SHAREHOLDER/STAKEHOLDER DICHOTOMY AND THE DIRECTORS' DUTIES.*

Abstract

The government of a number of countries are currently finding it difficult to provide the social needs of its citizens. Some people are therefore on the look-out whether there is any institution or organisation that will help the government in providing some of these basic needs of the society. Big commercial companies, in the present day world, appear better suited to assist in that direction based, amongst others, on their proper organisation, wealth and resources at their disposal, as well as power and influence they wield and exercise. There, however, appears to be an impediment on the big companies' (which are widely perceived to be economic entities) chances of discharging these social or societal needs – the duties of the board of directors which both under the common law and by virtue of the corporate legislation of many countries, are framed in such a way to favour the board's concentration on the maximisation of the shareholders' interests which therefore appears to hinder the board's discharging of the company's wider responsibilities. Currently, however, there is ongoing heated debate or argument for a shift from this orthodox shareholder primacy approach to a wider or broader stakeholder approach. Adopting a doctrinal research methodology, this work considered some of the arguments in support of the shareholder primacy and those in support of a shift from the status quo and concluded that there is a need to lessen the board's over-concentration on the interests of the shareholders with due attention paid to the non-shareholding stakeholders' interests.

Key words: Shareholders, Directors, Duties, Corporate, CAMA

1. Introduction

It is generally settled that the board is the organ of the company on whose shoulders the responsibility of making most of the major corporate decisions, including those relating to the relationship of the company with the rest of non-investing stakeholders, lies.[1] The growing concentration of economic powers in companies has attracted concerns about how and in whose interest(s) those powers are exercised.

The issue as to 'in whose benefits should a corporation exists' remains a contentious matter as there are divergent opinions in that regard and various supporter groups of each of these approaches. Of course, there are many theories propounded by these various groups. Supporter of each approach/view are vociferous in advocating for and marshalling out arguments in support of their preferred approach. In response to this issue, as far as public companies are concerned, three approaches remain central:

(a) The traditional shareholder primacy approach: This is the model adopted by the Nigeria Companies Act (CAMA) 1990 which is modelled after the UK Companies Act 1985. This same approach is retained by the current CAMA 2020 which is a clear replica of the CAMA 1990, insofar as the duties of the company's board of directors are concerned. This approach was also prevalent in the United Kingdom prior to the coming into force of the

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[1] According to s 269 of Companies and Allied Matters Act (CAMA) 2020, directors of a company are responsible for the management and direction of the company's business.

UK's Companies Act, 2006.[2] Under this approach, shareholders' interests alone are considered the ultimate concern of the corporate entity.[3]

(b) The 'enlightened shareholder value' (ESV) approach: Here, directors should have regard, where appropriate, to the need of ensuring productive relationships with a range of stakeholders, and have regard to the long term interests of the company. The shareholders' interests, however, retain the primacy. That is, directors can prioritise stakeholders but only if doing so would promote the success of the company for the overall benefits of the members. In other words, the ultimate concern of ESV approach is the promotion, enhancement and protection of the shareholders' interests; but the directors are encouraged, while promoting the shareholders' interests, to consider and have regard to other stakeholders' interests, most especially where doing so will enhance or further the shareholders' interests. That is, the ESV approach suggests that the term 'company', especially when used in the phrase 'acting in the interests of the company', is to be associated primarily with the members of the company, with the possibility of other constituencies being included if their interests enhance or foster those of the members.[4] This is the approach adopted by the UK Companies Act 2006 (especially section 172 thereof).

(c) The 'pluralist' approach: This approach insists that "co-operative and productive relationships will only be optimised where directors are permitted or (required by law) to balance shareholders' interests with those of others committed to the company."[5] Adoption of this corporate model increases the scope of key stakeholders in whose direct interests a company operates.[6] First, we are going to discuss these three approaches. Our understanding of these approaches will then help us in making a suggestion as to which of them has the greatest propensity of achieving the most inclusive corporate approach in Nigeria. Obviously, the position any given corporation operating in a given jurisdiction adopts amongst the above approaches depends, to a large extent, on the provisions of the country's corporate legislation. It can also depend on the individual company's approach, orientation or corporate culture - in that some companies may proactively decide to adopt a more inclusive approach in their corporate affairs notwithstanding the fact that the company law in operation in that country is embedded in the principles of shareholder primacy.[7] As Parkinson has noted, whilst technically, shareholder primacy requires

[2] See, for instance, J Armour, S Deakin and S J Konzelmann, (2003) "Beyond Shareholder Primacy? Reflections of the Trajectory of the UK Corporate Governance" 41(3*) British J. of Industrial Relations* 531.

[3] A Keay, (2006) "Enlightened Shareholder Value, the Reform of the Duties of Company Directors and the Corporate Objective" L.M.C.L.Q. 335, at p 336; S Kiarie(2006) "At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?" I.C.C.L.R. 329.

[4] Davies, D *et al* (2011) *Companies and Other Business Structures in South Africa,* (2nd ed), Southern Africa: OUP, at pp 9-10.

[5] ibid, at p 9.

[6] The approach demands that "company law should be modified to include other objectives so that a company is required to serve a wider range of interests, not subordinate to, or as a means of achieving, shareholder value (as envisioned in the enlightened shareholder value view), but as valid in their own right." UK Company Law Steering Group (CLRSG), *The Strategic Framework* (London, DTI 1999), at p 37.

[7] Thus, in their research, Silberhorn and Warren found that corporate culture plays an influential role in (the) company's development of its notion of corporate social responsibility (CSR), with institutionalised CSR functions and the company's communication departments driving the initiatives. See D Silberhorn, and RC Warren, (2007) "Defining CSR: A View form Big Companies in Germany and the UK" 19(5) European Business Review 352, at p 352. See also P Bansal and R Roth, (2000) "Why Companies Go Green: A Model of Ecological Responsiveness" 43 *Academy of Management Journal* 717; Waldman, D.A, Sully de Luque, M, Washburn, N and House, R.J (2006) Cultural and Leadership Predicators of Corporate Social Responsibility Values of Top Management: A Globe Study of 15 Countries" 37 *Journal of Int'l Business Studies* 823.

directors to exercise their duties in order to maximise shareholder wealth, the law is not "a serious obstacle to a more expansive notion of responsibility."[8]

The crucial question is: which of the aforementioned approaches should corporate law adopt that will serve society adequately without undermining/defeating the basic reason(s) for having the corporation as a vehicle for economic enterprise?[9] The discourse overreaching this key question have precipitate heated debates with much of these is traceable to the complexity of the issues and the strength of the conflicting interests that are likely to be affected by the outcome - as it ultimately raises the question as to whose interests should a company serve; and may entail increasing the number of stakeholders companies (will) have to consider when making and executing corporate decisions. Now, each of the approaches shall be treated, highlighting their merits and demerits; commencing with shareholder primacy and profit maximisation approach.

2. Shareholder Primacy and Profit Maximisation[10]

The objective of the company under shareholder primacy is to maximise the company's market value "through allocative, productive and dynamic efficiency."[11] Traditionally, the company is perceived to 'belong' to the shareholders.[12] Consequently, it is only their interests that is recognised and accepted as the object of corporate activities. In this approach, the law is inclined, concerned and concentrated essentially and primarily with the maximisation of the wealth available to the shareholders.[13] Every attention and priority is accorded to them and their interests - which, of course, is that they receive maximum returns for their investment in the company. Here, the directors are, by law, required to exercise their powers in the interest and for the benefit of the company as a whole.[14] Most often, the interests of the company is interpreted to mean, or rather, to be synonymous with those of its shareholders;[15] that property

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[8] J Parkinson, (2000) "Corporate Governance*: The Company Law Review* and Question of 'Scope'" 8 Hume Papers on Public Policy 29, at p 45.

[9] Company exists essentially for economic gains. In the words of Bone, "there is agreement among shareholder and stakeholder theorists that the aim of corporation is to make profit." The point of contrast is that stakeholder theorists are of the conviction that it is incumbent on the board to consider all corporate constituencies. J Bone, (2011) "Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought? 24 *Canadian Journal of Law and Jurisprudence* 277, at p 287. See also Blair, M and Stout, L (1999) "A Team Production Theory of Corporation Law" 85 *Va Law Review* 247, at p 253.

[10] This was the approach adopted by the UK under the common law and prior to the 2006 Act; South Africa Companies Act 1973, ss 234-40; the Current Nigerian CAMA 2020, section 305.

[11] Mayer, C (1997) "Corporate Governance, Competition and Performance" 24 Journal of Law and Society 152, at p 155.

[12] L Mitchell, (1990) "The Fairness Rights of Bondholders" 65 *New York University Law Review* 1165, at p 1192-3; Stokes, M (1994) "Company Law and Legal Theory" in S. Wheeler (ed.) *The Law of the Business Enterprise*, Oxford: OUP, at p 94; Committee on the Financial Aspects of Corporate Governance (Cadbury Report) (1992), para 6.1.

[13] The notion that the managers of the company do so for the benefit of the shareholders (who are claimed to be the owners of the company) has been criticised by many scholars, among whom are- Ireland, Patrick (1996) "Capitalism Without the Capitalists: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality" 17 Legal History 41; Worthington, Sarah (2001) "Shares and Shareholders: Property, Power and Entitlement (Part 1)" 22 Company Lawyer 258; Stout, Lynn (2002) "Bad and Not-so-Bad Arguments for Shareholder Primacy" 75 *Southern California Law Review* 1189, at p 1190. Again, in the case of *Short v Treasury Commissioners* [1948] 1 KB 116, at 122, Lord Justice Evershed refused to accept the claim/assertion that shareholders were the owners of a company.

[14] See, for instance, CAMA 1990, s 279(3); Companies Act 2006, s 172; Lord Greene MR in *Re Smith & Fawcett Ltd* (1942) Ch 304, at p 306; *Percival v Wright* [1902] 2 Ch. 421.

[15] See Davies, P (2010) *Introduction to Company Law*, New York: OUP, (2nd ed.),**,** at p 159; *Brady v Brady* (1987) 3 BCC 353; [1988] BCLC 20 C.A; *Greenhalgh v Arderne Cinemas* Ltd [1951] Ch 286, at p 291; Park v Daily News Ltd [1962] Ch 927, at p 963. See also E Ferran, (1999) Company Law and Corporate Finance,

of the company does not, strictly speaking, actually belong to the shareholders because of the principle of separate legal personality of the company,[16]notwithstanding.

The very objective of most companies is of course the pursuit of profit and shareholders invest accordingly in order to make profits through dividend payment and through appreciations in the value of their shares. Thus, the International Accounting Standard Board stated that "to an equity investor, an entity is a source of cash in the form of dividends (or other cash distribution) and increase in the price of shares or other ownership interests."[17] The board is permitted to do whatever it can legally do that will maximise the company's profit for the shareholders. The directors will breach their duties if they do not focus their attention in maximising profit for the members,[18] with this found expressed in *Dodge v Ford Motor Co,* where the Michigan Supreme Court stated that "a business corporation is organised and carried on primarily for the benefit of the (shareholders). The powers of the directors are to be employed for that end."[19] There is no legal duty on the directors to prioritise any other interests, except if doing so will enhance the profits available to the shareholders**.**[20] However, in exceptional cases, such as when the company becomes insolvent, the board becomes duty bound to protect the interests of the creditors - since it is their interests rather than those of the shareholders that will be more affected by conducts that deplete the company's assets at such point in time.[21] In fact, in such a case, the creditors' interests take precedence over those of the shareholders.[22] When the company is insolvent or is in such a form of financial difficulty, short of insolvency, the duty of the board under the common law, now section 172(1) of the Act to promote the success of the company for the benefit of the members as a whole "is suspended" until (such a time) the

Oxford: OUP, at p 126. Note that shareholders here means the members of the company as a group and not individually. The 'interests of the company' has also been interpreted to mean the best interests of present and future shareholders: *Hutton v West Cork Railway Co* (1883) LR 23 Ch. D 654).

[16] *Salomon v Salomon and Co. Ltd,* (1897) AC 22; 45 WR 193.

[17] International Accounting Standards Board, "Discussion Paper on Preliminary Views on an Improved Conceptual Framework for Financial Reporting: The Objective of Financial Reporting and Qualitative Characteristics of Decision-useful Financial Reporting Information" (2006), www.investmentfunds.org.uk/news/research/2006/topic/corporate_governance/imaresponsetoiasbdponconceptualframework.pdf

[18] A Keay, (2010) "The Ultimate Objective of the Company and the Enforcement of Entity Maximisation and Sustainability Model" 10(1) JCLS 35, at p 40. See also S M Bainbridge, (2008) *The New Corporate Governance in Theory and Practice,* New York: OUP, at p 73 where he pointed out that "When the directors hire equity capital from shareholders, the directors undertake a contractual obligation to maximise the value of the shareholders' residual claim on the corporation's assets." This obligation is, of course implied and not expressly stated in a formal contract.

[19] 170 N.W. 668, 684 (Mich. 1919).

[20] But, the stakeholder value advocates hold a different view. See for instance, the opinion of Dean, J (2001) *Directing Public Companies: Company Law and the Stakeholder Society,* London: Cavendish Publishing, at p 13. They insist that every constituency must be considered *in its own right*.

[21] This has been treated in Chapter Two. See cases like *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4BCC 30; *Re Pantone 485 Ltd* [2002] 1 BCLC 266; *Re MDA Investment Management Ltd* [2004] BPIR 75; *Facia Footwear Ltd (In Administration) v Hinchliffe* [1998] 1 BCLC 218, and Australian cases like *Walker v Wimborne* (1976) 137 CLR 1; 3 ACLC 359; *Spies v The Queen* [2000] HCA 43; (2000) 201 CLR 603; *Linton v Telnet Property Ltd* (1999) 30 ACSR 465; *Jeffrey v NCSC* (1989) 7 ACLC 556. See also Keay, A (2001) "The Directors' Duty to Take into Account the Interests of Company Creditors: When is it Triggered?" *25 Melbourne University Law Review 315.*

[22] See *Brady v Brady* [1988] BCLC 20, CA; A Keay, (2004) "Another Way of Skinning the Cat: Enforcing Directors' Duties for the Benefit of Creditors" Insolvency International, 17(1), 1-9, at p 5; Prentice, D (1990) "Creditor's Interests and Director's Duties" 10 *OJLS* 265; V Finch, "Directors' Duties: Insolvency and the Unsecured Creditor" in A Clarke (ed.), *Current Issues in Insolvency Law*, London, Stevens, 1991; .

company becomes solvent again.[23]The supporters of the shareholder value approach believe that it provides the best means of securing overall prosperity and welfare.[24]

This approach was deep rooted in the UK prior to the coming into force of the Companies Act 2006. Thus, CLRSG found that the UK's corporate law showed that companies are managed for the benefit of the shareholders. It also vests on the shareholders ultimate control of the corporate enterprise, such that "the directors are required to manage the business on their behalf......"[25] Continuing, it noted that the ultimate objective of companies in the UK was to generate maximum wealth for shareholders.[26]

As already noted, as regards directors' duties, the immediate past Nigerian corporate legislation (CAMA 1990)[27] and the current CAMA 2020[28] - which is identical with its predecessor in this regard - are substantively modelled after the UK's Companies Act 1985 as far as directors' duties are concerned. It therefore reflects a shareholder supremacy and shareholder wealth maximisation objective.[29] Companies are therefore viewed in Nigeria, just as in any other jurisdiction that adopts shareholder primacy approach, as private actors to be run exclusively in the interests of the shareholders. Thus, Nigerian courts adopt this view and do rule in favour of the supremacy of shareholders.[30] This position is also reflected in the interpretation of the relationship between the company and its stakeholders.[31]

Under the shareholder primacy approach, the directors owe their duties solely to the company - that is, the members as a whole[32] and not to either individual shareholder (except in limited circumstances like where the director is acting as an agent of a particular shareholder: *Allen v Hyatt*[33]) or to non-shareholding stakeholders.[34] In this context, 'the company' has been variously interpreted as meaning the corporate entity[35] or the company's present and future

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[23]A Keay, "Duty to Promote the Success of the Company: Is it Fit for Purpose in a Post-Financial Crisis World?" in J Loughery (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis*, (Edward Elgar, 2012) at p 68.

[24] See S Bainbridge, (1993) "In Defence of the Shareholder Wealth Maximisation Norm: A Reply to Professor Green" 50 *Washington and Lee Law Review* 1423; G D Smith, (1998) "The Shareholder Primacy Norm" 23 *Journal of Corporate Law* 277; J Macey, (1991) "An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties" 21 *Stetson Law Review* 23; F A Hayek, (1960) "The Corporation in a Democratic Society: In Whose Interests Ought it and Will it be Run?" in Anshen and Bach (eds.) *Management and Corporations (1985): A Symposium,* New York: McGraw Hill, at p 82.

[25] The CLRSG, *The Strategic Framework* (1999), at 34-35.

[26] ibid, at 37.

[27] CAMA 1999, S 279.

[28] CAMA 2020, S 305.

[29] See CAMA 2020, s 305, especially 305(3); O J Orojo, *Company Law and Practice in Nigeria,* 5th ed, (2008, LexisNexis) at p 266.

[30] See *Kotoye v Saraki* (1994) 7 NWLR (Part 357) 414, at p 467; *Olaniyan v University of* Lagos (1985) 2 NWLR (Part 9) 599; *Ansambe v B.O.N.* (2005) 8 NWLR (Part 928) 650.

[31] K M Ameshi, *et al* (2006) "CSR in Nigeria: Western Mimicry or Indigenous Influence?" 24 *Journal of Corporate Citizenship* 83; O Ogunniyi, *Nigerian Labour Law in Perspective*, (Lagos: Folio Publishers, 1991).

[32] *Percival v Wright* (1902) 2 Ch 421.

[33] (1914) 30 TLR 444, PC.

[34] For a detailed discussion on this, see J A Eze, (2018) "To Whom Do Company Directors Owe Their Directorial Duties? The Position in Nigeria and the United Kingdom" 1(1) *COOUJCPL* 112.

[35] See for instance, *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627; *Fulham Football Club Ltd v Cabra Estates Plc* [1994] 1BCLC 363; *Nicholson v Permakraft (NZ) Ltd* (1985) 3 ACLC 453; *Brunninghausen v Glavanics* [1999] NSWCA 199, (1999) 17 ACLC 1247; *Peoples' Department Stores v Wise* [2004] SCC 68, (2004) 244 DLR (4th) 564.

shareholders,[36] or even both.[37] In other words, directors are concerned with the collective interests of the shareholders, and where the members have competing interests, the directors are required to act fairly between them. In the event of a breach of any of those directors' duties, the right to enforcement is, as a general rule, available to the company/general body of members alone.[38] Thus, under the common law[39] and company legislation, no stakeholder has any right to maintain an action in court to enforce the breach of any of those duties even when he has an interest in the discharge of those duties,[40] except in some jurisdictions where the right to bring derivative action has been extended to some stakeholders.[41] Some commentators have sought to justify this shareholder exclusivity because of the uniquely uncertain and open-ended nature of the returns of equity.[42] They stress that other stakeholders can and do obtain contractual protection for their interests in the company. There is, therefore, no justification for affording them any extra safeguards that are provided by the company's governance mechanisms.[43]

Apparently, this approach serves shareholders very well as under it, any profits generated by the corporate enterprise, as far as the law is concerned, belong to them *in toto*[44] and not to any other stakeholder.[45] Thus, Berle and Means' view was that the shareholders, between themselves, "have the complete right to all of the profits which the corporation has made, and moreover were entitled to those profits which the management in reasonable exercise of its powers ought to make."[46] They further averred that "the expectation of the entire profit is the precise lure used to induce investment in corporate enterprise" in the capital market.[47] For Berle and Means the position - that shareholders are entitled to all the profits of the company - is developed by the law by extending the traditional logic of property to the corporate situation, and shareholder primacy thus justified by shareholders' property rights.[48] They aver that it is

[36] *Brady v Brady (1987) 3 BCC 535; Parker v Daily News Ltd* [1962] Ch 927.

[37] *Darvall v North Sydney Brick and Tile Co Ltd* (1987) 12 ACLR 537, at 554 (1988) 6 ACLC 154, 176.

[38] This is generally referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461.

[39] *Wright v Percival*, (1902) 2 Ch 421.

[40] See for instance, the UK Companies Act 2006, s 172(3).

[41] See, for instance, Nigerian CAMA 2020, s 346; South African Act 2008, section 165.

[42] See Sundaram, A.K and Inkpen, A.C (2004) "The Corporate Objective Revisited" 15 Organisation Science 350, at p 353; F Easterbrook and D Fischel (1989) "The Corporate Contract" 89 *Columbia Law Rev* 1416, at p 1428.

[43] See R Macey and G P Miller, "Corporate Stakeholders: A Contractual Perspective" 43 *University of Toronto Law Journal* 299; F H Easterbrook and D R Fischel, *The Economic Structure of Corporate Law*, (Cambridge: Harvard University Press, 1991) at pp 35-39.

[44] AA Berle and G C Means, *The Modern Corporation and Private Property*, (Transaction Publishers, 1932) at p 296.

[45] See also the decision in *Dodge v Ford Motor Co*. (1919) 170 N.W. 668. Here, Henry Ford took the view that the shareholders had been more amply rewarded on their investment in the company and so proposed to declare no further special dividends but only the regular dividends in order, among other things, "to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes." (ibid), at p 683. This was however, held to be "an arbitrary refusal to distribute funds that ought to have been distributed to the stockholders as dividends." The court pointed out that "it is not within the lawful powers of the board to shape and conduct the affairs of a corporation for merely incidental benefit of shareholders and for primary purpose of benefitting others." (ibid, at p 684). It was strongly stressed that the exercise of the board's discretion does not extend to "the reduction of profits or to the non-distribution of profits among stakeholders in order to devote them to other purposes." (ibid*).*

[46] A A Berle and GC Means, *The Modern Corporation and Private Property* (Transaction Publishers) 1932, at p 297.

[47] ibid.

[48] The old theories of the corporation that attributed ownership to shareholders and thereby justifying profit maximising objective has been described as "outdated, over-abstracted, over-static and far removed from the

not in the shareholders' best interests if the board uses the profits of the company to benefit non-investing constituencies, and that such conduct would amount to an illegitimate utilisation of the corporate profits and therefore a breach of board's obligation to hold those properties in trust for the shareholders for their benefit.

Further support for this shareholder primacy philosophy and for the profit maximisation objective of the company can be seen in the writings of Milton Friedman. In a particular high profiled work, Friedman insisted that the only social responsibility of business is to make profits: "There is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[49] Friedman's view proposed that the shareholders engage the board to "conduct the business in accordance with the shareholders 'desires, which generally will be to make as much money as possible,"[50] and that whatever the board is doing, and whatever relationship or interactivity the board may have with any stakeholder whatsoever must be such that will yield profit for the shareholders. For Friedman, anything short of that is an improper conduct on the part of the management, and must be condemned[51], justifying this stand on the ground that the shareholders are the providers of the company's capital which entitles them exclusively to the profits realised from the enterprise.[52] The directors, as their agents, owe them the duty to do everything legally possible to maximise returns for them.[53] Like Berle and Means and numerous others,[54] Friedman believes that the company should be free from State regulations as it is more or less a private initiative, and notwithstanding being aware of the capacity of corporate profit-seeking activities to generate externalities that may adversely affect non-shareholding stakeholders, he did not proffer any solution as to how those social costs should the taken care of, insisting however that the board is "spending someone else's money" when it utilises company resources to improve the welfare of non-shareholding stakeholders.[55]

modern business environment and social reality." See S Letza, X Sun and J Kirkbride, J(2004) "Shareholding versus Stakeholding: A Critical Review of Corporate Governance" 12(3*)* *Corporate Governance* 242, at p 243.

[49] M Friedman, (1970) "The Social Responsibility of Business is to Increase its Profits", New York Times, Sept. 13, 1970, 6 (Magazine), at p 32.

[50] ibid.

[51] He believes that there are only very few trends that can seriously undermine the very foundation of our free society as the acceptance by corporate managers of a responsibility other than to make as much profit for their shareholders as possible. See M Friedman, *Capitalism and Freedom,* (Chicago: University of Chicago Press, 1953).

[52] In his words "In a free enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has [a] direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of society...Insofar as his actions in accord with his 'social responsibility' reduce returns to stockholders, he is spending their money. Insofar as his actions raise the price to customers, he is spending customers' money. In so far as his actions lower the wages of some employees, he is spending their money. " (ibid). See also E Sternberg, (1997) "The Defects of Stakeholder Theory" 5 *Corporate Governance* 3.

[53] Though his argument may seem sound, one must not forget the assertion of Parkinson that "the public interest demands something more than profit maximisation within the law." J Parkinson, (1993) *Corporate Power and Responsibilities,* London: OUP, at p 364. This was re-echoed by Sargent who pointed out that though profit is "essential to the success of the corporation..... [it is] merely instrumental, and not the ultimate purpose of the corporation." Sargent, M (2004) "Competing Visions of the Corporation in Catholic Social Thought" School of Law Working Paper Series No 5, Villanova: *Villanova University School of Law,* at p 11.

[54] See also W T Allen, (1993) "Contracts and Communities in Corporation Law" 50 *Wash. and Lee Law Rev.*, 1395; H N Butler, (1989) "The Contractual Nature of the Corporation" 11 *Geo. Mason Law Rev*. 100.

[55] M Friedman, (above n 52), at p 33.

Sternberg,[56] supportive of the above, said that "using business resources for non-business purposes is theft." Similarly, Lantos argues that "altruistic CSR violates shareholders property rights, unjustly seizing shareholder wealth, and it bestows benefits for the general welfare at the expense of those for whom the firm should care (for) in close relationship."[57]

Certain arguments supportive of shareholder primacy approach have been put forward by some commentators. Some of them have been highlighted above. They include the agency theory or agency costs,[58] efficiency and accountability.[59] The work will now move on to consider the demands for a move away from the shareholder primacy to a stakeholder approach.

3. Agitations for a Shift from Shareholder Primacy to a more Inclusivity Approach

In the drive to maximise shareholder value, the critical relationships with employees, customers, suppliers and the community have been sacrificed and long-term shareholder value has been destroyed.[60]

As highlighted earlier, in contradistinction to shareholder value, the stakeholder approach maintains that the objective of the corporation should be to benefit all those who can be identified as 'stakeholders'. Under this approach, the directors are not only to manage the company for the betterment of shareholders, but also in the interests of the stakeholder groups who can affect or be affected by the actions of the company. Here, the board is obliged to balance the interests of the various stakeholder constituencies in deciding the appropriate course of action to take.[61]

Unlike the general acceptance today that a company is a legal person distinct from its members, barely two centuries ago, it was, to some people, unimaginable to think of it in that way. To them, the corporation was merely seen as an aggregation of natural persons and was in no sense different from a partnership. It had no identity distinct from those of its owners.[62] This notion

[56] E Sternberg, Just *Business: Business Ethics in Action, 2nd* ed., (London: OUP, 2000).

[57] G P Lantos, (2002) "The Ethicality of Altruistic Corporate Social Responsibility" 19(3*) Journal of Consumer Marketing* 203, at p 205.

[58] This theory has it that it is the shareholders who are best suited to guide, monitor and discipline the directors in carrying out the directorial functions in that without this shareholder value principle, the directors would be able to act opportunistically and costs (that is, agency costs) will be incurred in monitoring the directors in a bid to reduce the incidence of opportunistic behaviours and shirking. See S Kiarie, (2006) "At Crossroads: Shareholder Value, Stakeholder Value and Enlightenend Shareholder Value: Which Road should the United Kingdom Take?" *ICCLR 3*29, at p 330.

[59] Again, supporters of this approach argue that board's responsibility and answerability solely to the shareholders bring about accountability. They insist that the management will be accountable to no one if the board's responsibility solely to the shareholders is diluted. Bainbridge, for instance, argues that in the absence of clear standards, directors will be tempted to act in self-interests as "directors who are responsible to everyone are accountable to no one." S Bainbridge, (above, n 21), at p 67.

[60] D Cassidy, (2003) "Maximising Shareholder Value: The Risk to Employees, Customers and the Community" 3(2*) Corp Governance* 32, at p 32.

[61] See A Keay, (2007) "Tackling the Issue of the Corporate Objective: an Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'" 29 *Sydney Law Review* 577, at p 578.

[62] See, for instance V Morawetz, (1886) *A Treatise on the Law of Private Corporation at iii,* where he said that a corporation is "really an association formed by agreement of its shareholders, and…the existence of the corporation as an entity, independent of its members, is a fiction." See also H O Taylor, (1884) *A Treatise on the Law of Private Corporation Having Stock iv* where he said that "by dismissing this fiction [of the 'legal person'] a clearer view may be had of the actual human beings interested, whose rights may then be determined without unnecessary mystifications."

must have moved a US Court[63] to say that "to deprive a corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value..." The company was thus viewed mainly from the perspective of partnership, and partnership attributes and laws were, to a great extent, extended to it by analogy.[64] Again, like sole traders and partners in a partnership, the investors in many of the companies were equally the managers of the company.[65] They bore the risk by investing their wealth into the company and were still actively involved in the management of the business.[66] This seemingly justified the common law position which permitted them to be the chief (if not the sole) reapers of the fruits of the enterprise, just like sole traders and partners.[67]

As already noted, companies traditionally 'belong' to the shareholders. As such, only their interests were recognised as the sole concern of the company. But, having regard to the character of corporate ownership highlighted above, as well as change in the strict perception of property rights, should this traditional position still be strictly adhered to?

Much revolves around the issue of 'ownership' of the company which some people believe to be a right of the shareholders. Blair refuses to accept this believe, arguing that the age-long notion of ownership and control that the company is an asset of the shareholders should be dismissed. In its place, a company should be seen as "a governance structure whose social role is to administer the resources and investments made by all the company's stakeholders."[68] She claims that in lieu of ownership, the shareholders are actually in a "residual claim position...that provides the economic and moral rationale for giving them certain residual control rights."[69] She avers that it should not be the fact that we casually call them 'owners' as it is impossible to ascribe ownership to a given party or another in this kind of corporate governance without asking questions as to "which parties in the corporate enterprises are contributing what resources and which ones are bearing what risks"[70] She talks about *de facto* control,[71] that is, there are other stakeholders other than shareholders who have made investments in the modern companies and bear risks similar to those of the shareholders even though they do not invest equity capital in the company. She cited instance of specialised employees - with specific skills

[63] *The Railroad Tax Cases*, 13 F. 722, 747-48 (C.C.D. Cal. 1882). See also *Santa Clara v Southern Pacific Railway*, 188 U.S. 394 (1886).

[64] See D Millon, (2001) "The Ambiguous Significant of Corporate Personhood" 2 Stanford Agora 39. The aggregate theory, for instance, "analogised the corporation to a partnership, and the stockholders to the owners of the business." – Lee, I (2006) "Corporate Law and the Role of Corporation in the Society: Monism, Pluralism, Markets and Politics" 85 *Canadian Bar Review* 1, at p 6. This analogy is associated with the shareholder value model and enjoyed prominence during the 1800's.

[65] In a partnership, each partner, as a general rule, has equal right to participate in management of the firm. They are also entitled to share equally in the profits and losses of the firm, giving them essentially identical interests in the firm - higher profits.

[66] In the 19th century, UK companies were largely closely-held companies or family-owned, that is, private companies. The ownership and management were thus fused. See P L Cottrell, P.L. (1980) *Industrial Finance, 1830-1914*,(London and New York: Methuen, 1980)

[67] At present, ownership and management remain fused in a number of private companies.

[68] M Blair, (1995) "Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century" Brookings Centre for Law, Economics and Politics, www.brook.edu./PA/pressurel/ownership.Htm, at p 1. See also M Blair and L A Stout, (1999) "A Team Production Theory of Corporate Law*" Va. Law Review* 247.

[69] M Blair, (1996) "Wealth Creation and Wealth Sharing", Brookings Institution- Excerpt Published by US News Culture and Ideas, at p 1. This is the key to modern economic reasoning - law and economic nexus.

[70] ibid, at p 2.

[71] ibid.

- whose skills are needed only in a given or limited companies. These skills, she pointed out, may not be very valuable if taken somewhere else outside the company.[72]

Berle and Means seem to have accepted that shareholders who are now passive in the management of the company cannot claim the sole benefit of the corporate activities as they have surrendered the right to such exclusive claim by their passivity,[73] noting that by so doing, the shareholders have released the community of the obligation to protect them to the full extent implied in the doctrine of strict property rights. This clears the way for the pressure for more inclusivity of the interests of the stakeholders to be mounted. Berle and Means conceded that the claims of the shareholders can neither "stand against the paramount interests of the community"[74] nor "stand in the way of the modification of these rights in the interests of other groups."[75] They accepted that the passive property right must one day surrender to the larger interests of the society.

Thus, there seems to be a general agitation and appreciable understanding that the reputation of the company and the welfare of the stakeholders are essential to members' wealth maximisation and long-term survival of the company.[76] Tirole[77] argues that 'stakeholder value' acknowledges that company's activities have the tendency of creating negative externalities which need to be counterbalanced, either by institutional rules or by corporations themselves. Andriof *et al*[78] noted that the agitation for wider and inclusive stakeholder approach does not mean that shareholders are no longer pivotal and important or that profitability has ceased to be vital to corporate success. The issue, rather, is that - in order to survive and be profitable, a company should engage with a range of stakeholders - who unfortunately may have a widely varied view of what it means for a company to be successful.[79] Thus, while not under-playing the contributions of the companies to the generation of wealth and the need to promote competitiveness and enterprise, Parkinson[80] notes that it remains crucial that measures should be put in place to ensure that corporate activities are conducted on terms consistent with broader social values. This is similar to a position adopted by Williams[81] who avers that while we enjoy the obvious benefits of global capitalism, it is important to introduce "constraints - respect for human rights, protection of individual autonomy, fairness in human relations and environmental sensitivity - into otherwise 'mindless' capitalism."

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[72] Freedman has a similar line of thought. He believes that there are more than just shareholders who contribute to a corporation. See, E Freedman, (1984) *Stakeholder Management: Stakeholder Approach*,(Boston: Pitman/Ballinger, 1984). Keay also argues that shareholders are not necessarily the corporate constituency most affected by the company's decision. See A Keay, (2007) "Corporate Directors Behaving Poorly: Disciplining Options for Shareholders of *Journal of Business Law*, 656.

[73] In their own words, as shareholders in" big public companies have become passive property owners, they have "surrendered the right that the corporation should be operated in their sole interest." Berle and Means (1932) (rev. ed. 1967) at p 312.

[74] ibid, at p 312.

[75] ibid, at p 312.

[76] See L Becchetti,, *et al*, (2009) "Income, Relational Goods and Happiness" *Applied Economics* 1.

[77] J Tirole, (2001) "Corporate Governance" 69(1) *Econometrica* 1.

[78] J Andriof, *et al* (2002) *Unfolding Stakeholder Thinking*, (Sheffield: Greenleaf Publishing 2002), at p 9.

[79] See also J Bone, (above n 12), at p 287.

[80] J Parkinson, (2003) "Disclosure and Corporate Social Responsibility" *Journal of Corporate Law Studies* 3; J Parkinson, (2002) "Inclusive Company Law" in John de Lacy (ed.) *The Reform of United Kingdom* Performance: Competitiveness and Enterprise in a Broader Social Frame", *Company Law*, (London: Cavendish Publishing).

[81] C A Williams, (1999) "The Securities and Exchange Commission and Corporate Social Transparency" 112 *Harvard Law Review*, 1197, at p 1296.

The stakeholder approach is "premised on the theory that groups in addition to shareholders have claims on a company's assets and earnings because those groups contribute to a company's capital."[82] The advocates of stakeholder approach thus maintain that no group that has made contribution to corporate success should find itself going unrecognised.[83] They insist on achieving a balance of risks and rewards, of rights and responsibilities that is inclusive and is seen to be fair and equitable to all concerned.[84] It seems reasonable to think that the success of a company depends on (the) care for the people who work for the company and for the wider community. Thus, Stephen Timms MP alleges that "pursuing the interests of shareholders, and recognising wider responsibilities, is complementary to each other..."[85] with this being echoed by Margaret Hodge MP.[86] Parkinson seems to have a similar thing in mind when he advised that making legal provision for a frame-work of rules to promote the creation and maximisation of wealth is not and should not be the only public policy goal in relation to companies.[87] The law should also recognise that companies are important social actors whose decisions have major impacts, for good or ill, on a wide range of groups.[88]

Some of the arguments being put forward to justify calls for departure from the principle of shareholder exclusivity includes: increased efficiency; a more equitable distribution of the proceeds of corporate activities; wider participation in company decision-making in order to increase accountability; or in response to a 'democratic imperative'; and compliance with ethical or social responsibilities.[89]

4. Conclusion

It cannot be denied that the primary reason why most investors/shareholders invested in a company is for economic gains. And these investors/shareholders look forward to reap the fruits of their investment in the company which they normally do through the quick appreciation of the shares on the company in the capital market and through yearly payment of huge dividends at the end of the company's financial year. This concentration on shareholders' interests have caused a lot of company's directors to adopt short-term approaches so as to maximise the shareholders' wealth and have also made some of them not to give due consideration to the interests of non-shareholding stakeholder constituencies. This has attracted a lot of concerns and condemnation as these non-shareholding constituencies equally made various investments and commitments to the corporation. They are therefore stakeholders in the company. Their interests, therefore, deserves consideration, protection and promotion also. They key or big issue is, however, whether the board should owe it as a legal duty to consider

[82] RS Karmel, (1993) "Implications of the Stakeholder Model" 61 *George Washington Law Review* 1156, *at p 1171*.

[83] See S Kiarie, (2006) "At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take*?" ICCLR* 329, at p 332; Dean, J (2001) "Stakeholding and Company Law" 22 *Company Lawyer* 66, at p 69.

[84] See for instance, J Dean, *Directing Public Companies*, (Cavendish Publishing, 2001).

[85] Rt. Hon. Stephen Timms MP, (Minister of Corporate Social Responsibilities, UK), 2008.

[86] When she said: "Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones." (Rt Hon Margaret Hodge MP, *Companies Act 2006, Duties of Company Directors, Ministerial Statements,* at p 2 (London: DTI, June 2007)) Continuing, she said "I strongly believed that businesses perform better, and are more sustainable in the long term, when they have regard to a wider group of issues in pursuing success. That is a common-sense approach that reflects a modern view of the way in which businesses operate in their community: they interact with customers and suppliers; they make sure that employees are motivated and properly rewarded; and they think about the impact on communities and environment. They do so at least partly because it makes good business sense." *(*ibid*).*

[87] J Parkinson, (2000) "Corporate Governance: The Company Law Review and Question of 'Scope'" 8 Hume Paper on Public Policy 29, at p 30.

[88] J Parkinson, (2000) *(*ibid*).*

[89] See J Parkinson, (2000) (ibid), at pp 29-30.

and balance those non-shareholding stakeholders' interests which those of the shareholders. Opinions are seriously divided on this with great majority against the imposition of mandatory duty on the board to consider and integrate those interests as they view it as a mission impossible as the possibility of enforcing those duties if they were to be owed to the non-shareholding stakeholders is very slim and difficult to be uphold by the court.[90] Again, many commentators see the imposition of such a duty on the board as capable of overburdening the already overstretched board as the board will be in a very big stress, trying to balance the interests of these various stakeholder groups, especially as those interests are most likely be conflicting with one another.[91] It is therefore feared that it will open a floodgate of suits against the board by the various stakeholder groups who felt that their interests did not receive its due attention from the board. Of course, a lot of the board's time and the company's resources will be expended in defending those suits.

All these, notwithstanding, there is the great need for a shift from the over-concentration on shareholder primacy as advocated by the shareholder primacy groups to a broader or wider constituency approach as it is in the company's best interests to do so as adopting broader approach has a lot of potentials and benefits accruable therefrom which will, ultimately, culminate to the promotion and furtherance of the shareholders' interests, especially in the long run. It is therefore imperative that any reform of the director's duties should figure out where to draw the line between these approaches as adopting the extremes of these approaches does not seem ideal in the present day corporate world where companies are currently been perceived as part and parcel of the society with the high propensity of contributing to a saner, ethical and balanced society.

[90] See JA Eze, (2022) "The Possibility of Imposing Enforceable Legal Duty on the Board with Respect to the Interests on Non-Shareholding Stakeholder Groups" 13(2) *NAUJILJ* 40.

[91] The argument has it that the board will work more efficiently if they were to focus only on one objective. That is, as the different constituencies' interests do often conflict with one another, it sounds plausible that the board will be able to achieve consensus more easily if they were to focus attention principally on the interests of the shareholders (than on the divergent sets of interests of the various stakeholder groups). Bainbridge, for instance, argues that stakeholder model leads to indeterminate results because decision-making under the model creates a 'two masters' problem. He therefore maintains that directors should not be allowed to deviate from shareholder wealth maximisation, otherwise they will inevitably turn to indeterminate balancing standards. S Bainbridge, (above, n 21), at p 66.