

CLASSES OF SHARES AND CLASS RIGHTS: A COMPARATIVE EXAMINATION OF THE LAW IN NIGERIA AND RWANDA

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ABSTRACT

The concept of shares is one of the distinguishing features of corporate entities. More distinguishing is the array of men and women who subscribe to corporate entities or incorporated companies through acquisition of the issued shares of such companies. The prime place of shares as a means of providing or shoring up capital for companies makes it imperative that specific rights be attached to them. It is against this background and from a comparative perspective that this paper examines the law governing shares and the rights and duties attached to them in Nigerian and Rwanda. The analytical method is used in appraising data obtained from both primary and secondary sources. Findings show that foreign investments have been dwindling over time in these countries and the advent of the covid-19 pandemic has further constricted the rate of foreign investments into countries. It is in this context that this paper concludes that the enactment of new companies' laws by Rwanda and Nigeria in February, 2021 and August 2020 respectively aims at enhancing the atmosphere for both local and foreign investment and the consequent increase in shareholding capacities of citizens.

Keywords: Shares, Shares Rights, Variation of Rights, Limitations on Rights, Duties.

INTRODUCTION

The economies of countries are facing hard times due to multiple reasons and one of which is dwindling investments from both local and foreign companies. The advent of the Covid-19 pandemic has made investment window worse. As the world sets to reopen, it is expected that there will be stiff competition for both foreign and local investments. Investments will rejig the economies of countries through the creation of jobs and other economic activities for citizens.

In order to prepare itself for a share of the few investments in the post-COVID era, Rwanda enacted a brand-new company law in February, 2021, the Law Governing Companies. This new Rwandan Company Law came into existence via Official Gazette no 04 of 8th of February, 2021.

The Nigerian Government has also repealed its company law enacted in 1990 with a new Companies and Allied Matters Act, (or CAMA) 2020. These new laws aim at stepping up the

ease of doing business in their respective countries by removing some of the hindrances encountered by investors.

The idea of shares is one of the distinguishing features of corporate entities. More distinguishing is the array of men and women who subscribe to corporate entities or incorporated companies through acquisition of the issued shares of such companies. The prime place of shares and subscribers to these shares makes it imperative that specific rights be attached to them, the aim been to safe-guide the holders of shares and ensure they derive maximum benefit from their investment in the companies. It is against this background that this paper sets out to achieve two objectives: a) examining the laws guiding the rights attached to classes of share including the fall outs from this general right such as limitations on the rights and variations of the rights; b) the areas of convergences and differences between Nigerian and Rwandan company law governing shares as major source of equity financing.

The paper is a product of qualitative research whereby data were from both primary and secondary sources. These data sources were received both on online and offline. The analytical method is used to analyze the data from primary and secondary sources.

LITERATURE REVIEW

The Concept of Shares

According to Black's Law Dictionary, 10th Edition, a Share means an allotted portion owned by, contributed by, or due to someone. The meaning attached to the concept of shares has evolved over time. During the period of the "*Deed of Settlement Company*," the partnership property vested in the trustees, with members having a kind of "*shares*" which entitled them to an equitable interest in the assets of the companies. This relationship was not exactly smooth as members could neither lay claim to the assets of the company so long as the company still existed nor prevent directors from disposing off the assets of the company (Davies and Prentice, 1997). Burton's Legal Thesaurus sees shares as securities (Burton, 2013).

According to Tanase and Calota (2014), "*An equity instrument is any contract that evidences a residual interest in the assets of an entity after deducting all its liabilities, liabilities, where liabilities are defined as the present obligations of the entity arising from past events, the settlement of which are expected to result in an outflow from the entity of resources embodying economic benefits (i.e., an outflow of cash or other assets of the entity)*".

Also, shares are seen in the context of the rights it confers on the people holding the shares as provided in the memoranda and article of association (or MEMART). To this end, a share can be described as a unit of the bundle of rights and liabilities, which a shareholder has in a company as provided in the terms of issues and the articles of that company.

Shares can also be said to be chose in action.

"The interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place, and of interests in the second, but also consisting of a series of mutual covenant entered into by all the shareholders inter se in accordance with section 14, EA, 1985... A share is not a sum of money, but is an interest measured by a sum of money, and made up of various rights contained in the contract including the right to a sum of money of a more or less amount"

Article 42 of Rwanda's Company Act 2021 defined the word share as "*one of the equal parts of a company's share capital issued to every shareholder or the company itself.*" Nigeria's new CAMA, 2020 did not define the word "shares" but the repealed 1990 CAMA did. Section 650 (1) of repealed 1990 Nigerian Companies and Allied Matters Act defined shares as the interest in a company's share capital of a member who is entitled to share in the capital or income of the company and except where a distinction between stock and shares is expressed or implied includes stock. A share is the legal interest of a shareholder in the authorised and issued capital of a company measured by a sum of money for the purpose of liability in the first place, and of participation in the second place. In simple terms, shares are means by which companies raise money for their operations, development or investment in the company.

Nature of Shares

Explaining the nature of shares as seen in the decision in *Borland Trustees* case, Sealy and Worthington (2013) said:

"...shares are a means of denoting three things: first, the shareholders' financial stake in the company (including the shareholders' liability to contribute funds to the company, and rights to capital and income receipts from the company); Secondly, their interest in the company as an association (including rights as members, especially voting rights and rights conferred by statute and the company's constitution); And, thirdly, their rights as owners of a species of property (which is able to be bought, sold, charged, etc., and in which there can be both legal and equitable interests)"

The characteristics of shares as gleaned from the above decided case shows that shares are not movable property, they are personal property. Shares confer certain rights as spelt out in the country's law regulating companies or the incorporation documents of the company. Subject to the restrictions or limitations set out in the companies MEMART, shares can be transferred or transmitted from one person to another.

Another feature of note regarding shares in Nigeria and Rwanda is that the law requires that all classes or types of shares be registered in the MEMART of the company issuing it. To this end, bearer shares are prohibited. Section 174 (1) CAMA puts it this way: "*No company has the power to issue bearer shares.*" CAMA further defines "*a bearer share*" as "*a share which is represented by a certificate, warrant or other document...which states or indicates that the bearer of the certificate is the owner of the shares.*"

Classes of Shares

In this segment, classes of shares or types of shares are used interchangeably. By class, we mean a set or category of things having some property or attribute in common and differentiated from others by kind, type, or quality. Collins English Dictionary defines "*class*" as "*a number of persons or things regarded as forming a group by reason of common attributes, characteristics, qualities, traits or kind.*"

Another point to note is that the categorization of shares into classes means shares rank differently. Section 143 (1) of CAMA says “*shares shall not be treated as being of the same class unless they rank equally for all purposes.*”

Quite often, shares are divided into two major types’ namely ordinary shares and preference shares. While ordinary shares are also known as equity shares, another name for preference shares is preferred shares. Both Rwanda’s Company Law and Nigeria’s CAMA also provide two main classes of shares. For example, Article 53 of Rwanda’s Company Act 2021 provides that:

“Subject to the provisions of company’s incorporation documents, different classes of shares may be issued in a company. The shares in a company may be ordinary or redeemable.”

Nigeria’s CAMA 2020 also recognizes classes of shares. Specifically, section 144, CAMA listed the classes of shares as preferred or deferred shares. What can be seen from the Nigerian and Rwandan laws is that what constitutes the two major classes of shares vary. While the Rwandan law listed ordinary and redeemable shares as major classes of shares, Nigeria’s CAMA itemized preferred and deferred shares as the major classes of shares. There are other classes of shares existing side by side with the two main ones. Articles of association companies may have one or more of the following classes of shares:

1. Preference shares.
2. Cumulative shares.
3. Ordinary shares.
4. Redeemable shares.
5. Deferred/ founders’ shares.
6. Treasury shares.

Preference shares- Preference shares carry fixed returns on investment. In the event of a company winding up, they must be paid first. They have special rights attached to them. For example, they may have fixed dividends which may be cumulative or non-cumulative, redeemable or irredeemable convertible or participatory.

Redeemable shares- Are shares issued only on the prospect that the company will buy them back at a future date. The shareholders also have the option of selling the shares back to the company.

Founders or deferred shares on the other hand are the shares taken up by the founders or promoters of the company. It is usually the cheapest that is, it costs less than the other types of shares. It carries no fixed returns and like the name (deferred share) implies, payment of dividends and returns of capitals are deferred until payment has been made in respect of other classes of shares. That is, whatever is left after the ordinary and preference shareholders have been settled are usually left for the founders’ shareholders?

Ordinary shares are also known as equity shares. They carry the risk of the investment because they have no fixed dividend. In effect, ordinary shares are the burden bearing shares and carry no fixed return on the investment. When business is good, they participate in surplus profits after the directors and managers have been paid. In so far as members can be said to own

the company, the ordinary shareholders are its proprietors. These categories of shareholders receive dividends after all other classes of shares have received a minimum dividend.

Cumulative shares: As the name of this class of share suggests, these are the shares that come about as a result of dividends not being paid in full or being outrightly missed by shareholders during financial the year or years. In effect, whereby the dividend is missed or not paid back in full then it can accumulate until when the company next has sufficient distributable reserves.

Treasury shares: Treasury share is introduced by CAMA 2020 due to the opportunity given to Limited Liability Company to purchase its own shares. To purchase its own shares, the company's article must have approved it. Shareholders must also in a special resolution, grant approval to the company to buy its own shares. However, a company may not purchase its shares if, as a result of the purchase, there would no longer be any issued shares of the company other than redeemable shares held as treasury shares.

Shareholders

Shareholders are members of the public who have invested in a company through buying of shares of the company. Shareholders are thus, part owners of a company. The Cambridge Dictionary defines shareholder as holder of shares of a company and consequently enjoys part of the profits made by the company including the right to vote officials of the company such as directors during general meetings of the company. According to Geis (2020), shareholders are the residual owners of a company. These residual owners do not collectively vote on every of the firm's decision but rather, cede power to a small group of representatives who are entrusted to call most of the shots.

From the legal point of view, the Peoples Law Dictionary defined shareholders as the owner of one or more shares of stock in a corporation, commonly also called a "*stockholder*." The term shareholder is defined by Rwandan company law as an individual or corporation whose name is entered in the shareholders' register and that owns at least one share of a company's stock. Nigeria's new Company Act did not define the term shareholder, but instead defined "*substantial shareholder*."

A shareholder is an investor, an owner or property owner. He is also a stockholder, stockholder of record or simply, a stockowner (Burton, 2013).

A shareholder is a member of a company. According to CAMA, "*in the case of a company having a share capital, each member is a shareholder of the company and shall hold at least one share.*"

Types of Shareholders

Black's law Dictionary (9th Ed.) gave the typologies of shareholders as follows:

1. Controlling shareholders: is one who has power to influence the company's activities due to having substantial number of shares.

2. Dormitory shareholder: is a shareholder who owns stocks in a name only for the benefits of the true owner whose identity is kept secret or concealed.
3. Interested shareholder stockholder: this one owns enough stock to affect corporation's annual decision making.
4. Majority shareholder: a person who owns or controls more than half of the company's shares.
5. Minority shareholders are one who holds less than half of the total shares outstanding and such cannot control the company's management.

Shareholders have also been categorized into two major types namely, common shareholder and preferred shareholder (Katz, 2018).

Common shareholders own a company common stock. On the other hand, preferred shareholders own company preferred shares and have no voting rights. They have no say in management of the company. They earn fixed dividends which must be paid before those of common shareholders are paid.

Rwanda company provides for controlling holder that's a shareholder owning 50% and above of shares of a company's visiting power.

Rights Attached To Shares

Shares rights are those rights a company assigns to classes of shares created by the company's article of association at inception of the company or later through resolutions by sections of the members of the company. Rights attached to share can be by law or by the company Articles or Memorandum (Memart). These rights are exercise through resolutions of shareholders:

1. During Shareholders extra-ordinary meeting
2. Through shareholders written resolution in-lieu of meeting.
3. By a unanimous agreement of shareholders.

These rights are determined by the terms of their issue and the article of association of the company. To this end, in a capital market, classes of shares attract different types of rights. The rights could either be rights specifically conferred on a class or fundamental rights enjoyed by all classes.

Thus, when a company at inception, come up with the idea of dividing its capital called shares to its members, the idea at a glance, raises the presumption of equality between all its shareholders. That is, it will seem all shares confer the same rights and impose the same liability.

The equality principle of shares prevails where there is absence of agreement to the contrary. For many years for example, it was thought that in the absence of express provision in the original constitution of the company, the continued equality of all shares was fundamental condition which could not be abrogated by an alteration of the articles so as to allow the issue of shares preferential to those already issued.

Also, under United Kingdom (UK's) Company law practice, all shares are presumed to rank equally if the law did not specify the rights held by particular classes of shareholders (Vitali, 2006). Although, this position counters the earlier one in *Andrews v. Gasmeter Co Ltd*

that established that in the absence of a prohibition in the memorandum, the article could be altered to authorize such an issue. Also capable of being altered by provisions in the memorandum and article is the presumption of equality in relation to shareholders' liability.

The principles espoused in Birch's case have been incorporated into the new company laws of Nigeria and Rwanda. Consequently, these established principles now regulate the issue of rights attached to classes of shares in the two countries. According to Article 53 of Rwanda's new Company Act shares could confer preferential rights to distributions of capital or income; special, limited or conditional voting rights. Shares may not also confer any voting rights.

Article 85 of the Law Governing Companies in Rwanda expanded the range of rights on shares as earlier provided by Article 53. Thus under Rwandan Company law, shares confer the following rights on their holders:

1. The right to share in the distribution of the dividends of the company;
2. The right to share in the distribution of the surplus assets of the company upon its liquidation;
3. The right to vote on shareholders' resolutions includes:
 1. Appointing or removing an auditor or director.
 2. Approving a major transaction;
 3. Adopting or altering articles of association;
 4. Dissolving the company;
 5. Approving an amalgamation in accordance with the provisions of this Law.

Shedding more light on specific rights, 3⁰ provide:

“Unless otherwise specified in the incorporation documents, each share has attached to it the following rights: 1° with respect to the right to share in the distribution of the dividends of the company, the right to an equal share; 2° with respect to the right to share in the distribution of the surplus assets of the company upon its winding up, the right to an equal share;”

Article 59 provides for Pre-emption rights of shareholders: *“Subject to the provisions of incorporation documents, the shareholders of a private company have a pre-emption right to acquire newly-issued shares of a company as provided in this Article ...”*

There are other rights emanating from those specified above which are also attached to shares which include the right to vote on shareholders' resolutions. Other rights include right to transfer shares and pre-emption rights. Article 91 talks about another very special type of rights, those companies maintain the interest of shareholders through regular information about the company's performance. The types of information include:

1. Newly signed Company's annual account as approved.
2. Copy of Auditors report the Account of the Company.
3. Report of Board of Directors of the Account of the Company. In writing dividends to be paid.
4. These details must reach shareholders of both Public and Private Company within 4 months of the company financial year forward.

The document can be given to them physically, electronically or by post thus shareholders must be informed of the following:

1. Proceeding of meeting of classes of shareholders.
2. About Documents of incorporation of the company.

Letter shall be sent to shareholders for their authorization where the company wishes to:

1. Alter its documents of Incorporation.
2. Get class authorization
3. Carry on major transitions.
4. Change the status of aspects of the company.
5. When company thinks of merging with others (amalgamation).

Nigeria's CAMA 2020 provides for two set of rights: those attached to shares created at the formation of the company and those rights attached to shares created after the company has come into existence. Shares created during formation of the company are held by the initiators of the company while later shares are those shares created after the formation of the company. The foundation for rights attached to shares generally is as spelt out in Section 46 (1) of CAMA 2020:

“Subject to the provisions of this Act, the memorandum and articles, when registered, shall have the effect of a deed between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered in so far as they relate to the company, its members, or officers.”

Section 138 CAMA also dwelt on the rights and liabilities attached to shares in Nigeria. This section specifically mentioned two main rights as the rights attached to shareholders: right to attend any general meeting of the company and the right to vote at such a meeting. Arising from the provisions of sections 46, 138 (b) of CAMA, (Ogunniran, 1998), the rights attached to shares in Nigeria are (Adesina, 2020):

1. To receive notice and attend general meeting and vote at the meeting.
2. To a share of the company profits.
3. To a final distribution on winding up.
4. Company indebted to shareholders and therefore, company is obligated be run lawfully.
5. Rights to receive a copy of the memorandum and articles and of every balance sheet to be laid before the general meeting.
6. To inspect and obtain copies of minutes of general meeting.
7. To inspect and petition for winding up or in the alternative apply for a remedy.
8. Right to transfer shares.
9. Right to transmission of shares.

Another type of right attached to shares are those reserved for existing shareholders members of the company who are already holding shares of the company. These are called pre-emptive rights. The new company laws of Nigeria and Rwanda made express provisions for pre-emptive rights. CAMA in section 142 (1) on Pre-emptive rights says: *“a company shall not in any event allot newly issued shares unless they are offered in the first instance to all existing shareholders of the class being issued in proportion as nearly as may be to their existing holdings.”*

In the same vein, *Article 59 Rwandan Company Law 2021*, is on pre-emption rights and provides: “*Subject to the provisions of incorporation documents, the shareholders of a private company have a pre-emption right to acquire newly-issued shares of a company as provided in this Article.*”

While this paper concedes that all these rights are very important to shareholders in Rwanda and Nigeria, however, some are at the heart of why shareholders invested in the companies in the first place. The right of a shareholder to receive a dividend (profit) whenever dividend is declared is certainly the most essential right.

Variation of Right Attached to Shares

The creation of classes of shares with rights attached to them also raises the issue of variations including modalities for variation of such rights. Both the Nigerian and Rwandan company laws seem to have incorporated section 630 of the English Companies Act, 2006. Under English Company ACT 2006, class rights cannot be varied or abrogated without the consent of the class in writing.

In effect, the general principle is that the rights enjoyed by one particular class should not be varied by the holders of another class of shares within the company (i.e. it is necessary to gain the consent of the members of the class whose rights are the subject of proposed variation to agree to this process). This provision of the Act in documenting as well as highlighting what class rights are provided by far, greater security to the beneficiary of the right than a right conferred merely by the articles which is open to the risk of alteration by a special resolution. On variation of rights of shareholders under Rwandan law, the new Companies Act states:

“Where the share capital of a company is divided into different classes of shares, a company does not take any action which varies the rights attached to a class of shares unless that variation is approved by a special resolution of shareholders having such a class.”

Thus, from provision of Article 87 of Rwandan Company Law, shareholders right can be varied. For the variation to be effective, it must have been approved by a special resolution of shareholders having such a class of shares. In effect, the law mandates companies not to not take any action which varies the rights attached to a class of shares unless that variation is approved by a special resolution of shareholders during a general meeting of members of that class of shareholders. Under Nigeria’s CAMA, shareholders’ rights can be varied too. Section 166 of CAMA, 2020 provides:

“If at any time the share capital of a company is divided into different classes of shares under section 143, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may, whether or not the company is being wound up, be varied (a) in accordance with the provision in the company’s articles for the variation of those rights; or (b) where the company’s articles contain no such provision, with the consent, in writing, of the holders of three- quarters of the issued shares of that class, or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class.”

In effect, the position of the law is that shareholders rights can be varied either as expressly provided in the company's article or under certain conditions such as where the article does not contain provisions for variation of rights attached to shares. The two conditions required whereby the company wishes to amend or include a provision in its article for variation of rights attached to a class of shares include:

1. Obtaining written consent of three quarters of members holding that class of shares.
2. Where members of the company holding that class of shares give their sanction in a special resolution passed by them at a separate General Meeting held by all members holding that class of shares.

Variation could either be positive or negative. Variation is positive when it confers additional rights to shareholders. For example, when companies give financial assistance to people to enable such people to buy the company's shares, it envisages that it will increase the scope of its operations and consequently more profits and more dividends for shareholders. For the shareholders therefore, it's a win-win situation as Article 188 (3) of the Rwandan Company Act, 2021 guarantees their protection by holding that a company giving financial assistant to attract new investors must ensure that 1) giving the assistance in question is of benefit to any shareholders not receiving the assistance; 2) the terms and conditions under which the assistance is given are fair and reasonable to any shareholders not receiving the assistance.

Also, the opportunity offered a shareholder to sell his or her shares back to the company when he is not comfortable with certain actions of the company is another form of additional right to shareholders that is made possible by variation of rights. According to Article 106 of the Rwandan Company Act, 2021;

“A shareholder is entitled to require a company to purchase his or her shares where a special resolution is passed for the purpose of: 1. altering the incorporation documents of a company with a view of imposing or removing a restriction on the business or activities of the company; 2. approve a major transaction or an amalgamation of the company.”

The negative side of variation of shareholders rights occurs when company amalgamated becomes bankrupt, wound up or removed from companies register etc.

Liabilities on Shares Rights

The liabilities on rights of shares in Rwanda's corporate law are as provided under Article 92 as follows:

“With the exception of an unlimited liability company, a shareholder is not liable for the obligations of a company only because of being a shareholder. The liability of a shareholder to the company, or for the company's obligations is limited to: 1° any amount unpaid on a share held by the shareholder; 2° any liability expressly provided for in the company's incorporation documents which may provide that the shareholder's liability is unlimited; 3° any distribution received by the shareholder but which has to be recovered in accordance with Article 73 of this Law.”

Arising from the provision of the law above, there are three limitations on the rights of shareholders.

1. Any amount unpaid on a share held by that shareholder
2. Any liability to repay a bonus received by the shareholder
3. Such other liability/liabilities which are expressly provided for in the constitution of the company.

Nigeria's CAMA position on liabilities attached to shares is contained in section 138 (1): Subject to the provisions of this Act, the liabilities attaching to the shares of a company or any class thereof shall be dependent on terms of issue of or the company's articles. Among the liabilities under Nigerian law is that which requires shareholders to pay for shares within reasonable time.

Jurisdiction to Determine Matters Relating to Shares

A community reading of sections 4(1) (2), 7(a), 251 and 257 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) gives the Federal High Court exclusive jurisdiction to hear and entertain matters that arise from the operations of the Companies and Allied Matters Act (Adetona et al., 2020).

Consequently, it is the Federal High Court that has the jurisdiction to determine matters relating to shares in Nigeria. The position is similar to that of Rwanda where jurisdiction is vested on the Commercial Court which has the status of a High Court.

CONCLUSION

The comparative approach used in this paper availed us the opportunity to see in-depth how the very new company laws of Rwanda and Nigeria have addressed new developments in corporate practice in their respective countries. Coming against the backdrop of dwindling foreign investment occasioned by COVID-19 pandemic and other concerns, clear attempts were made in the various sections of the new laws to make investment paths generally attractive; very easy and friendly. The place of shareholders in the new scheme of things was aptly recognized as seen from the various sections that addressed issues relating to shareholders.

We expect that the courts in interpreting the sections dealing with classes of shares and class right will apply flexibility. Flexibility is one of the ways of prospective investors will be attracted into these countries. We believe that this is of course the intentions of the drafters of the new company laws of Nigeria and Rwanda. This is because the place of Companies in the development of the economies of both Nigeria and Rwanda being developing economies in Africa cannot be over-emphasized. One of the ways to enhance development of these economies is to enact Laws that attract investment through growth of Companies. Furthermore, the law must encourage shareholders/ prospective shareholders to invest by way of shareholding in Companies. This will boost development because these companies will be able to boost their operations due to the enhanced capital base. The Shareholders are protected by law as issues relating to their shares can be resolved by the court.

As the world gradually restarts after the devastations of the covid-19 pandemic, investors will take their investments to countries where ease of doing business is best. The case includes the way and manner the local courts handle disputes involving company and others.

To this end, the direction of ruling by judgment of courts in UK should be emulated or guide their counter parts in Nigeria and Rwanda.

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