

**CUMULATIVE VOTING, THE NEED FOR EFFECTIVE CORPORATE
DEMOCRACY; A CASE FOR ITS ADOPTION IN NIGERIAN
CORPORATE LANDSCAPE***

Abstract

With the recent skepticism about the nature of corporate boards and practices which results in malfeasance, lack of accountability and transparency, inadequacy and weak enforcement of existing laws, the adoption of cumulative voting system in Nigeria will create room for minority shareholders to be fairly represented on the board and can at least have a say in the management of the company.

1. Introduction

The protection of minority shareholders within the domain of corporate activity is one of the major problems facing company law¹. In *N.I.B Invest W/A v. Omisore*², the court held thus:

“The locus classicus common law rule in *Foss v Harbottle*³ is well founded with its articulated conceptual restating that to redress a wrong done to a company or to enforce the right of a company the proper plaintiff is the company itself and the court will not entertain an action brought on behalf of the company by a shareholder...” per Ogumbiyi J.C.A (pp 33-36 paras G-A)

The law is torn between striking a balance between effective control of the company and the interest of minority shareholders. Under company law jurisprudence, the powers of the company are vested in the Board of directors and members in general meeting.

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¹ *Gombe v. P.W Nig Ltd* (1995) 6NWLR (pt 402) 402

² (2006) 4 NWLR (pt. 969) 172

³ (1845) Hare 461

However, on a closer study of the day to day working of the company, it is discovered that most decisions which affect the day to day running of the company is taken by the Board of directors⁴. In traditional times which mainly focused on the straight forward voting, there is little or no representation for the minority shareholders in the board. This means that the board was mostly comprised of those voted in by the majority shareholder(s). The hardship encountered by minority shareholders can be better show cased with a hypothetical scenario. In Optimum Inc. there are two shareholders, shareholder A has 60% of the 100 shares of the company and shareholder B has 40% of the 100 shares in the company. If in an election, the company wants to elect 3 members into the board with the adoption of the traditional straight forward voting, shareholder A has 60 votes to cast for director 1, 2 and 3 respectively. The resultant effect of this is that shareholder A's 60 votes will beat shareholder B's 40 votes in electing the 3 members of the board. This then means that the board will be composed mainly of the preferred candidates of shareholder A with no representation whatsoever for the minority shareholder B thereby prejudicing his interest. It was in a bid to inject some level of protection for the minority shareholder that cumulative voting in election of company directors was introduced into corporate law practice. This article is dedicated to the study of the working and effect of cumulative voting with practical examples of countries where it is practiced and will conclude by providing reasonable insights on why it should be adopted in Nigeria.

2. What is Cumulative Voting?

Cumulative voting or proportional voting is the procedure of voting of a company's directors; each shareholder is entitled to one vote per share multiplied by the number of director(s) to be elected.

⁴ Onyeka Christian Aduma and Chineze Sophia Ibekwe , Protection of minority shareholders under Nigerian Company Law, Nnamdi Azikiwe University Journal of International Law and Jurisprudence Vol. 8, 2017

This helps strengthen the ability of minority shareholders to elect a director. This method allows shareholders to cast all their votes for a single nominee for the board of directors when the company has multiple openings on its board. Thus where multiple candidates are running for a seat at the board, each shareholder can choose between voting for a single candidate and splitting their votes between multiple candidates⁵. Using the example of Optimum Inc. giving earlier, assuming that in the election of the directors to fill the 3 seats at the board, shareholder A have 60 shares out of the 100 shares of the company while shareholder B will have 40 shares. With the adoption of cumulative voting, shareholder A having 60 shares is entitled to 60 votes times the number of seats sought to be filled making it a total of 180 votes, shareholder B having 40 shares is entitled to 40 votes times the number of seats sought to be filled which will be 120 votes in total. Cumulative voting implies that the two shareholders may choose to cast all their votes as they deems fit. They may allocate all votes to a particular candidate or may split them across the several candidates as they deem fit. In other to secure a seat at the board, shareholder B may choose to cast all his votes on a single nominee.

The effective adoption of cumulative voting benefits minority shareholders by allowing them to focus all their votes on a single candidate. If multiple minority shareholders work together, they can often cause a change or win an appointment despite being outnumbered. The implementation of this proportional voting system has recorded tremendous results in countries where it is being practiced. A cursory look at some of these countries will be undertaken in this article.

⁵ Joe Stansell , Cumulative voting, Stansell Law PLLC, December 16, 2010

3. Cumulative Voting in USA

Whether a corporation is required to adopt cumulative voting and the manner in which the corporation is permitted to adopt cumulative voting are governed by the laws of the state where the company is legally incorporated. Each state has its own provisions regarding cumulative voting in board elections⁶.

Cumulative voting was not adopted in USA until 1870 when the state of Illinois adopted a new constitution requiring cumulative voting to be adopted in voting for new directors into the board of Illinois corporations. With Illinois taking the lead, other states also adopted laws mandating the use of cumulative voting in corporate elections⁷.

Most states' laws on cumulative voting are of four types. The most prevalent type allows cumulative voting if a provision for it exists in the corporations articles of incorporation. The second most popular type requires cumulative voting unless the article of incorporation expressly prohibits it. The next type allows cumulative voting to be adopted or prohibited through the company's bylaws and the fourth type mandates all companies to use cumulative voting for the election of their board of directors⁷.

In *United States v Village of Portchester*⁸ the court conducted a careful analysis of Portchester's at large voting scheme for electing its Board of Trustees and determined that the system violated Section 2 of the Voting Rights Act.

⁶ John F. Coyle , Altering Rules, Cumulative Voting and Venture capital, Columbia Law School Journal 2016

⁷ Cumulative voting for corporate boards , Fair vote Program for Representative Government, Right to vote Initiative, IRV America, Voting and Democracy Research center

⁸ No. 7: 2006 cv 15173 document 124 (S.D.N. Y 2010)

Plaintiffs have proven the existence of all three jingles precondition, and have shown clearly that under the totality of the circumstances at large election system of electing members of the board of Trustees prevents Hispanic voters from participating equally in the political process in the village. Having found a section 2 violation, the court evaluated the parties proposed remedial plans following the high level of deference accorded to the defendant jurisdiction the court adopted Portchester's proposal for cumulative voting because it was deemed legally acceptable under the Voting Rights Act, the constitution and New York Law. The court have approved the parties agreed consent detailing the education and outreach program that will ensure the non effective discriminatory implementation of the new system. To give sufficient time for implementation the court also orders Portchester to hold its 2010 Trustee Election in June 2010.

4. Cumulative Voting in India⁹

Indian companies are allowed to provide in their articles of association that cumulative voting should be adopted in the election of company directors where there are more than one seat to be filled in the board. This system was previously provided for in section 265 of the Old Companies Act 1956 and is currently contained in section 163 of the new Companies Act of 2012.

This proportional voting system was adopted by GSK Consumer Healthcare ltd. (GSK CH) in the appointment of its directors.

However, despite the overemphasized advantages of cumulative voting, almost none of the listed companies have moved towards a cumulative

⁹ Maulik Vyas, Retail investors, IGFs bank on cumulative voting rights for bigger in firms, Corporate Trends, 2014

voting system, it is submitted that this situation is largely due to its non mandatory provision as such it is suggested that the Indian legislature amend their Company's Act and make it a mandatory requirement where a company wants to fill multiple seats on its board.

5. Cumulative Voting in China

Cumulative voting was introduced in China as a form of experiment to some listed companies. The experiment recorded huge success as a result of which the Chinese Securities Regulatory Commission in 2002 released the Code of Corporate Governance for Listed companies aimed at elevating minority shareholder rights and improve corporate governance¹⁰. Following this introduction, cumulative voting was provided for in the companies' law of China¹¹. This is to the effect that for the purposes of election of directors or supervisors by the shareholders general assembly, the system of cumulative voting may be practiced in accordance with the provisions of the company's articles of association or a resolution by the shareholders' general assembly for its adoption. The effect of this statutory provision is that cumulative voting is not mandatory in China but may be adopted where the articles of association of the company provides for it or if there was a resolution passed by the shareholders' general assembly in favour of the adoption of cumulative in the election of its directors where there are multiple seats to be filled.

6. A Case for the Adoption of Cumulative Voting in Nigerian Corporate Governance

So many arguments have been proffered for and against the adoption of cumulative voting in the election of company directors.

¹⁰ Chao Xi and Yugang Chen, *Does cumulative voting matter? The case of China: an empirical assessment*, Cambridge University Press, 2014

¹¹ Article 106, Companies Law of the People's Republic of China Order of the President of the People's Republic of China, 2006

The opponents of the adoption of cumulative voting contend that the system will lead to distortion of the board in the sense that directors elected by the minority with the use of cumulative voting will not represent all shareholders thereby leading to factionalism and will feel accountable to only a specific segment of shareholders and therefore inclined to address their interests and desires first¹².

It is respectfully submitted, that the above view is misguided in that in straight forward voting, the entire board represents the interests and preference of the majority shareholder(s) allowing a minority shareholder one or two seats on the board. Cumulative Voting will not halt the Board's performance but will increase accountability and diffusion of ideas.

It is therefore submitted that this proportional voting system be adopted in election of company directors in Nigeria where more than one seat is to be filled at the Board. Sadly the Nigeria National Assembly in its proposed 2018 Bill for the repeal and re-enactment of the Companies and Allied Matters act failed to incorporate this practice in the amendment.

Conclusion and Recommendation

Cumulative voting benefits minority shareholders by allowing them to focus all of their votes on a single candidate or decision point. If multiple minority shareholders work together they can often cause a change or win an appointment they want, despite being out numbered. We recommend the incorporation of the cumulative voting in future amendment of the Company and Allied Matters Act (CAMA) in Nigeria.

¹² Cumulative voting for corporate boards , Fair vote Program for Representative Government, Right to vote Initiative, IRV America, Voting and Democracy Research center