Stakeholder Protection and Corporate Social Responsibility from Comparative Company Law Perspective: Nigeria and South Africa

Nojeem Amodu*
University of Cape Town
nojeemlaw@yahoo.com

Abstract

There have been notable legislative advancements and improvements in corporate governance codes towards stakeholder rights protection. But, how much protection have they really afforded stakeholders against social irresponsible corporate behaviours? The article undertakes a comparative analysis of the legal framework underlying the stakeholder-inclusive approach in South Africa and the environment, social and governance (ESG) or sustainability corporate reporting in Nigeria. It identifies faulty philosophical background together with policy misalignment of corporate governance codes and primary corporate law as critical factors undermining efforts to embed responsible corporate behaviour towards safeguarding qualified and legitimate stakeholder interests. It recommends specific amendment provisions which address the ideological defect and aligns corporate governance codes with primary corporate legislations in the countries.

Keywords

Comparative company law, CSR, Nigeria, South Africa, stakeholder protection

INTRODUCTION

Many domestic corporate legislations are currently largely underpinned by shareholder primacy theory, a corporate law ideology focusing on creating conducive environment for corporate executives to maximise profits for shareholders with little credible requirements for safeguarding other rights. This notwithstanding, companies are urged to satisfy the interest of persons other than the shareholders. Such other persons usually affect, or are affected by the achievement of a company's purpose, or have legitimate claim on a company and can exert influence over the company, or are exposed to risk whether financial, human or environmental as a result of the company's operations.[1] These other persons or entities are the corporate stakeholders.[2]

---

* Nojeem Amodu is a post-doctoral research fellow in the University of Cape Town, South Africa. The author may be contacted at nojeemlaw@yahoo.com.

1 BU Ihugba "Compulsory Regulation of CSR: A Case Study of Nigeria", (2012) 5 *J. Pol. & L*. 68 at 69.

2 The stakeholder group will include shareholders, employees, creditors, suppliers, contractors, customers, regulators, host and impacted communities, the media and others. The stakeholder group of a business could be quite tricky to define. For various definitions and conceptions of the group, see among others: E Freeman, J Harrison, A Wicks, B Parmer, and S de Cole *Stakeholder Theory: The State of the Art* (2010, CUP) 209; E Freeman *Strategic Management: A Stakeholder Approach* (1984, Pitman) 31; TM Jones, AC Wicks and RE Freeman "Stakeholder Theory: The State of the Art" in NE Bowie (ed.) *The Blackwell Guide to Business Ethics* (2001, Wiley-Blackwell) 20, 21, *et seq.;* T Donaldson and LE Preston "The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications" (1995) 20 *The Academy of Management Review* 65 at 88;

Corporate governance is the "relationship among various participants in determining the direction and performance of corporations."[3] It is also defined as the various means through which the society seeks to control company behaviour in the public interest.[4] The Organisation for Economic Cooperation and Development (OECD) defined corporate governance as a set of relationships between a company's management, its board, its shareholders, and other stakeholders.[5]

Corporate social responsibility (CSR) comes to live in corporate governance discourse when stakeholder protection is up for discussion. CSR appears to be that link between corporate governance and stakeholder protection. While CSR[6] may also be bedevilled by several definitions and conceptions, this article conceptualises CSR as a regulatory construct with which the interests of corporate executives and directors are aligned with not just the interests of shareholders but also that of a stakeholder group within the company's environment. Company environment referred to includes the company's physical environment (its surrounding land, air, water, and host and any impacted communities within its area of operation), its human environment (such as its members and employees), its social environment (its interaction and reputation in the society), its economic environment (managing wealth and resources creation and distribution) and political environment (interaction with government and regulatory bodies).

Although CSR is the missing link between corporate governance and stakeholder protection, stakeholder theory and CSR are not exactly one and the same and they do not seek to achieve the same goal. As will be demonstrated in part 2 of this article, while CSR is a neutral concept and may not necessarily be anti-shareholder primacy theory, stakeholder theory sits on the opposing side of the fundamental assumptions of shareholder primacy model especially in stakeholder protection discourse.

The role of CSR and corporate governance in the stakeholder protection discourse must be underscored within corporate law context. Since it is practically impossible for legislators to envisage or anticipate every mischief scenario in corporate law and practice, it is therefore virtually unfeasible to envisage and provide for every possible problem or challenge in corporate law and practice within primary legislations. This means that there will exist certain lacunae to be filled by judicial interpretations and agreed standards, regulations, conventions and best practice codes which may not have passed through legislative processes. The principles of both CSR and corporate governance - as presently largely expressed in voluntary self-regulatory codes - are thus essentially applicable to fill in these gaps. In addressing stakeholder protection, the principles of corporate governance and CSR are useful tools employed in giving effects to legislated provisions especially in the absence of case law.[7] This also

---

MBE Clarkson "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance" (1995) 20 *Academy of Management Review* 92; LJ Mullins *Management and Organizational Behaviour* (2002, Prentice).

3 R Monks and N Minow *Corporate Governance* (1995, Blackwell Publishers) at 1.

4 JE Parkinson "Corporate Governance and the Regulation of Business Behaviour" in S Macleod (ed.) *Global Governance and the Quest for Justice* Volume II, Corporate Governance, (2006, Oxford and Portland) at 1.

5 Organisation for Economic Cooperation and Development (OECD) *G20/OECD Principles of Corporate Governance* (2015, OECD Publishing) at 9.

6 In this article, CSR is not voluntary corporate charity or philanthropic community development activities beyond the requirements of the law. For similar conception, see generally, N Amodu "The Responsible Stakeholder Model: An Alternative Theory of Corporate Law" [2018] 1 (5) *Journal of Comparative Law in Africa* 1; N Amodu, "Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria" [2017] 1 (61) *Journal of African Law* 105; and, AO Adeyeye *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption*, (2012, Cambridge University Press) at 9.

7 T Lambooy *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000-2010 and Case Studies* (2010, Kluwer) at 50 citing L Timmerman 'Gedragsrecht, belangenpluralisme en vereenvoudiging van het

means that corporate governance and CSR principles should, and will follow and align with legal provisions. In other words, legislated rules of corporate law should not be at variance with the principles of corporate governance, and *vice versa*. The OECD Principles of Corporate Governance underscore this point noting that while corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources, it should also be consistent with the rule of law and support effective supervision and enforcement.[8] Both primary and secondary legislations usually provide for stakeholder protection in the form of enjoining corporate executives to sustainably seek profits for shareholders by having regards for impacts of corporate actions on other constituents of the business.[9] Giving effect to legislated corporate law provisions especially towards stakeholder management and protection has led to a proliferation of largely voluntary corporate governance codes of best practices around the world.[10] These codes contain self-regulatory corporate disclosure requirements, enjoining integrated corporate reporting on the so-called non-financial (social and environmental) or sustainability matters.

Further to the comment at the beginning of this introduction, although two dominant corporate objective theories (shareholder primacy and stakeholder-oriented theories) have largely shaped corporate governance and disclosure requirements, and while many appear underpinned by the stakeholder theory, upon critical scrutiny however, they are essentially conditioned by the fundamental assumptions of the shareholder primacy theory.[11] Shareholder primacy oriented disclosures may be direct or indirect. It is direct if the target benefit is the provision of relevant information to shareholders or towards enhancing shareholder value, or allowing prospective shareholders to decide whether to invest or not in the company. It could be indirect for the shareholders benefit when the disclosure regime appears on the surface to accommodate stakeholder engagement but ultimately enhances shareholders' (both present and prospective) interests. Usually when it is indirect, after such stakeholder engagement, all activities or major decisions therefrom are subjected to shareholders' approval or implementation with little or no further recourse to stakeholders involved. This article will show in part 3 how prevalent this indirect shareholder primacy oriented corporate disclosure has been. The second form of corporate disclosure benefits the larger stakeholder group. This kind of disclosure usually reflects genuine demonstration of steps undertaken by a company to address its own irresponsible corporate behaviour towards stakeholders. This second disclosure requirement has two targets: (i) raising company's cost of irresponsible corporate behaviour as stakeholders are expected to shun such company upon access to negative disclosures without credible mitigating procedures; (ii) incentivising responsible corporate behaviour whose disclosure costs ultimately reduces upon relevant stakeholder positive reaction to information disclosed.[12] The foregoing theoretical distinction in

vennootschapsrecht' (Rules of conduct; diverging interests and simplification of company law), Ondernemingsrecht, (2005) 1 *Company Law Review* 2 to 8, specifically at 2.d.

8 OECD Principles of Corporate Governance, above at note 5 at 13, 14, *et seq*.

9 See *Shlensky v. Wrigley* 237 N. E. 2d 776 (ill. App. 1968) where directors of a company running a baseball team refused to install lights at the stadium to permit night games (which would ordinarily translate to more profits available to the shareholders) because of the deleterious effect of such light on the lives of local people in the surrounding community. The shareholders had brought a claim to enforce shareholder primacy but failed.

10 L Osemeke and E Adegbite "Regulatory Multiplicity and Conflict: Towards a Combined Code on Corporate Governance in Nigeria" (2016) 133 *J Bus Ethics* 431 to 451 at 433 and 434.

11 Parkinson "Corporate Governance and the Regulation", above at note 4 at 17.

12 Ibid.

corporate disclosure requirements is vital because the purpose of the disclosure usually determines the extent and quality of the disclosure and therefore its efficacy.[13] If disclosure targets shareholder interests and to enhance shareholder value, then, the level or extent of information to be disclosed by the companies is likely minimal, just to comply with minimum requirements of the law, without necessarily paying attention to adequacy, accuracy or otherwise of stakeholder information disclosed in the wider public interest.[14]

In light of the foregoing, this article is interested in the following questions: What theoretical models underpin corporate disclosures towards stakeholder protection in Nigeria and South Africa? In what primary corporate law provisions are stakeholder protection measures expressed? In other words, what stakeholder protection provisions in legislated primary company laws in Nigeria and South Africa are corporate governance codes giving effect to? How effective are these provisions within the business community in these countries? What additional mechanism or alternative approach may be employed to tackle victimisation of legitimate and qualified stakeholders and curb box ticking, empty and mindless compliance with corporate disclosure requirements in corporate governance codes?

This article will argue that answers to these questions in relation to safeguarding stakeholder rights through responsible corporate behaviour transcend compliance with disclosure requirements in corporate governance codes. It will also argue that corporate law isolation from provision of effective stakeholder protection in Nigeria and South Africa is untenable. The article has 4 parts. Following this introduction, part 2 considers corporate law theories and principles shaping stakeholder protection requirements and their usefulness to stakeholders. Part 3 comparatively analyses corporate law and CSR legal and regulatory framework towards protecting stakeholder rights in South Africa and Nigeria and highlights factors undermining effective stakeholder protection in their corporate governance and CSR discourse. It also recommends additional measures and alternative approach for stakeholder protection to these states. The article closes in part 4.

STAKEHOLDER PROTECTION AND UNDERLYING THEORIES

Theories are constructed principles, guidelines and assumptions aiding deeper interpretations of concepts, ideas, actions and inactions. A theory is a group of logically organized and deductively related laws[15] which are constructed to make sense of the judgments that constitute ethical and political worlds of humans.[16]

Sometimes, corporate law theories appear as "interesting philosophical speculations" or "intellectual games", "metaphysical" or just bluntly called "useless waste of time".[17] In reality however, they aid the development of a framework within which we can assess the values and assumptions that either unite or divide the plethora of cases, reform proposals, legislative amendments, and practices

13 For empirical data on this, see generally, K Hakkon, P Kwangwoo, and R Doojin "Corporate Environmental Responsibility: A Legal Origins Perspective" (2017) 140 *J Bus Ethics* 381 to 402.
14 Parkinson "Corporate Governance and the Regulation", above at note 4 at 17.
15 K Marx *Early Writings* translated and edited, T Bottomore, (1963, McGraw-Hill) at 52.
16 C Sunstein *Legal Reasoning and Political Conflict* (Oxford University Press, 1996) at 52.
17 NHD Foster "Company Law Theory in Comparative Perspective: England and France" [2000] 48 (4) *American Journal of Comparative Law* 588.

that constitute modern corporate law.[18] Accordingly, as will be shown in part 3 of this article, expounding on the fundamental assumptions of certain theories underpinning stakeholder protection discourse are vital to the findings and recommendations offered in this article. Given the multidisciplinary nature of the CSR and stakeholder protection discourse, there are different theoretical approaches from which stakeholder protection may be, and has been analysed.[19] However, for the purpose of this article, the two dominant corporate law theories of shareholder primacy and stakeholder theory are highlighted below.[20]

Shareholder Primacy Theory

To a shareholder primacy theorist, all directors' duties must be driven to maximize shareholder wealth and value.[21] It proceeds on a fundamental assumption that companies and businesses are private properties[22] of their incorporators and as such the success of the company must be taken as the success of its members. Milton Friedman had noted that "few trends could so thoroughly undermine the very foundation of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible"[23] and that "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."[24] Corroborating Friedman, Hayek also argued against the use of corporate properties and resources "for specific ends other than those of a long-run maximization of the return on the capital placed under their control" and further warned that the fashionable doctrine that their policy should be guided by "social consideration" is likely to produce most undesirable results.[25]

---

18 J Dine *The Governance of Corporate Groups* (2000, Cambridge University Press) at 1 citing S Bottomley, "Taking Corporations Seriously: Some Consideration for Corporate Regulation" (1990) 19 *Federal Law Review* 203, 204.

19 TK Cheruiyot, and P Onsando "Corporate Social responsibility in Africa: Context, Paradoxes, Stakeholder Orientations, Contestations and Reflections" in A Stachowicz-Stanusch (ed.) *Corporate Social Performance in the Age of Irresponsibility – Cross National Perspective* (2016, Information Age Publishing Inc.) at 95, 96, *et seq*.; see also, E Garriga, and D Mele "Corporate Social Responsibility Theories: Mapping the Territory" (2004) *Journal of Business Ethics* 53, 65; JE Parkinson "Models of the Company and the Employment Relationship" (2003) *British Journal of Industrial Relations* 481 to 509; J Dewey "The Historic Background of Corporate Legal Personality" (1926) 35 *Yale Law Journal* 655; R Sacco "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 *American Journal of Comparative Law* 10 to 20.

20 For details of theoretical underpinnings of corporate actions and CSR generally, see Amodu "The Responsible Stakeholder Model", above at note 6; and N Amodu "Theoretical Underpinnings of Corporate Social Responsibility: Victim of Ideological Clashes" [2014] 3 (6) *Journal of Corporate Governance* 1160, 1214.

21 LM Fairfax "Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric" (2007) 59 *FLA. L. REV*. 771, 779 citing S Bainbridge "Director Primacy: The Means and Ends of Corporate Governance" (1997*) N.W. U. L. Rev*. 547, 563.

22 L Whitehouse "Corporate Social Responsibility as Regulation: The Argument from Democracy" in J O'Brien (ed.) *Governing the Corporation, Regulation and Corporate Governance in an Age of Scandal and Global Market* (2005, John Wiley & Sons) at 156.

23 M Friedman *Capitalism and Freedom* (1962, University of Chicago Press) at 133.

24 M Friedman *Capitalism and Freedom* (40th anniversary edition, 2002, University of Chicago Press) at 133. Profits maximisation however is not at all costs, as Friedman also acknowledged. The model still recognizes certain restrictions to act within the limits of the law and play "within the rules of the game". However, Friedman's views appear to be a classic view. More recent exponents of the shareholder primacy model argue that in the drive for profit maximization for shareholders, corporate executives may simply treat statutory laws and regulations as mere cost of operation and may willingly flout if penalties pose no significant risk to the company's bottom line. JF Sneirson "Shareholder Primacy and Corporate Compliance" (2015) 26 *Fordham Environmental Law Journal* 1, 4, 5 *et seq.*.

25 F Hayek "The Corporation in a Democratic Society: In Whose Interest Ought It and Will It Be Run?" in M Anshen, and G Bach (eds.) *Management and Corporations* (1985, McGraw-Hill) at100.

From the above, the good news is that this theory absorbs directors from undue distractions and external pressures,[26] especially where CSR and stakeholder management are considered in that manner. The bad news however is that, not only will this model undermine effective stakeholder protection mechanisms but has so dominated corporate law and governance around the world,[27] especially in the Anglo-American jurisdictions[28] that its 21st century proponents argue it should be end of corporate law debates on corporate objective.[29] For instance in the United Kingdom (UK), despite the conscious effort[30] at promoting a seeming third way theory in between shareholder primacy and stakeholder-oriented theories, called the enlightened shareholder value'[31] (ESV) - where extraneous competing interests of certain stakeholders are supposedly balanced but only for the long term benefits of the shareholders [maximization of dividends and capital (share price) growth[32]] - the ESV is still rooted in the shareholder primacy model having not given the stakeholders any real justiciable rights.[33] Applying the fundamental assumptions of this theory therefore, many cases have held that it will largely constitute unacceptable corporate waste of time and resources for corporate executives and directors to sacrifice profits which would otherwise be available to shareholders for sharing on the altar of some grandiose ethical, social, or environmental concerns of a stakeholder group.[34] In relation to policy choices, this theory influences arguments that corporate law should focus on providing enabling

---

26 RT Miller "The Coasean Dissolution of Corporate Social Responsibility" [2014] 17 (2) *Chapman Law Review* 1 at 2citing D Henderson "Misguided Virtue: False Notions of Corporate Social Responsibility" (2001).

27 Its agenda and assumptions have also been propagated by international financial agencies, such as the World Bank and the International Monetary Fund (IMF) when providing financial assistance to developing countries and advising them on the best route to economic and social development. In fact, the OECD's Principles on Corporate Governance as revised in 2004, for example, were said to be unashamedly shareholder-oriented. S Soederberg, *The Politics of the New Financial Architecture* (2004, Zed Books); and see, P Ireland and RG Pillay "Corporate Social Responsibility in a Neoliberal Age" in P Utting and JC Marques (eds.) *Corporate Social Responsibility and Regulatory Governance Towards Inclusive Development?* (2010, Palgrave Macmillan) at 85 and 87; see also, Part 5 of the OECD Principles of Corporate Governance, above at note 5.

28 United Kingdom's Company Law Review Steering Group, Department of Trade and Industry (CLRSG) "Modern Company Law for a Competitive Economy: The Strategic Framework" (1999, Department of Trade and Industry) at 37. J Dine "Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?" [2012] 3 (1) *Journal of Human Rights and the Environment* 44, at 57; P Ireland, "Company Law and the Myth of Shareholder Ownership" [1999] 62 (1) *Modern Law Review* 32 to 57; P Davies "Enlightened Shareholder Value and the New Responsibilities of Directors" (2005, Inaugural Lecture at University of Melbourne Law School).

29 H Hansmann and R Kraakman "The End of History for Corporate Law" in J Gordon and M Roe (eds.) *Convergence and Persistence in Corporate Governance* (2004, Cambridge University Press) 33 to 68 at 34; see also MJ Roe, "The Shareholder Wealth Maximization Norm and Industrial Organisation" (2001) 149 *U. PA. L. REV*. 2063 at 2065.

30 C Williams and J Conley "An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct" 2004, *University of Carolina Legal Studies Research Paper* No 04-09) at 4, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632347 last accessed 5th May, 2019.

31 C Villiers "Corporate Law, Corporate Power and Corporate Social Responsibility" in N Boeger, R Murray and C Villiers (eds.) *Perspectives on Corporate Social Responsibility* (2008, Edward Elgar) at 85, 97, 98 *et seq.* noting the similarity between the UK Enlightened Shareholder Value and the Australian "Business Approach to Corporate Responsibility" and underscores the "business case" argument for CSR which enjoins corporate executives to consider stakeholder interests and report on non-financial matters of CSR like employee or environmental matters so long as it will make *business sense* (cost-benefit implications) to so do and such considerations are in relation to the overall economic performance of the company and without prejudice to enhancing shareholder value.

32 P Ireland and RG Pillay "Corporate Social Responsibility", above at note 27 at 85 and 86; see also, J Armour, S Deakin, and SJ Konzelmann "Shareholder Primacy and the Trajectory of UK Corporate Governance" (2003) 41 BRIT. J. INDUS. REL. 531 at 7 available at: http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp266.pdf last accessed 5th May, 2019.

33 J Eijsbouts *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* (2011, Inaugural Lecture, Maastricht University) at 51; J Abugu "Primacy of Shareholders' Interests and the Relevance of Stakeholder Economic Theories" (2013) 7 *Company Lawyer* 201 at 204, 205 *et seq*. and PL Davies *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008) at 506, 507, *et seq*.

34 See generally, *Hutton v. West Cork Railway Co*. (1883) 23 Ch.D., 654; *Lee v. Chou Wen Hsien* [1985] BCLC 45 (PC); *Item Software (UK) Ltd v. Fassihi* (2004) EWCA Civ 1244 (CA); *Re Smith & Fawcett* [1942] Ch 304; *Brady v. Brady* [1988] BCLC 20; *Peskin v. Anderson* [2000] All ER (D) 2278; *Dawson International Plc v. Coats Paton Plc* [1989] BCLC 233; *Percival v. Wright* (1902) 2 Ch 421; *Dodge v. Ford Motor Co.* (1919) 204 Mich. 459, 170 N.W. 668*; Re Lee, Behrens & Co Ltd* (1932) Ch 46; *Rogers v. Hill* 289 U.S. 582 (1933); *McQuillen v. National Cash Register Co*., 27 F. Supp. 639 (D. Md. 1939); *Greenhalgh v. Arderne Cinemas Ltd* (1951) Ch. 286, 291; *Gottlieb v. Heyden Chemical Corp*., 90 A. 2d 660 (Del. 1952); *Parke v. Daily News Ltd* (1962) 3 WLR 566; *Amalgamated Society of Woodworkers of South Africa v. Die 1963 AmbagsaaWereniging* (1967) 1 SA 586 (T); *Michelson v. Duncan* 407 A. 2d 211 (Del 1979).

environment for businesses to thrive (and maximise profits) while issues relating to corporate responsibility or stakeholder protection against abuses using the corporate form should be sorted out within by aspects of the law such as environmental law, human rights law *et cetera*.

Stakeholder Theory

Edward Freeman made the stakeholder model popular and defined the term "stakeholder" as the "groups and individuals who benefit from or are harmed by, and whose rights are violated or respected by, corporate actions."[35] This theory is based on the assumption that companies ought to exist for the mutual benefit of those with relevant interests in or against the companies as a going concern.[36] While the shareholder primacy model is prevalent in Anglo-Saxon jurisdictions, the stakeholder oriented theories have been mostly adopted in East Asia, and continental Europe, The Netherlands and Germany[37] in particular. As may be expected, these stakeholder theories afford some protection for the stakeholders. They inform agitation that corporate decisions, actions and inactions must demonstrate due consideration of multiple stakeholder interests including shareholder interests. Therefore, within the ambits of this model, no singular interest of any stakeholder is particularly ranked higher than the other.[38] All such interests from different constituents must be balanced in determining the success of the business.[39] The fundamental assumptions of these stakeholder theories have also enjoyed wide adoption in modern legal principles,[40] (business) codes of corporate governance,[41] court judgments[42]

35 E Freeman, "A Stakeholder Theory of the Modern Corporation" in LB Pincus (ed.) *Perspectives in Business Ethics* (1998, McGraw-Hill) at 174.

36 JE Parkinson *Corporate Power and Responsibility* (1993, Clarendon Press) at 310.

37 K Hopt and P Leyens "Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy" [2004] 2 (1) *European Company and Financial Law Review* 135 at 141 and D Block and A Gerstner, "One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany" (2016) *Comparative Corporate Governance and Financial Regulation* 1.

38 E Freeman, A Wicks, and B Parmar "Stakeholder Theory and 'The Corporate Objective Revisited'" (2004) 15 *Organization Science* 364 at 365. It has also been argued that as the shareholder primacy theorists contend that shareholders may claim private ownership of the company because of their investment, so can, as stakeholder theorists argue, stakeholders such as employees, financiers, creditors and other constituents who have also invested their skills and monies lay similar ownership claim to the company. See S Letza and others "Shareholding versus Stakeholding: A Critical Review of Corporate Governance" (2004) 12 *Corporate Governance: An Int'l Rev*. 242, 251

39 JH Farrar *Company Law* (2nd edn, 1988, Butterworths) at 12.

40 For instance the weakening, flexibility or expansion of the business judgment rule such that some form of protection is afforded stakeholders in what is considered legitimate management of a business enterprise; corporate executives may now legitimately increase wages of employees rather than declare profits for the shareholders; also, the definition of a 'reasonable takeover' now involves consideration of the impact of such takeover on employees, suppliers, local communities and creditors in determining how reasonable or not a takeover may be permitted. See among others: Hampson *v.* Price's Patent Candle Co (1876) 45 LJ Ch. 437; *Shlensky v. Wrigley* (237 N.E 2d 776 ill. App 1968); Harlowe's Nominees Pty Ltd *v*. Woodside Lakes Entrance) Oil NL (1968) 121 CLR 483, 493; Teck Corporation Ltd v. Millar (1973) 33 DLR (3d) 288 (BCSC); People's Department Stores Inc *v*. Wise (2004) 3 S. C. R. 461; Lonrho Ltd *v*. Shell Petroleum Co. Ltd (1980) 1 WLR 627 (HL); Unocal Corporation *v*. Mesa Petro Co. (1985) Del. Supr. 493 A.2d 946; see also, B Horrigan *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham, UK, 2010) at 108 citing L Stout, "Bad and Not-So-Bad Arguments for Shareholder Primacy" (2002) 75 *Southern California Law Review* 1189 at 1202 to 1203.

41 For examples of the business codes, see P Ireland and RG Pillay "Corporate Social Responsibility" above at note 27 at 88. Other regulatory codes include, just to mention a few for the purpose of this article, the 2018 Nigerian Code of Corporate Governance; the South African King King IV Report on Governance 2016; the 2014 Central Bank of Nigeria Code of Corporate Governance; the Nigerian Securities and Exchange Commission Code of Corporate Governance for Public Companies of 2011 and the 2014 Nigerian Communication Commission Code of Corporate Governance for the Telecommunications Industry.

42 Even courts within the Anglo-American jurisdiction have stated that directors may take into account of the long term well-being of a company, instead of short term benefits of maximizing profits for the shareholders. See for instance, Provident International Corporation v. International Leasing Corp Limited (1969) 1 NSWR 424 at 440; Paramount Communications Inc. *v*. Time Inc. 571 A. 2d 1140 (Del, 1989); People's Department Stores *v.* Wise (2004) 3 S. C. R. 461; and BCE Inc. *v.* 1976 Debenture holder (2008) 3. S. C. R.560.

and legislations[43] around the world. Further, with the adoption of the ESV in the UK, its corporate governance has been described as being rather in a "state of flux" than being really dominated by the shareholder primacy oriented theories.[44] The reason for this assertion is not far-fetched. Even though fundamentally underlain by shareholder primacy theory, there are a number of principles and provisions in the UK Corporate Governance Code[45] and the Companies Act of 2006 still suggesting that corporate executives and managers should balance competing stakeholder interests in running companies.[46]

When compared with the shareholder primacy model, the stakeholder model is no doubt better favourably disposed to stakeholder protection by enjoining corporate executives to behave responsibly and manage the company in the interest of not just the business investors but also in the interest of all stakeholders. However, a major query for this model is in relation to its assumption ranking shareholder interests and other stakeholder rights as equal. Further, apart from its failure identify who and who will qualify as material and legitimate stakeholders of a business, this model also lags in the provision of a practicable paradigm with which corporate executives can actually or effectively balance the so-called *equal* interests of all stakeholders and in the best interest of the company.[47] So, it turns out that while the stakeholder theory has attractions, especially normatively speaking, but it is largely not practical, and while solving the problem of shareholder opportunism, has led to a more serious problem of stakeholder opportunism.[48] The question then remains, even if directors and shareholders have agreed that there is need to balance competing stakeholder interests, with what workable theory, regulatory and enforcement regime can this be achieved?

Many scholars have attempted to formulate some middle ground approaches which sit between the two dominant theories.[49] However, the theoretical and regulatory ambits of an alternative model called the responsible stakeholder model[50] (RSM) appears most useful for the purpose of this article. RSM rejects corporate law isolation from stakeholder protection which is cardinal to the shareholder primacy theorists. Within this theory, corporate law (and regulators using corporate law and corporate governance) need not necessarily descend into the arena to prescribe specific internal corporate governance rules for businesses for safeguarding stakeholder interests; since one size never fits all,

43 Section 166(2) of Companies Act, 2013 (India); sections 7 and 72(4) of Companies Act, No. 71 of 2008 (South Africa) (SACA); section 172 of Companies Act 2006 (England); and section 279 of the Companies and Allied Matters Act, 1990 as amended (Nigeria).

44 KJ Hopt "Comparative Corporate Governance: The State of Art and International Regulation" (2011, European Corporate Governance Institute Working Paper Series in Law, No. 170) available at: <http:ssrn.com/abstract=1713750> last accessed 5th May, 2019.

45 The UK Financial Reporting Council (FRC) undertakes regular review of the UK code. The latest version of the code is that of July, 2018 available at: See <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UKCorporate-Governance-Code-FINAL.PDF> last accessed 5th May, 2019.

46 See section 172 of the UK Companies Act 2006 enjoining corporate executives to have regards to the interests of employees, local communities, customers, suppliers, and other related stakeholder concerns in working for the success of the company. Creditors' interests are specifically made crucial under subsection (3) of the said section 172.

47 A Keay "Stakeholder Theory in Corporate Law: Has It Got What It Takes?" [2010] 3 (9) *Rich. J. Global L. & Bus*. 249 at 300.

48 Ibid.

49 See for instance the arguments and underlying assumptions of theories such as 'the Team Production Theory" canvassed by Margaret Blair and Lynn Stout in M Blair and L Stout, "A Team Production Theory of Corporate Law" [1999] 2 (85) *Virginia Law Review* 247 and "The Entity Maximisation and Sustainability Model" (EMS) canvassed by Andrew Keay in A Keay "Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model" (2008) 71 *Modern Law Review* 663.

50 This middle ground theory appears necessitated as proponents on both sides of shareholderism versus stakeholderism have almost irredeemably condemned the other. P Ireland and RG Pillay "Corporate Social Responsibility", above note 27 at 91 had noted that "while the advocates of CSR seek to modify corporate behaviour through voluntarism and self-regulation, a ruthlessly shareholder-oriented, Anglo-American model of the corporation which is antithetical to meaningful CSR is being entrenched around the world by legal and other means." The formulation of RSM and its interaction, similarities and differences from other theories can be found in Amodu "The Responsible Stakeholder Model", above at note 6.

this writer submits that, under existing conditions, corporate law and policy makers may continue to struggle in recommending effective corporate governance principles (whether in codes or not) for stakeholder protection. This writer reiterates that such efforts in the past has encouraged (will likely continue to encourage) CSR greenwash[51] and empty or half-hearted compliance with codes of corporate governance without any real value or safeguards to stakeholder interests. This article recommends the RSM for effective stakeholder protection as it assumes the need to enhance shareholder value (wealth creation for shareholders) but conjunctively, ensures social efficiency through the employment of the principles of corporate law to advance the aggregate welfare of stakeholders. With the RSM, the obligation to identify and balance relevant stakeholder interests in a manner suitable to the commercial focus of each company will rest on that company itself, and not necessarily imposed by regulators through corporate law. Some broad guidelines and mention of usual suspects in the stakeholder group may be given however. While the business community would find the latitude to determine its own stakeholders workable, however, the law safeguards stakeholders by ensures that whenever any qualified stakeholder alleges violation of its legitimate interest in the company, both primary and secondary corporate laws must provide avenue to such stakeholder to seek redress and be remedied. RSM prescribes a presumptive duty on companies to self-develop appropriate and suitable stakeholder management and protection techniques. Companies within this framework must establish to regulators what suitable self-regulatory stakeholder mechanism they have employed towards balancing competing stakeholder interests. But upon the failure of such company-internal self-regulatory framework, the law should presume such business has acted irresponsibly and must painstakingly show verifiable steps taken to balance competing interests but after which nonetheless resulted in injury to a victim stakeholder. In other words, because of the powers, influences and impacts companies (small, big, domestic or multinationals) generally have in the society, corporate law and corporate governance must complement each other in providing a clear corresponding obligation on businesses to protect legitimate and qualified stakeholders' interests. In addition, as a result of corporate powers and influence in the society, the imposition of a rebuttable presumption of guilt whenever violation is alleged by a stakeholder appears appropriate. It is left for businesses, in such circumstance, to discharge an onus that they have acted responsibly. In part 3 below, this article will amplify this point and describe how useful this theory may be towards formulating stakeholder protection obligations and requirements in corporate law and corporate governance codes and addressing CSR greenwash and mindless compliance in Nigeria and South Africa.

COMPARATIVE ANALYSIS OF STAKEHOLDER PROTECTION IN NIGERIA AND SOUTH AFRICA

This part considers protection of stakeholder interests both at primary legislation (company law enactment) and subsidiary legislation (regulations and codes) levels. It also examines the features of techniques used for stakeholder protection in the Nigeria and South Africa, together with their theoretical

[51] Corporate greenwash arises where corporate executives and companies pay lip service and only half-heartedly comply with code requirements without embedding code requirements as corporate culture or making them part of the so-called DNA of the company. Greenwash involves box ticking disclosures, and empty integrated reporting stakeholder management activities. See M Cherry "The Law and Economics of Corporate Social Responsibility and Greenwashing" (2014) 14 *U.C. Davis Bus. L. Journal* 281 to 303; and AM Cherry and JF Sneirson, "Chevron, Greenwashing, and the Myth of 'Green Oil Companies'" (2012) 3 *WASH. & LEE J. ENERGY, CLIMATE & EVN'T* 133 at 140 and 141.

underpinnings, practical manifestations in laws and how effective or otherwise they have been within these business communities.

There are a few interesting primary corporate legislation[52] provisions in the two jurisdictions enjoining corporate executives to safeguard stakeholder interests. In Nigeria for instance, section 279 (3) and (4) of the Companies and Allied Matters Act (CAMA)[53] enjoins directors to act in the best interests of the company as a whole and ensuring the interests of the company's employees are also considered. There are clear references to consideration of other interests apart from shareholder interests in the above showing the Nigerian primary corporate law takes cognizance of stakeholder protection. However, the value to be derived from these sections by corporate stakeholders in relation to safeguarding their interests in the running of the company is another question. For instance, having sought to protect an important stakeholder group such as employees at section 279 (3) and (4), the same legislation in the same section immediately weakens the efficacy of such provision (at least from the perspective of any victim employee stakeholder) under sub-section (9)[54] to the effect that even if the corporate executives do not behave responsibly in safeguarding stakeholder interests, only the "company" can complain. The problem is that these sections are clear adoption of the shareholder primacy-centric common law position of what is considered to be the "company" or the "interest of the company" in circumstances such as this. The "company" is assumed to mean members or shareholders as a whole and the best interest or success of the company is taken to mean what is beneficial to the (economic) interests of the shareholders as a whole.[55]

In relation to corporate disclosure in financial statements also, the Nigerian primary corporate legislation is focused on the shareholder primacy model with no provisions for consideration of important stakeholder interests (such as impacts on community life or the environment) as there are no provisions for non-financial corporate disclosures or as it is more appropriately referred to in South Africa, integrated reporting on sustainability matters.[56]

---

52 There are other legislations in other aspects of the law, outside the purview of this article such as in South Africa, the 1998 National Environmental Management Act (NEMA); the Bill of Rights included in the Constitution (South Africa, 1996); the 1995 Labour Relations Act 66 and the Broad Based Black Economic Empowerment Act 53 of 2003. In Nigeria, see sections 11 (a) and 50 of the Financial Reporting Council of Nigeria Act 2011; section 166 of 2007 Nigerian Minerals and Mining Act No. 20; the 2007 Nigeria Extractive Industries Transparency Initiative (NEITI) Act, the 2007 National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, *et cetera.*

53 See also section 283(1) of CAMA. For a brief history of Companies and Allied Matters Act (CAMA), see O Amao, "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States" (2008) *Journal of African Law* 89 at 95 and 96.

54 See also sections 314 and 315 of CAMA showing its shareholder primacy orientation, with little or no real value addition to stakeholder protection.

55 *Hutton v. West Cork Railway Co.* (1883) 23 Ch.D., 654; *Percival v. Wright* (1902) 2 Ch 421; *Dodge v. Ford Motor Co.* (1919) 204 Mich. 459, 170 N.W. 668*; Evans v. Brunner, Mond & Co*. (1921) 1 Ch. 359, *Re Lee, Behrens & Co Ltd* (1932) Ch 46; Rogers *v*. Hill 289 U.S. 582 (1933); McQuillen *v*. National Cash Register Co., 27 F. Supp. 639 (D. Md. 1939); *Greenhalgh v. Arderne Cinemas Ltd* (1951) Ch. 286, 291; *Gottlieb v. Heyden Chemical Corp.*, 90 A. 2d 660 (Del. 1952); *Parke v. Daily News Ltd* (1962) 3 WLR 566; *Amalgamated Society of Woodworkers of South Africa v. Die 1963 AmbagsaaWereniging* (1967) 1 SA 586 (T); *Michelson v. Duncan* 407 A. 2d 211 (Del 1979). See also section 172 of Companies Act, 2006 (England).

56 CAMA sections 331, 332 *et seq*. and schedule 2.*Cf*: section 334(2) (h) in relation to financial statements containing a "value-added statement for the year" which content at section 335(4) is a report of "the wealth created by the company during the year and its distribution among various interest groups such as the employees, the government, creditors, proprietors and the company". This has been interpreted in terms of stakeholder protection provision. See Amao "Corporate Social Responsibility", above at note 53 at 101 citing JO Orojo *Company Law in Nigeria* (3rd ed., 1992, Mbeyi & Associates) at 37. Interestingly, the Nigerian 2007 Investments and Securities Act (ISA) which established the Securities and Exchange Commission (SEC) and regulating the activities of public liability and quoted companies in Nigeria also made no provision for integrated corporate reporting (on non-financial matters). Further, while sections 11 (a) and 50 of the Financial Reporting Council of Nigeria Act 2011 may contain promising provisions for stakeholder protection, the definition of "financial statements" under section 77 of the Act linking same to the purely shareholder-primacy oriented statements of CAMA and with no reference to stakeholder integrated reporting has undermined any stakeholder safeguards sections 11 and 50 might otherwise afford.

Further, there is an on-going legislative process to amend the CAMA in a proposed 2016 Companies and Allied Act. However, the writer's review of relevant provisions on legal status or obligations of directors and corporate reporting obligations shows that there is really nothing changing anytime soon from the *status quo ante*.

South Africa's stakeholder protection provisions in its primary corporate legislation appear better than Nigeria's. How effective such provisions are, is, however also, a different question. A few of these provisions are examined below. It is impressive that the South African 2008 Companies Act No. 71 (SACA) is very clear from the onset about its objectives to accommodate stakeholder interest at section 7(d) and (k).[57] Section 72(4)[58] also talks about a social and ethics committee while section 76(3) (a) and (b)[59] enjoins directors to act provide in good faith and in the best interests of the company. While the legislative advancements at sections 7 and 72 of the SACA are impressive, the fact that the stakeholder protection recognition provisions are respectively included in the preliminary sections and reduced to board committee considerations appear to leave a bitter taste in the mouth, despite the writer's initial commendation. Further, despite the innovations at sections 7 and 72(4), the clear provisions of section 76(3) (b) enjoining corporate executives and directors to perform their functions in the best interests of the company suggest shareholder primacy theory still largely underpins the provisions.[60] In recognition of this development, Linda Muswaka concludes that even though efforts have been made in the South African Companies Act No. 71 of 2008 (SACA) to ensure that other stakeholders' interests (apart from just shareholders) are protected, it seems that legislation is far from effectively safeguarding the rights of stakeholders.[61]

Just as is the case with Nigeria, South Africa is also involved in an on-going process of amending the SACA through the 2018 Companies Amendment. A review of this amendment does not also show any significant improvement in relation to its stakeholder protection provisions. For instance, Amendment 14 essentially seeks to subject the social and ethics committee report to shareholders discussion at general meetings while Amendment 15 seeking to amend section 72 of the SACA essentially mandates an externally assured social and ethics committee report but as still subjected to the company politics of shareholders at general meetings.

In part 1 of this article, it was noted that corporate governance (as may be manifested in business codes) gives effect to legislated provisions and as noted in the 2015 G20/OECD Principles of Corporate Governance, corporate governance codes should complement the primary corporate legislations.[62] In both Nigeria and South Africa, there are provisions in the codes targeted, amongst other aims, at stakeholder protection. While industry players in South Africa have one comprehensive

---

57 *Cf:* CAMA section 7(c); also section 11(a) of the Financial Reporting Council of Nigeria Act, 2011.

58 See also Regulations 26 and 43 of the 2011 Companies Regulations (South Africa). There are no comparable provision as these in the CAMA or any subsidiary legislation in Nigeria. However, just like in South Africa, see sections 134(3)(o) and 135 of the 2013 Indian Companies Act requiring, *inter alia,* the constitution of a corporate social responsibility committee on the board of directors of qualified Indian companies.

59 This can be compared to the wordings in section 279 and 283 of the CAMA in Nigeria.

60 I Esser "Corporate Social Responsibility: A Company Law Perspective", (2011) 23 *South African Mercantile Law Journal* 317 at 324.

61 L Muswaka "Shareholder value versus stakeholders' interests - a critical analysis of corporate governance from a South African perspective" (2015) *Journal of Social Sciences* 217 to 225.

62 Similarly Irene-Marie Esser and Piet Delport had also noted that in this circumstance, the corporate governance code in South Africa, "King IV is not law, and does not prescribe, with a primary emphasis not on 'what' must be done, but rather 'how' it must be done." See I Esser and PA Delport "The South African King IV on Corporate Governance: is the crown shiny enough?" [2018] 39 (11) *Company Lawyer* 378 at 384.

code of corporate governance in the King IV,[63] the Nigerian business community appears not so lucky.[64] Following complaints about the multiplicity of codes in Nigeria and recommendation for one comprehensive document,[65] the Financial Reporting Council of Nigeria[66] issued the 2018 Nigerian Code of Corporate Governance[67] replacing a controversial 2016 National Code of Corporate Governance (Nigerian Code).

There are indeed innovative principles and recommended practices towards stakeholder protection in these documents which certainly deserve commendation. For instance, the provisions of Principles 26, 27, and 28 of the 2018 Nigerian Code of Corporate Governance[68] are impressive. Similarly in the South African King IV,[69] there are interesting provisions towards stakeholder protection. By way of brief history, King II of 2002 replaced King I of 1994 and was remarkable for acknowledging that there was need for departure from the corporate governance single bottom line approach (shareholder primacy approach) to a triple bottom line, which embraces the economic, environmental and social aspects of a company's activities. King III of 2009 is remarkable in refining the triple bottom line concept of King II and used the term "triple context" which informed the introduction of the concept of integrated reporting, showing that the differentiating line between the so-called "financial" and "non-financial" matters of a company is getting blurred and that the dimensions of the economy, the society and the natural environment are all intertwined and not separate.[70] King IV was introduced in 2016, effective 2017 and improved on the King III. One of King IV's key objectives is addressing mindless

63 Institute of Directors in Southern Africa, "King IV Report on Governance for South Africa 2016" replacing the "King III Report on Corporate Governance for South Africa 2009".

64 Code of Corporate Governance for the Telecommunication Industry 2016, issued by the Nigerian Communications Commission (NCC) (replaced 2014 NCC Code); Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014 issued by the Central Bank of Nigeria (CBN) (replaced 2006 CBN Code); Code of Corporate Governance for Public Companies in Nigeria 2011 issued by the Securities and Exchange Commission (SEC) (replaced 2003 SEC Code); Code of Good Corporate Governance for Insurance Industry in Nigeria 2009 issued by the National Insurance Commission (NAICOM); and Code of Corporate Governance for Licensed Pension Fund Operators 2008 issued by the National Pension Commission (PENCOM). They are usually called 'sectoral codes', which phrase has been adopted in this article.

65 Osemeke and Adegbite "Regulatory Multiplicity and Conflict", above at note 10 at 435.

66 Compare with the Financial Reporting Standards Council in South Africa established under section 203 of SACA. The Financial Reporting Council of Nigeria is a federal government parastatal under the supervision of the Federal Ministry of Industry, Trade and Investment with the statutory remit to amongst others, develop and publish corporate governance codes, accounting and financial reporting standards to be observed in the preparation of financial statements of public entities in Nigeria. See section 8 of the Financial Reporting Council of Nigeria Act, 2011.

67 The Code was adopted as part of the Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 (Nigerian Code). Companies are mandated to report on the application of the Code in their annual reports for financial years ending after January 1, 2020 in the form and manner prescribed by the Financial Reporting Council of Nigeria. These companies include: (a) all public companies (whether a listed company or not); (b) all private companies that are holding companies of public companies or other regulated entities; (c) all concessioned or privatised companies; and (d) all regulated private companies being private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service (FIRS) and the Corporate Affairs Commission (CAC). The Nigerian Code is available at: https://drive.google.com/file/d/1_uOzdXFOqexptBQDfDudAvNoIYPjAO27/view last accessed 5th May, 2019. In any event, other sectoral codes of conduct are still applicable in Nigeria. See paragraph F of the Introduction to the Nigerian Code.

68 This article deliberately excludes references to the "Code of Business Conduct and Ethics" or the word "ethics" at Principles 24 and 25 in the Nigerian Code as they are contextualised in terms of morality. See the definition of "ethics" in paragraph 29.1.9 of the Nigerian Code. Good moral values are generally not enforceable except coincides with prescribed legal duty in Nigeria and many jurisdictions and therefore. To be clear, this article's conception of CSR and stakeholder protection measures are not on the basis of morality.

69 For the general overview of the objective and more historical perspectives on King IV, see Esser and Delport "The South African King IV on Corporate Governance", above at note 62 at 378 to 384.

70 So, rather than corporate disclosure aimed at stakeholder protection being referred to as "non-financial" reporting or disclosure, "integrated reporting" or disclosure is preferred. Integrated reporting under King III clearly demonstrates improved understanding of stakeholder protection techniques. Such improved understanding appeared to have prompted independent production of a new form of corporate reporting and responsible for the increased number of companies in South Africa compared to Nigeria disclosing on the so-called non-financial matters. See the findings in the empirical research of GN Ofoegbu, N Odoemelam and RG Okafor "Corporate board characteristics and environmental disclosure quantity: Evidence from South Africa (integrated reporting) and Nigeria (traditional reporting)" (2018) 5 *Cogent Business & Management* 1 to 27 at 3.

compliance with corporate disclosure requirements in corporate governance codes. Unlike the Nigerian Code with the tone of mandatory compliance,[71] in addressing mindless compliance, King IV is a set of voluntary principles and practices. The phrase “stakeholder-inclusive approach” appears thematic in the code and informed its key provisions on stakeholder protection.[72]

While it is obvious both jurisdictions have corporate disclosure provisions in their respective codes of corporate governance towards stakeholder protection and embedding sustainable business practices, two basic questions appear pertinent. What are the primary legislation disclosure provisions which these codes are complementing, or giving effect to? The second question is, what workable recommendations have been provided to corporate executives to consider and safeguard qualified, material and legitimate stakeholder interests?

Analysis at the beginning of this part has shown that stakeholder protection provisions in corporate law regime of these countries can be described as either minimal (as corporate law provisions are shareholder-primacy centric and isolated itself from stakeholder protection as in Nigeria) or inadequate[73] (as in the case of South Africa where stakeholder-inclusive approach appears enshrined but upon scrutiny, essentially reduced to boardroom politics[74] and subjected to shareholders' consideration and manipulations).

Notwithstanding that there are policy advancements in the two jurisdictions in relation to integrated corporate reporting requirements, this article nonetheless submits that the corporate governance codes in these two jurisdictions are defective;[75] there are no clear provisions in the primary corporate law regime of these countries with clear adoption of the stakeholder theory or any of its modern variants mentioned in part 2 above. This writer submits that the impressive and innovative policies of stakeholder-inclusive approach and underpinning integrated disclosures in South Africa, and the Nigerian environment, social and governance (ESG) sustainability disclosure requirements have no strong legislative foundation[76] and the affected codes could, as well as a matter of fact, be said to have gone on different trajectories (adopting stakeholder-oriented approach) compared to the primary corporate laws (which are still shareholder primacy centric) instead of complementing them. The defects in these codes seem accentuated by the position of law in both Nigeria and South Africa that subsidiary

---

71 See Regulation 1 of the Regulations on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018. It is interesting to note however that unlike Principle 8 of the Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014 issued by the Central Bank of Nigeria or at page 53 of the 2016 National Code of Corporate Governance, this Code has no specific provision categorically stating it is a mandatory code. Explanations in its Introduction coupled with usage of the word “should” demonstrate that corporate executives and directors are recommended to voluntarily implement.

72 See the impressive Principle 16 of the King IV. Also, Part 5.5 embodies the stakeholder-inclusive approach towards getting businesses to behave responsibly to stakeholders.

73 DJ Joubert “Reigniting the corporate conscience: reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange” in C Visser and TT Pretorius (eds.) *Essays in Honour of Frans Malan: Former Judge of the Supreme Court of Appeal*. (2014, LexisNexis) 183 to 195 at 187.

74 With the development of share option schemes very rampant across many jurisdictions including in Africa, where directors are given shares in the company, and have essentially become both directors and shareholders at the same time, how exactly are they expected to objectively balancing competing interests of stakeholders? Further, as a problem under the agency theory, directors have been shown not to necessarily constitute effective monitors or guardians of their principals' (shareholders') interests. See, IO Bolodeoku “Corporate Governance: The Law's Response to Agency Costs in Nigeria” (2007) 32 *Brooklyn Journal of International Law* 467 at 480 noting that “the optimism of effective monitoring by the board of directors is, oftentimes, illusory, since the social and economic relationship between top-level managers and members of the board can, in fact, undermine the latter's effectiveness as monitors.” If the foregoing is anything to go by, how much of a success can a stakeholder protection process be as primarily hinged on directors' judgments?

75 Relatedly, Ireland Paddy and Renginee Pillay had noted that “The ‘soft’ law of CSR is no match for the ‘hard(er)’ laws protecting shareholder interest.” See P Ireland and RG Pillay “Corporate Social Responsibility”, above at 27 at 79.

76 See similar arguments in Amodu, “Regulation and Enforcement of Corporate Social Responsibility”, above at note 6.

legislations provisions *in pari materia* with primary legislations provisions cannot amend the provisions in the primary enactments.[77]

In relation to the queries of a workable stakeholder management system for effective stakeholder protection, it is the writer's view that these policy innovations in the codes may never[78] offer any real protection to stakeholders as cases of CSR greenwash and faux box ticking integrated reporting will only continue.[79] This is largely because qualified, material and legitimate stakeholders, despite these codes, will still rely on the company itself (acting through its directors, who are now also shareholders with the share option schemes) to protect their interest. Besides, a "company" under the two shareholder primacy-centric corporate law systems still means the shareholders as a whole and as principals of corporate executives and directors.

It is interesting to note that King IV attempts to extend the meaning of 'company' to other constituents stating that "the company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment.[80]
It is also interesting to note that proponents of creative[81] thinking such as the above within the South African stakeholder protection regime have also sought to rely on inferences or obiter made by judges in cases such as *Minister of Water Affairs and Forestry v. Stilfontein Gold Mining Co. Ltd*,[82] *De Villiers v. BOE Bank Ltd*[83] *and Mthimunye-Bakoro v. Petroleum Oil and Gas Corporation of South Africa (SOC) Limited*[84] about the importance of corporate executives complying with corporate governance codes such as the King IV in running the company. Since it is also the duty of corporate executives to prevent financial loss and avoid unnecessary risks which could affect the company's bottom line or dissipate its assets,[85] it could also be creatively and expansively argued that the provisions of sections 279(3) and 283(1) of CAMA allow directors to pursue CSR and protect stakeholder interests in avoidance of

77 *Executive Council, Western Cape v. Minister for Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v. President of the Republic of South Africa 2000* 1 SA 661 (CC); *Adene and Ors v. Dantubu* (1994) 2 NWLR (Part 382) 509; *Eko Hotels Limited v. Financial Reporting Council of Nigeria* (FHC/L/CS/1430/2012); *NNPC v. Famfa Oil Ltd* (2012) 17 NWLR (Pt. 1328) 148; *Bernard Amasike v. The Registrar General of the Corporate Affairs Commission* (2010) NWLR (Pt. 1211) 337; *Olanrewaju v. Oyeyemi & Ors* (2001) 2 NWLR (Pt. 697) 229; *Din v. A.G. Federation* (1998) 4 NWLR (Pt. 87) 147 at 154; *Gov. Oyo State v. Folayan* (1995) 8 NWLR (Pt.413) 292 at 327. *Attorney General of Lagos State v. Eko Hotels Limited and Oha Limited* (2006) NWLR (Pt. 1011) 3782; *Noble Drilling Nigeria Limited v. Nigerian Maritime Administration and Safety Agency*, (2013) LPELR-22029 (CA).

78 P Ireland and RG Pillay "Corporate Social Responsibility", above at note 27 at 97.

79 Inadequacies or general failure of self-regulatory corporate governance approach and codes around the world and the reduction of compliance requirements of corporate governance codes to box ticking exercise are no longer news. See: Osemeke and Adegbite "Regulatory Multiplicity and Conflict", above at note 10 at 438; AS van Zyl "Sustainability and Integrated Reporting in the South African Corporate Sector" [2013] 8 (12) *International Business & Economics Research Journal* 903 to 926 at 904, 905 et seq.; See at footnote 88 and accompanying texts in Parkinson "Corporate Governance and the Regulation", above at note 4; see also Nike Inc. *v*. Marc Kasky, 539 US 654 (2003); and, Kasky *v.* Nike, Inc. 45 P.3d 243 (Cal. 2002) where Kasky filed a lawsuit in California regarding newspaper advertisements and several letters Nike distributed in response to criticisms of labor conditions in its factories. Kasky claimed that the company made representations that constituted false advertising. Also see, R McCorquodale "Corporate Social Responsibility and International Human Rights Law" (2009) 87 *Journal of Business Ethics* 385, 104.

80 King IV Report on Governance for South Africa 2016 at 26. See also, I Esser and P Delport "The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value Approach: Part 1" (2017) 50 *De Jure* 97 at 106 and at footnote 33. For similar arguments in Nigeria, K Aina, "Board of Directors and Corporate Governance in Nigeria" (2013) 1 *International Journal of Business and Finance Management Research* 21.

81 See generally, Esser "Corporate Social Responsibility" above at note 60 for other expansive interpretations of relevant sections in the South Africa Companies Act No. 71 of 2008 towards stakeholder protection.

82 Although CSR and stakeholder protection were not directly issues for determination, the allusion to the King Report corporate governance requirements by Justice Hussain in Minister of Water Affairs and Forestry *v.* Stilfontein Gold Mining Co. Ltd 2006 5 SA 333 (W) following the mass resignation of corporate executives involved after an environmental (water) pollution scandal has been argued pushing the agenda for stakeholder protection and CSR in South Africa.

83 2004 (2) All SA *457* (SCA)

84 [2015] JOL 33744.

85 P Rott "Directors' Duties and Corporate Social Responsibility under German Law – Is Tort Law Litigation Changing the Picture?" (2017) 1 *NJCL* 9 to 27 at 18.

unnecessary risk to the company's assets. However, while the above may be considered impressive, but to a judge and/or a regulator, they are nothing but conjectures. Without a clear legislative prescription adopting a stakeholder oriented theory such as the RSM suggested in part 2 above, it will be difficult to convince any judge in the two jurisdictions that there a legal duty on corporate executives to actually safeguard stakeholder interest and therefore, the above creative arguments will continue to offer no real safeguard for the interest of stakeholders under the present framework in these jurisdictions.

In order to further drive home the point, section 166(2) of the 2013 Indian Companies Act appears useful. In acting in the best interest of the company, directors are mandated to consider employees, the shareholders, the community and the protection of environment. This is a clear legislative expansion of directors' duty beyond consideration of shareholders' interests and for the benefit of the mentioned stakeholders, employees, host community and environment. It is unlike section 172 of the English Companies Act which says directors should have regard for stakeholders. The above provision leaves no one in doubt that the Indian primary corporate legislation is not shareholder primacy oriented. However, as impressive as the above section 166(2) appears, it is not without its shortcomings. Having mentioned a few stakeholders in this sections, what becomes of the rights of other qualified, material and legitimate stakeholders who are not mentioned? Again, while the Indian corporate law has also elevated CSR discourse and stakeholder protection to the board of directors' level,[86] apart from the above similar criticisms against the South African social and ethics committee framework,[87] the conception of corporate responsibility as largely corporate charity and community development projects in India leaves so much to be desired.

Notwithstanding the above criticism of the Indian stakeholder protection framework, Nigeria and South Africa may nonetheless draw a few lessons. This article submits that what is missing and should be incorporated in the ongoing corporate law amendment processes in Nigeria and South Africa is a specific duty on the company itself (and not on corporate executives or directors like in India) to ensure qualified, material and legitimate stakeholder interests are properly considered and balanced in determining what is in the best interest of the company. This will give impetus to the ESG reporting under Principle 28 of the Nigerian Code and the stakeholder-inclusive integrated reporting under King IV. The activities of the social and ethics committee will also be enhanced in providing real value to stakeholders and ensuring more mindful compliance with stakeholder protection requirements by corporate executives.

While aligning with Irene-Marie Esser's view that it would have been better had the wording of section 76(3) (b) been clearer, as the current wording may create the impression that shareholder primacy is still preferred in the South African corporate law system,[88] this article however departs from the mainstream notion which she appears to adopt, suggesting that CSR principles and stakeholder protection are better provided for, in other aspects of law, and not essentially within corporate law.[89] This article submits that wholehearted adoption of the shareholder primacy theory, and the isolation of

86 See sections 134 (3) (0) and 135 of the Companies Act 2013 (India).
87 Above at footnote 74.
88 Esser "Corporate Social Responsibility" above at note 60 at 324.
89 Id at 334.

corporate law from providing effective remedy for violations of stakeholder rights using the corporate form have simply become untenable. [90] If there was, there is simply no longer any unassailable reason why corporate law principles, theories and rules should only focus on creating conducive environment for corporate executives to maximise profits for shareholders and not afford credible requirements for safeguarding all stakeholder rights. All aspects and areas of law, environmental law, human rights law, international law and corporate law among others should be instrumental towards moving the society closer to somewhere acceptable by the majority. Corroborative of the foregoing is the submission that corporate law isolation or the claim that corporate law should serve only the interests of the shareholder and managerial elite is highly suspect, especially if we believe that the purpose of corporations is to serve society as a whole rather than a small, wealthy minority.[91] Part 2 of this article has shown that the revolution away from shareholder primacy oriented provisions in corporate legislations (primacy and subsidiary) appears to have already begun. Sections 11(a) and 50 (f) of the Nigerian Financial Reporting Council of Nigeria and sections 7(d) and (k) together with section 72(4) of SACA are promising provisions and could be built upon towards CSR and stakeholder protection. This article submits that any expansive or creative interpretation afforded provisions such as under sections 279(3) and 283(1) of CAMA and under sections 7(d) and (k), 72(4), 76(3) (b), 218(2) of SACA together with inferences from earlier cited cases may not only be stretching the limits of those provisions too far but also amount to precarious handling of such an important aspect of public welfare. Such arguments will appear protective to stakeholder interests without any real benefits to any victim stakeholder. The real danger to stakeholder protection from this will be that proliferation of these so-called creative expansive thinking may crowd out other suggestions such as in this article for head-on, direct and clear changes to primary corporate legislations. They might end up being used to divert policy makers' attention at domestic and international level from taking steps such as recommended in this article.

This article further submits that primary corporate legislations in both Nigeria and South Africa (and maybe beyond) should be amended to specifically show that they are no longer shareholder primacy oriented. Within the framework of alternative corporate law theory of RSM as described in part 2 above, this article argues that a duty be imposed, not on corporate executives, but on the company itself to consider, manage, and balance competing stakeholders' interest as shall be considered to be in the best interest of the company. This obligation on the company therefore means that shareholders, as residual owners, will ensure wholehearted and mindful compliance with sustainability and integrated reporting and disclosure requirements since they know that violation of legitimate interest of any qualified stakeholder may be very costly to the company, and affect available profits for sharing or may drastically dissipate corporate assets and inimical to their interests as residual claimants. Such amendment will also include a flexible definition of who may be considered qualified, material and legitimate corporate stakeholder which definition will vary from one company to the other, at different

90 There are indeed instances where the shareholder primacy model may encourage non-compliance with legal obligations if such may increase the earnings of shareholders in the long run. Under a cost-benefit analysis, corporate executives may deliberately evade (not avoid) tax obligations if calculations suggest that penalty for such evasion is lesser than corporate earnings derivable from such evasions. After all, it is all about profit maximization almost at any costs. See generally Sneirson "Shareholder Primacy and Corporate Compliance", above at note 24.

91 WW Bratton and ML Wachter "Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation" [2008] 34 (1) *The Journal of Corporate Law* 99 at 151.

stages of corporate operations and activities. Once these amendments are done, corporate governance codes in these jurisdictions will truly complement and give effect to the primary corporate legislations. Upon adoption of the foregoing recommendations, the business judgment rule with which corporate law has imposed a duty on corporate executives to promote the financial interests and assets of companies will be further expanded to accommodate directors' wholehearted pursuit of CSR and stakeholder protection requirements in the best interest of the company. Further, in light of prevailing modern socio-economic, political and environmental realities, corporate law has come of age to justifiably impose a duty on companies allowing their directors, guided by the business judgment rule, to act responsibly and exercise their discretions and balance competing interests of constituents without imposing any specific one-size-fits-all measures for companies to adopt. Self-regulatory business conduct codes within the business communities and requirements, guidelines and recommendations in corporate governance codes will give effect to the primary corporate legislation for CSR and stakeholder protection. Within the framework of the advocated responsible stakeholder model (RSM), the legal duty on companies for stakeholder protection should promote the success of companies as a whole. Company activities and assets will now be managed for the ultimate benefit of the shareholders, but only in the sense that they constitute the residual risk bearers or claimants. For such residual risk, shareholders will retain the privilege of appointing competent and responsible corporate executives and directors who shall ensure, while avoiding unnecessary risks to corporate assets, the business of the business is responsible business. And if such corporate executives as appointed by shareholders, fail in this legal obligation, qualified and material stakeholders with legitimate interests will have real enforceable rights to seek redress with the regulators or the courts as either jurisdiction may choose.

CONCLUSION

This article has shown that the concept of corporate social responsibility (CSR) constitutes a potent corporate governance tool towards safeguarding stakeholder rights. It also underscored the prevalence of the shareholder primacy theory and how it has manifested in corporate legislations whether directly as in the Nigerian Companies and Allied Matters Act of 1990 as amended (CAMA) or somewhat disguised as something else such as in the enlightened shareholder value (ESV) theory adopted in the UK Companies Act, 2006. While the South African primary corporate law system may be considered improved when compared to Nigeria's, upon scrutiny however, its stakeholder-inclusive approach was found essentially hinged on the variant form of shareholder primacy oriented provisions contained in section 76(3)(b) of the South African Companies Act no. 71 of 2008 (SACA). The article argued that references to stakeholder interests under section 7(d) and (k) of SACA or under section 279 (4) of CAMA are insufficient to embed responsible corporate activities in these jurisdictions. The article recommended that both jurisdictions should harden their existing soft law largely self-regulatory and voluntary framework for stakeholder protection which appear to promote CSR greenwash and mindless compliance with stakeholder protection requirements. It noted that real protection to stakeholders can only afforded where the primary corporate legislations are aligned in philosophy, principle and provisions with their impressive sustainability and integrated reporting requirements contained in their respective subsidiary legislations (corporate governance codes This article has not that formalised stakeholder meetings should be entrenched in primary corporate legislations to rival shareholder meetings. As conceived within the formulated responsible stakeholder model (RSM), that will essentially defeat the commercial focus of the company and may discourage investment in the jurisdictions. The proposal is to impose a duty on company itself to consider, manage and balance competing stakeholder interests which will expand the traditional meaning of "the best interest of the company" in primary corporate legislations. It will not distract companies from their pure commercial focus but only ensure 'real' protection is afforded qualified, material and legitimate stakeholders by corporate executives, if they want to remain competitive.