine has different codes that impose minimum acceptable code of conducts and behaviour on the directors and managers of a company. Some of its codes that exist and are adopted in Nigeria include the Securities and Exchange Commission (SEC) Code, the Pension Commission (PENCOM) Code, and the Central Bank of Nigeria (CBN) Code.

In the interpretation and implementation of the Corporate Governance Codes, the contribution of the secretary is highly essential.<sup>88</sup> For instance, the *SEC Code of Corporate Governance* 2011 provides that “*the responsibility for ensuring compliance with or observance of the principles and provisions of this code is primarily with the Board Of Directors.*”<sup>89</sup> In spite of this provision, section 8 however states that “*the Company Secretary has the primary duty of assisting the Board and Management in implementing this code and developing corporate governance practices and culture.*”<sup>90</sup> The Code goes further to provide *inter alia* that the company secretary shall be responsible for providing the Board of Directors with detailed guidance on how their responsibilities should be properly discharged in the best interest of the company, coordinating the orientation and training of new directors, etc.<sup>91</sup>

Thus, with the recent focus on corporate governance, the role of the company secretary has increasingly grown, and he is now seen as the “*guardian of the company’s proper compliance with both the law and best practice.*”<sup>92</sup> With his present status and increment in his duties, the company secretary must be very careful at discharging these duties in order to avoid liabilities which may ensue as a result of his failure to discharge his functions accordingly, or where he is acting in a capacity, as an agent of the company. The question is could a company secretary be liable at all, or does he owe any fiduciary duty towards the company that may make him liable? This question brings us to the examination of his fiduciary duties and liability.

<sup>88</sup> Olatunde Busari, *supra*, note 86 at p. 4.

<sup>89</sup> Section 1.3(b) of the Securities and Exchange Commission (SEC) Code of Corporate Governance, 2011.

<sup>90</sup> *Ibid*, Section 8.

<sup>91</sup> *Ibid*, see generally, Section 8.4 (a)-(f). For other functions of the Company Secretary, see, Dr. Olugbenga Shoyele, “Duties, Powers and Responsibilities of Company Secretaries to the Board and Management”, *supra*, note 6 at 128-29.

<sup>92</sup> The Institute of Directors, “The Role of the Company Secretary”, p. 3, available online: <<http://www.iod.com/MainWebSite/Resources/Document/companysecretary.pdf>>, accessed on February 19, 2013.

### **Fiduciary Duties and Liability of the Company Secretary**

Generally speaking, the company secretary owes no fiduciary duty to the company. But when he acts as an agent of the company, he shall owe fiduciary obligation to the company, thus becoming liable to the company. CAMA stipulates the circumstances when a company secretary shall become liable to the company for breach of fiduciary duties as “... where he makes secret profits or lets his duties conflict with the personal interests, or uses confidential information he obtain from the company for his own benefit.”<sup>93</sup>

In other instances, a company secretary, as an officer<sup>94</sup> of the company may be liable for breach of duty in the course of discharging his administrative responsibilities in the same way as members of the board will be liable. There are many provisions of CAMA that deal with instances where the secretary, as an officer of the company would be liable for failure to discharge his duties. Some of these provisions include, failure to comply with the requirements of section 211 regarding statutory meeting is an offence, of which the company and any officer in default shall be guilty,<sup>95</sup> default in return of allotments,<sup>96</sup> and failure to keep register of directors and secretaries.<sup>97</sup>

Aside from the liability and penalties as provided under various provisions of CAMA, the board of directors are statutorily conferred with power to remove the company secretary, but in accordance with the provisions of CAMA as set out under section 296.

### **Removal of the Company Secretary**

CAMA is silent on the removal of the secretary of a private company. Therefore, he may be removed without compliance with the provisions of CAMA, but subject to any contract of service. However, CAMA makes elaborate provisions for the removal of a public company secretary, and thus he cannot be removed arbitrarily. This power of removal is vested on the board of directors collectively, and no one director, not even the chairman of the board is in the position to single-handedly hire or fire the secretary of a public company. Thus, a secretary may be removed by the directors subject to the provisions of section 296.<sup>98</sup> Section 296(2) goes further to lay down the conditions under which the secretary of a public company may be removed. According to the section,

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<sup>93</sup> See Section 297 of CAMA.

<sup>94</sup> See note 3 above for the definition of who an officer is under Section 650 of CAMA.

<sup>95</sup> See section 212 of the CAMA.

<sup>96</sup> See Section 129(2), *ibid.*

<sup>97</sup> See Section 292(7), *ibid.*

<sup>98</sup> See Section 296(1).

*When it is intended to remove the secretary of a public company, the board of directors shall give him notice:*

- (a) *stating that it is intended to remove him;*
- (b) *setting out the grounds on which it is intended to remove him;*
- (c) *giving him a period not less than 7 working days within which to make his defence and;*
- (d) *giving him an option to resign his office within a period of 7 working days.*<sup>99</sup>

Where the board of directors has issued the secretary notice in compliance with the above provisions, but the secretary has failed to make his defence or resign his office within the stipulated days, CAMA confers on the board, the discretion to remove him from office. This discretion stemmed from the provisions of CAMA when it states that “*where, following the notice prescribed in subsection (2)... the secretary does not within given period resign his office or make a defence, the board may remove him from office....*”<sup>100</sup> However, a report to this effect must be made by the board to the next general meeting.<sup>101</sup>

Where the secretary rather than resign his office makes a defence and the board does not consider his defence as sufficient on two grounds, then the board may either discretionary remove him, remove him with the approval of the general meeting, or suspend him, and shall make a report to the next general meeting. The two grounds upon which the board will consider the sufficiency of the secretary’s defence are: firstly, where the ground upon which it is intended to remove the secretary is that of fraud or serious misconduct, and secondly, on all other grounds, other than fraud or misconduct.

Nevertheless, these grounds have different consequences of actions to be taken by the board. Thus, in the case of fraud or misconduct, the board may remove him from office and shall report to the next general meeting.<sup>102</sup> In other instances, other than fraud or misconduct, the board shall<sup>103</sup> not remove him without the approval of the general meeting, but may suspend him. Where he is suspended, the board must make a report to the general meeting.<sup>104</sup> Where a suspended secretary is ultimately removed with the approval of the general meeting, notwithstanding any rule of law, “*the removal may take*

<sup>99</sup> See Section 296(2) (a)-(d).

<sup>100</sup> See Section 296(3).

<sup>101</sup> *Ibid*

<sup>102</sup> *Ibid*, Section 296(3)(a).

<sup>103</sup> Emphasis supplied.

<sup>104</sup> Section 296(3)(b) of CAMA.

effect from such time as the general may determine.”<sup>105</sup> To these writers, the essence of this provision is to protect the independence of the secretarial position and avoid victimization of the company secretary by the board of directors.

As stated above, CAMA is silent on the procedure for the removal of a company secretary operating in a private sector. Although, the private company secretary may be removed in accordance with the terms stipulated in his contract of appointment, but in practice, many of these contracts of employment do not contain the procedure for the removal of such secretary. Going by this lacuna, it will be right to hold that a secretary of a private company can be removed at will by the board of directors by mere notification of its intention to do so. In view of the injustice this might be on innocent ones, we humbly suggest that this lacuna be statutorily filled up to avail the secretary of a private company the same natural justice principle<sup>106</sup> accorded to the secretary of a public company so that they will be able to perform their duties without fear of intimidation and victimization.

## Conclusion

In spite of the name “secretary”, the recent secretary has been elevated to a befitting status, with his roles, not that of a clerical or secretarial one. Rather, he is responsible for the efficient administration of a company, in particular, to ensure compliance with statutory and regulatory requirements and for ensuring that decisions of the Board of Directors are implemented, as well as keeping the board members informed of their relevant legal responsibilities to ensure efficient corporate governance. In fact, the growing importance placed on corporate governance has really enhanced the role of the company secretary. This could have led ADV K Malunga to conclude his keynote address that:

*“John W. Gardner must have had secretaries or administrative professionals in mind when he stated that “excellence is doing ordinary things extraordinarily well”. But that is also an understatement because the job description of a*

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<sup>105</sup> *Ibid*, Section 296(4).

<sup>106</sup> The principle of natural justice is encapsulated *inter alia* in the legal maxim of *audi alteram partem*, meaning that, a person should not be condemned un-heard. See Section 36 of the *Constitution of the Federal Republic of Nigeria*, 1999 which stipulates the right to fair hearing. See also *Stephen Adedeji v. Police Service Commission*, (1967) 1 All N.L.R. 631, and *Ogboh v. Federal Republic of Nigeria* [2002] 10 N.W.L.R. pt. 774 at 21.

*secretary or personal or administrative assistant is not "ordinary".*<sup>107</sup>

In order to enhance the discharge of his duties at all times, the penal sections of CAMA 2004 must be reviewed. These sections are obsolete and due for amendments, as the relevant monetary value attached to any violation is worthless and nothing to write home about.<sup>108</sup> This remains a fact notwithstanding the *Companies Regulations, 2012* which did not address the issue. However, amongst other recommendations noted in the body of the paper, in order to create a balance of independence between the secretaries of the private and public companies, the statutory provisions relating to the removal of the secretary of public company must also be applied *mutatis mutandis* to its counterpart in the private sector. By this, the company secretary, as an indispensable asset of the company will discharge his roles without any fear of victimization and good corporate governance will continuously be attained.

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<sup>107</sup> ADV K Malunga, note 1 above.

<sup>108</sup> For instance, see notes 95 to 97 above.