

Enlightened Shareholder Value Principle in the UK Companies Act 2006: What Lesson for a Legal Approach to CSR in Nigerian?

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Abstract

The original emergence of corporate social responsibility (CSR) as a call to companies to consider the interests of their external stakeholders out of charity or philanthropy now reverberates in the context of legal duties of companies' directors. A foremost effort at achieving the objective of making CSR part of the legal duties of companies' directors is provided under section 172 of the United Kingdom Companies Act 2006, which provides for the "enlightened shareholder value" principle. This paper critically analyses the statutory enlightened shareholder value principle and determines the purpose, implication, and significance of the principle in relation to a legal approach to CSR in other common law jurisdictions such as Nigeria.

Keywords: Corporate social responsibility, Enlightened shareholder value, Companies Act 2006, duties of directors, Companies Act 2020,

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1. Introduction

Corporate social responsibility (CSR) has evolved significantly since the 1960s as a company's ethical acknowledgement and commitment to serve wider interests beyond those of its members or shareholders. A company's business operations impact the interests of people who are not its members or within the company, including the location and the environment where the company operates. These outside interests constitute the stakeholders of a company, as distinct from the company's shareholders. The original emergence of CSR as a call to companies to recognize and serve the interests of their stakeholders out of charity or philanthropy now reverberates in the context of the legal duties of company directors.

At common law, the idea that directors owed their duties only towards the maximization of profits for the company's shareholders expanded to include the recognition of the need to consider the interests of the company's other stakeholders. The common law position was succinctly captured by Bowen LJ in the case of *Hutton v West Cork Railway*¹ that the "law does not say that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company". This implied that directors' focus on profit maximization for shareholders as the only purpose of a company did not prohibit directors from considering the interests of other stakeholders.

Directors were not prohibited from taking into account the interests of other stakeholders as long as it was a means to the end of maximizing shareholders' gains in the long-term. The common law position therefore allowed directors to exercise the discretion to consider other stakeholders' interests as a means of promoting long-term shareholder value². However, the focus on profit maximization for companies' shareholders, otherwise referred to as shareholders primacy, aligns more with the foundational purpose of a company than the stakeholder theory which seeks to project the interests of those who impact or are impacted by the business operations of the company.

Consequently, the question as to whether directors should necessarily consider other stakeholders' interests in addition to shareholders interests remains unresolved since the notable Berle-Dodd debate in about the first quarter of the 20th century. The debate centred around the responsibility of companies towards its external stakeholders, especially in light of the foundational purpose of a company, which is only to make profits for its members or shareholders. While Berle argued in favour of the shareholder primacy theory – that the responsibility of companies' directors is only to maximize profits for shareholders³, Dodd had countered with the stakeholder theory – that directors must also be responsible for other constituencies such as employees, customers, local communities, and the public⁴.

A middle ground that seems to have emerged from the debate in this 21st century is that the realization of

¹ (1883) 23 Ch D 645, at p. 673

² Mihir Naniwadekar and Umakanth Varottil, (2016). The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis. NUS Working Paper 2016/006. NUS Centre for Law & Business Working Paper 16/03, p. 4. Electronic copy available at: <https://ssrn.com/abstract=2822109>

³ AA Berle, (1931). Corporate Powers as Powers in Trust. 44 Harv L Rev 1049

⁴ E Merrick Dodd, (1932). For Whom are Corporate Managers Trustees? 45 Harv L Rev 1145

short-term profit maximization for shareholders may narrow directors' focus on shareholders' interests, however, a long-term sustainable view of shareholder interests will inevitably require directors to consider the interests of other stakeholders¹. This middle ground approach between the contending shareholder and stakeholder theories appears to provide an influential rationale for CSR in this contemporary time. CSR finds its roots in the stakeholder theory which is opposed by the foundational purpose of a company, and by implication, the shareholder primacy theory.

As a result of its stakeholder basis, CSR remains at the realm of voluntarism and moral suasion of companies rather than in the spheres of corporate legal obligations to stakeholders². A foremost attempt at effectuating the middle ground approach and achieving the objective of making CSR part of the legal duties of companies' directors is provided under the United Kingdom Companies Act 2006, which extended the scope of directorial considerations for maximizing profits for shareholders. Section 172 of the UK Companies Act 2006 provides for the "enlightened shareholder value" principle³. This statutory principle requires company directors to have regard to the wider interests of various stakeholders when exercising their power on behalf of the company and its shareholders.

This provision of the Companies Act 2006 does not by any means constitute a direct statutory enactment of CSR in the UK. However, in the general absence of statutory CSR in most common law jurisdictions the provision on enlightened shareholder value principle under the Companies Act 2006 offers an exception worthy of consideration for its potential effect on instituting a legal regime for directorial practice of CSR. It is to that end that this paper critically examines the principle of enlightened shareholder value as provided in section 172 of the UK Companies Act 2006 to determine the purpose, implication, and significance of the principle in relation to a legal approach to CSR in other common law jurisdictions such as Nigeria.

2. Shareholder Value in the Context of CSR

It has been noted elsewhere that "the conflicting proposition between shareholder primacy and the stakeholder theory gives CSR a dubious status under common law"⁴. Generally, under common law shareholders were considered as the primary beneficiaries of the company and therefore directors' fiduciary duties were to be performed in the shareholders' interest and for the maximization of shareholder value⁵. The common law contractarian theory of the company regarded directors as contractual agents of the shareholders, with fiduciary obligations to maximize returns on shareholders' investments⁶.

The only exception, as indicated in the opinion of Bowen LJ in *Hutton v West Cork Ry. Co*⁷, was that directors could consider the interests of other stakeholders to the extent that such consideration served the shareholders' interests in the long term. However, in the decade following the Berle-Dodd debate, Lord Greene had stated in the case of *Re Smith and Fawcett*⁸ that directors must exercise their discretion *bona fide* "in the interests of the company, and not for any collateral purpose". Indeed, the legal implication of the *ultra vires* doctrine as established in the case of *Ashbury Railway Carriage & Iron Co. v Riche*⁹ would invalidate directors' exercise of corporate powers for any purpose other than to achieve the business objects of the company.

In addition, despite the rule laid down in the case of *Foss v Harbottle*¹⁰ which established the separate legal personality of a company, the power and influence of shareholders such as the power to appoint and remove directors allowed shareholders to appropriate the interest of the company as equivalent to their own interests. As financial contributors to the formation of the company and its capital, shareholders under common law were

¹ See generally, Clarke, C., & Friedman, H. H. (2016). Maximizing shareholder value: a theory run amok. *Journal of Management*, 10(4), 45–60; Stout, L. A. (2012). *The shareholder value myth: how putting shareholders first harms investors, corporations, and the public*. San Francisco: Berrett-Koehler Publishers; A Keay, (2010). Stakeholder theory in corporate law: Has it got what it takes? 3/9, *Richmond Journal of Global Law and Business* 249; Martin, J., Petty, W., & Wallace, J. (2009). Shareholder value maximization: is there a role for corporate social responsibility? *Journal of Applied Corporate Finance*, 21(2), 110–118.

² Babajide S. Shoroye, (2022). Charitable Donations and Corporate Philanthropy: Examining the Trend in the Law Relating to Corporate Social Responsibility in the UK and Nigeria. *Journal of Poverty, Investment and Development*. Vol. 61, p. 26

³ Harper Ho, V. (2010). Enlightened shareholder value: Corporate governance beyond the shareholder-stakeholder divide. *Journal of Corporation Law*, 36(1), 59–112; J. Yap, (2010). Considering the Enlightened Shareholders Value Principle. 31 *Company Lawyer* 36; S. Kiarie, (2006). At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take? 17 *I.C.C.L.R.* 329; D. Fisher, (2009). The Enlightened Shareholder – Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of Their Decisions on Third Parties? 20 *I.C.C.L.R.* 10

⁴ Babajide S. Shoroye, (2022). Charitable Donations and Corporate Philanthropy: Examining the Trend in the Law Relating to Corporate Social Responsibility in the UK and Nigeria. op.ct., p. 28

⁵ Lance Ang, (2019). Directors' Duties and Stakeholder Interests: A Convergence Towards a Common Law 'Enlightened Shareholder Value' Model? NUS Centre for Asian Legal Studies Working Paper 19/11, at p. 2

⁶ Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 *Nw. U.L.Rev.* 547

⁷ [1883] 23 Ch. Div. 654, 673

⁸ [1942] 1 Ch 304 (CA) 306

⁹ 1875) L.R. 7 HL; The common law *ultra vires* doctrine applies to void any acts performed on behalf of a company if such acts were beyond the company's business or objects as set out in its charter or where the acts are prohibited by statute.

¹⁰ (1843) 2 Hare 461, 67 ER 189

effectively treated as the “owners” of the company for whose ultimate benefit the company should be managed¹.

Consequently, within established rules and doctrines of common law, shareholder primacy prevailed, untrammelled by the stakeholder theory. Therefore, arguments between supporters of shareholder primacy and proponents of stakeholder theory make more meaning when examined in the context of CSR. The wide range of social, economic, ethical and environmental aspects of life and the society are implicated in the concept of CSR. Proponents of stakeholder theory argue that these different aspects of human and societal lives should conduce to a company’s sense of social responsibility towards its external stakeholders. And that this sense of CSR ought to be expressed through directors who manage the company.

It is in this context that Dodd originally noted that “there is reality and not simply legal fiction” in the proposition that directors of a company are “trustees” for the company and not merely for its shareholders, and as such they owe a social responsibility to the company’s stakeholders, in addition to its shareholders². Dodd’s proposition laid the foundation for stakeholder theory which adherents of Berle’s school of thought attempted to destroy but upon which strong scholarship has been built since the 1970s when Friedman famously wrote in the New York Times an article titled; “The Social Responsibility of Business Is to Increase Its Profits”³.

Friedman argued that it undermined the foundation of a free society to accept that directors should owe a “social responsibility other than to make as much money for their stockholders as possible”, 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”⁴. But a contrary argument developed later by the stakeholder theorist, Freeman, was that if business organizations are to be successful in the current and future environment, their managers “must take multiple stakeholder groups into account”⁵.

Instructively, despite the Berle-Dodd debate and the Friedman-Freeman counter arguments, the defining question has remained as framed by Hayek that, for a company; “In whose interest ought it and will it be run?”⁶. And the answer has remained that the original purpose of a company would not be served if “social consideration” determines corporate expenditure, or if corporate funds were expended on “specific ends other than those of a long-term value maximization for the company and its shareholders”⁷. Therefore, as it has been noted elsewhere⁸, “there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value”.

The “enlightened shareholder value” approach focuses on long-term value maximization for shareholders while taking into consideration the interests of other stakeholders for the purpose of promoting the shareholder value⁹. But how coterminous is CSR with long-term shareholder value maximization? In order to determine the implication and significance of the principle of enlightened shareholder value for CSR, including its conceptual or functional relationship, it is apposite to understand the purpose of the principle as provided in section 172 of the UK Companies 2006.

2.1 Enlightened shareholder value principle

Essentially, enlightened shareholder value (ESV) principle is to improve directorial decision-making concerning the interests of stakeholders of a company, in addition to the interests of the company and its shareholders. ESV principle represents a statutory attempt to strike a middle ground or a balance between shareholder primacy and stakeholder theory. This is in recognition that effective CSR management is not incompatible with shareholder value, and having wider stakeholders’ interests can be the key to long-term financial performance of a company¹⁰. As Andreadakis pointed out, ESV approach does not prioritise the interests of other stakeholders at the expense of shareholders¹¹. It is that all stakeholders benefit from a long-term view and hence the sustainability of the company.

Prior to the formal enactment of the UK Companies Act 2006 which provides for ESV principle in section 172, the Company Law Review Steering Group, the body which reviewed the UK company law leading to the

¹ Lance Ang, (2019). Directors’ Duties and Stakeholder Interests: A Convergence Towards a Common Law ‘Enlightened Shareholder Value’ Model? op.cit

² E. Merrick Dodd, Jr., “For Whom Are Corporate Managers Trustees?”, op.ct at p. 119

³ Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. TIMES, Sept. 13, 1970

⁴ Ibid, at p. 7

⁵ R. Edward Freeman, et al., (2010). Stakeholder Theory: The State of the Art (Cambridge: Cambridge University Press) at p. 9

⁶ F Hayek (1985). “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) 97 at 100

⁷ ibid

⁸ Henry Hansmann and Reinier Kraackman, (2004). “The End of History for Corporate Law” in Jeffrey N. Gordon and Mark J. Roe (eds), Convergence and Persistence in Corporate Governance (Cambridge: Cambridge University Press) at p. 33

⁹ Richard Williams (2012). Enlightened Shareholder Value in the UK. UNSW Law Journal Volume 35(1). p. 360

¹⁰ Maeve O’Connell and Anne Marie Ward, (2020) Shareholder Theory/Shareholder Value. <https://www.researchgate.net/publication/340620401>

¹¹ Stelios Andreadakis, (2013). Enlightened Shareholder Value: Is It the New Modus Operandi for Modern Companies? <https://www.researchgate.net/publication/286341508>

Act, had made a persuasive case for a middle ground approach. The conclusions and recommendations of the Steering Group provide an illuminating contextual understanding of the rationale and purpose of the provisions on ESV principle in the Companies Act 2006. In its White Paper under the heading, “Enlightened Shareholder Value”, the Steering Group noted that the ultimate objective of companies as currently enshrined in law was to generate maximum value for shareholders¹.

The Steering Group further noted that while supporters of shareholder primacy argued that maximum value for shareholders could not be achieved without companies building long-term relationships, “the law as currently expressed and understood fails to deliver the necessary inclusive approach”². Therefore, the Steering Group recommended the introduction of ESV principle for the purpose of retaining the fundamentals of directors’ duties and to correct the approach of some directors who only manage companies for the short term and narrow interests of members and at the expense of wider interests and longer-term approach³.

According to the Steering Group, in many situations directors should adopt a broader, inclusive, and longer-term approach to their role as there was nothing compelling them to focus on only the short term. The Steering Group wanted to ensure that directors recognised the fact that they have, in appropriate cases, an obligation “to have regard to the need to build long-term and trusting relationships with employees, suppliers, customers and others in order to secure the success of the enterprise over time”⁴. Notably, as Keay and Iqbal opined, the Steering Group did not envisage the ultimate objective of the company being changed from shareholder value, because ESV principle would simply ensure that stakeholder interests are to be considered in achieving the ultimate objective⁵.

Thus, ESV principle while clearly based on shareholder value, is to eschew “exclusive focus on the short term financial bottom line of companies and seeks a more inclusive approach that values the building of long-term relationships”⁶. The UK Government fully agreed with ESV principle as recommended by the Steering Group and embedded it in the Companies Act 2006. The purpose is to ensure that directors must promote the success of the company for the benefit of its shareholders, and that this can only be achieved by taking due account of both the long-term and short-term interests, including wider stakeholders’ interests such as employees, customers, suppliers, community, and the environment.

The provisions on ESV principle contained specifically in section 172(1) of the Companies Act 2006 are reproduced below *in extenso* for easy reference. Captioned as the “Duty to promote the success of the company” the section provides that:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to;

- a) *the likely consequences of any decision in the long term*
- b) *the interests of the company's employees*
- c) *the need to foster the company's business relationships with suppliers, customers and others*
- d) *the impact of the company's operations on the community and the environment*
- e) *the desirability of the company maintaining a reputation for high standards of business conduct, and*
- f) *the need to act fairly as between members of the company.*

The above statutory provisions are clear enough to the extent that they require company directors to have regard to other stakeholders’ interests as a means of ensuring the company’s success and enhancing the shareholder value over the long term. The inclusion of all the interests identified in section 172(1) (a)-(d) is a formal recognition under the UK company law that both the shareholders and other stakeholders have residual risks, and their interests require recognition and consideration. As noted by Kabour, ESV principle as contained in the section has curated the path towards a more stakeholder-centric construct of UK company law⁷. While ESV principle does not add much to the general duties of directors, its significance is that it warranted a statutory footing for the consideration of different stakeholders’ interests in an explicit form for the first time in UK legal history.

Instructively, the interests which directors are obligated to consider as listed in section 172(1) (a)-(d) are the external stakeholders of a company and these stakeholders constitute the objects of CSR. Under the statutory provisions, directors are obliged to act in a way that benefits the company’s shareholders, however, in their decisions-making process they must take account of these external stakeholders which include employees,

¹ Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework, 1999, London, para 5.1.12

² *ibid*

³ Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework. *op.cit*, para 5.1.17

⁴ Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework. *op.cit*, para 5.1.12

⁵ Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. *Journal of Business Law*, 2019 (4). pp. 304-327

⁶ Company Law Review, Modern Company Law for a Competitive Economy: Developing the Framework, 2000, London, para. 2.21

⁷ Reem Kabour, (2021). What effect does the enlightened shareholder value principle in the Companies Act 2006 have on the corporate objective of UK companies? *IALS Student Law Review*, Vol. 8, Issue 2, pp. 13-29

customers, suppliers, community, the environment, and others; an inclusive and long-term account of the implications of their decisions on these other stakeholders thereby establishing a reputation for high standards of business conduct.

The requirement for directors to “have regard” to these wider stakeholders’ interests leads to ESV because in the long-term it is believed that such directorial considerations would lead to more profitability of the company for its shareholders¹. The requirement also clarifies any confusion between the interests of shareholders and those of stakeholders as not mutually exclusive but interdependent. Apparently, the provisions on ESV bring stakeholders’ interests within the context of obligatory CSR because directors have the statutory duty to consider the respective stakeholders’ interests. But in effect, how does the ESV principle relate to CRS in functional or conceptual respects.

2.2 Relationship between CSR and ESV Principle

The ESV principle has attracted criticisms from those who argued that it “brings little or nothing to the table”². Others have argued that the statutory ESV “merely constitutes a rebranding of shareholder primacy, which has often been seen as a harsh aspect of capitalism, devoid of any moral basis to make it more palatable to those who adhere to stakeholderism”³. A substantive analysis of ESV principle in the context of the shareholder primacy/stakeholder theory debate and the procedural elements limiting its enforceability, which constitute the focus of much of the criticisms⁴, are beyond the scope of this paper. The present focus is the potential impact of the principle on a comparative approach to CSR between two common law jurisdictions.

It is submitted that the argument for a deserving place for stakeholders’ interests in directorial management of the company in the long-term as conceptualized in ESV principle is related to the concept of CSR or can be used to ground it because such argument advocates for the interests of outsiders to the company; those considered as stakeholders because they are impacted or can impact the company. In fact, there is no significant distinction between arguments for ESV principle and for CSR under the stakeholder theory. As Martin et. al noted, CSR and stakeholders’ interests have the potential to be complementary undertakings that result in a virtuous circle in which doing good helps companies to do well, and doing well provides the wherewithal to do more good”⁵.

The ESV principle is effectively a “business case for CSR” in terms of the driving forces of CSR such as being a marketing strategy which benefits the company in the long term and creates profitable or respectful relationships with the company’s other stakeholders⁶. In this CSR sense, ESV principle may be considered as promoting a form of marketing strategy for companies’ directors to aim at competitive advantage and successful improvement of their bottom line, corporate reputation and public good-will, all to the benefits of the company and its shareholders.

It has been shown elsewhere how the CSR profile of a company enhances its corporate and brand image with positive effect on external stakeholders including higher patronage of the company’s products or services, increase in employees’ productivity, attraction of new customers, improvement in relations with investors and more access to capital, and a mutually beneficial relationship with host communities⁷. This paper’s argument that ESV principle approximates to the business case for CSR is justifiable because the requirement of ESV under section 172(1) of the Companies Act 2006 is considered as a “Duty to promote the success of the company”.

Therefore, the purpose of ESV principle is to ensure the success of the company in the longer-term based on due consideration of the interests of its stakeholders besides those of its shareholders. This is not conceptually and functionally different from the business case for CSR where companies develop CSR agenda not because of an altruistic desire to only assist in improving the socio-economic welfare and conditions of external stakeholders but only to make more profit⁸. Given the conceptual and functional relationship between CSR and ESV principle, a pertinent question that emerges is: In whose interest did the UK Government enact ESV

¹ Company Law Review, *Modern Company Law for a Competitive Economy: Strategic Framework*. op.cit, para 5.1.17

² Elaine Lynch, (2012). Section 172: A ground-breaking reform of directors’ duties, or the emperor’s new clothes? *Company Lawyer*, (33(9)), 196-203

³ Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013), p. 278

⁴ See Maeve O’Connell and Anne Marie Ward, (2020) *Shareholder Theory/Shareholder Value*. <https://www.researchgate.net/publication/340620401>; Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. *Journal of Business Law*, 2019 (4). pp. 304-327; Stelios Andreadakis, (2013). Enlightened Shareholder Value: Is It the New Modus Operandi for Modern Companies? <https://www.researchgate.net/publication/286341508>; Richard Williams (2012). Enlightened Shareholder Value in the UK. *UNSW Law Journal* Volume 35(1). p. 360

⁵ Martin, J., Petty, W., and Wallace, J. (2009). Shareholder value maximization: is there a role for corporate social responsibility? *Journal of Applied Corporate Finance*, 21(2), 110–118

⁶ Zhao, J (2017) Promoting More Socially Responsible Corporations through a Corporate Law Regulatory Framework. *Legal Studies*, 37 (1). pp. 103-136

⁷ See Babajide S. Shoroye, (2022). Charitable Donations and Corporate Philanthropy: Examining the Trend in the Law Relating to Corporate Social Responsibility in the UK and Nigeria. op.ct, , p. 26

⁸ Geethamani, (2017). Advantages and disadvantages of corporate social responsibility, op.cit, at p. 374

principle, the company's, the shareholders', or the stakeholders'?

As a company's consideration of the interests of external stakeholders, CSR has originally and traditionally been voluntary, but ESV principle as provided in section 172(1) of the UK Companies Act 2006 imposes a legal obligation on companies' directors to practise CSR. Ostensibly, it follows that the statutory ESV principle is in the interest of stakeholders. But under the provisions of section 172(1), companies are obligated to pursue shareholders' interests with a long-term view that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholders' interests¹.

The obligation created in section 172(1) has been described as imposition of a duty "to genuinely take the relevant matters into account" in order to reconnect "the corporate vehicle with the society in which it operates"². Consequently, in line with the middle ground approach as recommended by the Steering Group, ESV principle is neither in the interest of shareholders nor stakeholders, but the company as a separate legal personality. Therefore, in concept and purpose, the UK statutory ESV principle has not meant any significant changes for both shareholders and stakeholders within their original context of CSR.

In the original context, companies practise CSR voluntarily but with underlying motive for business advantage. And under the statutory ESV principle, directors are obligated to perform the same duty irrespective of motive. In both cases the objective is the same – a consideration of the interests of other stakeholders of the company, whether implied as in voluntary CSR or express as in statutory ESV principle. It is therefore a consistent conceptual and functional relationship between CSR and statutory ESV principle.

3. CSR and ESV Principle under Nigerian Law

The most that may be gleaned from the relationship between CSR and ESV principle in the UK company law is that they are consistent, even complementary, in concept and purpose, and in social and legal contexts. For instance, in compliance with the provisions of section 172(1) (a)-(d) directors would effectively be practising CSR, and any directorial practices of CSR would fall squarely within the ambit of the statutory provisions. This is not the case in Nigeria where the "shareholder primacy-centric common law position"³ is retained in the latest Companies Act 2020 and CSR remains a voluntary practice at the discretion of directors.

There is no ESV principle in the Nigerian Companies Act 2020 and provisions that are relevant to CSR are only inferable to the extent that such provisions require companies to have regard for the interests of other stakeholders, in addition to the interests of shareholders of companies. Section 305(3) of the Companies Act 2020 provides that in acting in the best interests of the company, directors "shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations".

In section 305(4), it is further provided that matters to which directors are to have regard in the performance of their duties "include the interests of the company's employees in general, as well as the interests of its members". Thus, besides a consideration of the impact of the company's operations on the environment and local community, directors are only required to consider the interest of the company's employees. This is a relatively small number of external stakeholders' interests to be considered by directors, when compared with section 172(1) of the UK Companies Act 2006 which identifies five different stakeholders' interests.

Significantly, reference to long-term view of the company in section 172(1)(a) is essential to the consideration of stakeholders' interests because that is when the impact of the company's business operations on external stakeholders is likely to be manifested. This defining element of statutory ESV principle is not reflected in section 305(3) and (4) of the Nigerian Companies Act 2020. The long-term success of a company, as envisaged under the statutory ESV principle, is invariably dependent on the well-being of all of its stakeholders. In the absence of a term of operation within which directors must consider the interests of stakeholders, the implication is that directors are not obligated to do so whether in the short or long term.

It is curious that Nigeria laid back instead of stepping forward in the direction of more effective practice of CSR with the UK statutory ESV principle, given that the Companies Act 2020 derived substantially from the UK Companies 2006⁴. The result of Nigeria's failure to adopt the statutory ESV principle is that directorial consideration of wider stakeholders' interest in corporate decision-making for the purpose of enhancing the practice of CSR in Nigeria has not moved from the realm of voluntariness to the sphere of legal duties of directors.

¹ D. Millon, (2012). 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law', op.cit, at p. 58

² Rt. Hon. Lady Justice Mary Arden, (2007). "Companies Act 2006 (U.K.): a new approach to directors' duties" 81 Australian L.J. 162 at 168 and 173

³ Nojeem Amodu, (2020). Stakeholder Protection and Corporate Social Responsibility from a Comparative Company Law Perspective: Nigeria and South Africa, *Journal of African Law*, 64, 3, 425–449, at p. 438

⁴ Nigerian Companies Act 2020 is a wholesale adoption of the provisions of the UK Companies Act 2006, with minor omissions especially of provisions that reflect trend or modern corporate practices. For more on Nigeria's curious omissions of some key provisions of the UK Companies Act 2006, see Babajide S. Shoroye, (2023). Delimiting the duties and powers of company administrator under the companies and allied matters act 2020. *International Journal of Law, Policy and Social Review*, Volume 5, Issue 3, 2023, Page No. 137-143

Despite the generally acknowledged importance of CSR for all stakeholders – the company, shareholders, and wider interests – it remains at the whims and caprices of directors in Nigerian companies; practised selectively for business advantage rather than for its intrinsic social value. The Companies Act 2020 botched an opportunity to have strengthened the practice of CSR in Nigeria by ensuring its legal compellability. However, for the purpose of a legally compelling practice of CSR in Nigeria, does the UK statutory ESV principle offer any lesson?

3.1 Towards a Legal Approach to CSR in Nigeria

It is arguable whether the UK statutory ESV principle has much to recommend it to the practice of CSR in other common law jurisdictions such as Nigeria. Williams argued strenuously that the statutory ESV principle does not represent any substantive change in the approach of UK company law to stakeholders, and that as such “it is of doubtful usefulness to other jurisdictions seeking to enhance social responsibility in their company law”¹. The views of practitioners and experts concerning the impact of the statutory ESV principle are as varied as they are inconsistent. But it has been reiterated that the duty it imposes on directors has not led to a “radical change”² in directorial responsibilities.

The legal duty, which is the notable feature of statutory ESV principle, has turned out to be a “damp squib which did not introduce any new liabilities or responsibilities for directors”³. As provided in section 172(1) (a)-(f) of the Companies Act 2006, ESV principle is stated with a high degree of generality and as such read much like a list of exhortations to good conduct by directors rather than specific instructions to undertake, or refrain from undertaking, any particular actions⁴. More so, the principle does not provide any legal guidance relating to the imposed directorial duty and with specific reference to its enforceability.

Consequently, enforceability of the principle by stakeholders is not legally tenable; only shareholders may be able to enforce it through derivative proceedings because directors owe the duty to the company, and not to the stakeholders. This means that the range of people who are able to enforce the provision is narrow and excluding stakeholders. According to Keay and Iqbal, this is a major flaw of the statutory ESV principle which limits its impact; and that neither the Steering Group nor the Government intended stakeholders to have any power or rights to enforce it⁵.

However, while the Companies Act 2006 failed to vest stakeholders with power of enforceability of ESV principle, the provisions of section 172 nonetheless endorse a multi-stakeholder decision-making duty which obligates directors to be accountable to stakeholders, and this has the effect of nudging companies in the direction of greater social responsibility⁶. Remarkably, the provisions have addressed the challenge of how best to balance the often-conflicting interests of a company’s shareholders and stakeholders in order to keep the company on the pathway of profitability and sustainability.

Conflict typically arises between shareholders and other stakeholders interests due mainly to agency issues, wherein self-serving directors make decisions that focus on short-term gains with the effect that the long-term sustainability of the company is put at risk. This approach only benefits short-term transitional shareholders who trade for quick speculative gains; it does not serve the interests of long-term shareholders who are interested in the sustainability of the company⁷. Beyond its elemental deficiencies, therefore, statutory ESV principle has provided an enshrined normative function for directors towards the practice of CSR, the effect of which has been the beginning of the promotion of long-term view of companies over the short-term

From its intent and purpose, the statutory ESV principle requires more than mere consideration of stakeholders’ interests because it goes as far as to support directorial accountability through the requirement of a statement of strategic report of how directors have complied with their duty to have regard to stakeholders’ interests as listed in section 172(1) (a)-(d) of the Companies Act 2006⁸. Although, the statutory ESV principle

¹ Richard Williams (2012). Enlightened Shareholder Value in the UK. UNSW Law Journal Volume 35(1). p. 360

² J. Gauntlett and R. Dattani (Norton Rose) Directors Duties Codified and referred to in J. Loughrey, A. Keay and L. Cerioni, “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 Journal of Corporate Law Studies 79; In fact, findings from the study on the impact of statutory ESV principle conducted by Keay and Iqbal confirmed that the enactment of section 172 had not changed directorial regard for stakeholders’ interests, with only 17 per cent of directors indicating that the provision had led to a change in their behaviour. See Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. Journal of Business Law, 2019 (4). pp. 304, at p. 327

³ Bruce Hanton of Ashursts, quoted in Financial Director 26 November 2006 and referred to in J. Loughrey, A. Keay and L. Cerioni, “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 Journal of Corporate Law Studies 79

⁴ Richard Williams (2012). Enlightened Shareholder Value in the UK. UNSW Law Journal Volume 35(1). p. 360

⁵ Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. Journal of Business Law, 2019 (4). pp. 304, at p. 327

⁶ Virginia Harper Ho, “‘Enlightened Shareholder Value’: Corporate Governance Beyond the Shareholder-Stakeholder Divide” (2010) 36 Journal of Corporation Law 61

⁷ Maeve O’Connell and Anne Marie Ward, (2020) Shareholder Theory/Shareholder Value. op.ct

⁸ Reem Kabour, (2021). What effect does the enlightened shareholder value principle in the Companies Act 2006 have on the corporate objective of UK companies? IALS Student Law Review, Vol. 8, Issue 2, pp. 13-29; See also the UK Companies (Miscellaneous Reporting) Regulations 2018

was not included in the Companies Act 2006 with any specific reference to CSR, its intent and purpose point to a viable approach to an effective legal regime for the practice of CSR in common law jurisdictions such as Nigeria without ESV principle.

As ready noted in the preceding section of this paper, ESV principle effectively constitutes CSR in practice. Therefore, the implication of section 172(1) is that it removed CSR from the realm of corporate voluntarism and directorial discretion to the sphere of legal duties of directors. This has set a trend for other common law countries such as India to enact ESV principle in their company laws. Indeed, India has taken the statutory ESV principle further than the UK in terms of using it to enforce the practice of CSR at the level of board of directors.

In section 166(2) of the Indian Companies Act 2013 a director of a company is required to “act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment”. These expressly stated stakeholders under the section are less than those mentioned in section 172(1) of the UK Companies Act 2006, and more like the provisions of section 305(3) and (4) of the Nigerian Companies Act 2020.

However, under the provisions of section 135 of its Companies Act 2013 Indian became the first common law jurisdiction to provide for mandatory CSR policy for companies. According to the section, every company that satisfies the prescribed threshold of annual turnover is required to spend at least 2% of its net profits as CSR expenditure on a list of activities provided in Schedule VII of the Act. Under the section, Indian companies are required to set up a Board Committee with responsibilities for formulating CSR policy, recommending the amount of expenditure to be incurred on CSR activities and monitoring the CSR policy implementation.

Majumdar has pointed out that under the provisions of section 135 of the Companies Act 2013 CSR activities in India do “appear to further social good, beyond the interests of the firm”¹. Majumdar’s point is more so because under the Companies (Corporate Social Responsibility) Rules 2014, which provide for the details of the legal obligations for CSR under section 135, CSR programmes and activities that solely benefit companies’ employees and their families would not be considered as CSR activities within the meaning of the section. This to ensure that CSR obligations are more widely focused on external stakeholders.

Consequently, the emerging concept of CSR in India under the Companies Act 2013 goes beyond charity or philanthropy and requires companies’ directors to undertake CSR programs and activities as legal obligations, integrating social, environmental, and ethical concerns into their business processes². This is the intent and purpose of the UK statutory ESV principle despite its inherent limitations or weaknesses. Arguably, the influence of the principle on the current legal regime on CRS in India is more than apparent. And for Nigeria, it offers a lesson on a legal approach to CSR and the lesson can be applied to reflect Nigerian local context and peculiarities, like the case of India.

4. Summary and Conclusion

At common law, the idea that directors owed their duties only towards the maximization of profits for the company’s shareholders expanded to include the recognition of the need to consider the interests of the company’s other stakeholders. However, the focus on profit maximization for companies’ shareholders, otherwise referred to as shareholder primacy, aligns more with the foundational purpose of a company than the stakeholder theory which seeks to project the interests of those who impact or are impacted by the business operations of the company.

Consequently, the question as to whether directors should necessarily consider other stakeholders’ interests in addition to shareholders’ interests remains unresolved since the notable Berle-Dodd debate, including Friedman-Freeman counter arguments. A middle ground approach that seems to have emerged in this 21st century is that the realization of short-term profit maximization for shareholders may narrow directors’ focus on shareholders’ interests, but a long-term sustainable view of shareholders’ interests will inevitably require directors to consider the interests of other stakeholders.

This middle ground approach is referred to as “enlightened shareholder value” principle which constitutes the provisions of section 172(1) of the UK Companies Act 2006. Although, the statutory ESV principle does not make any specific reference to CSR, this paper however shows that its intent and purpose offer a lesson on legal approach to effective practice of CSR in other common law jurisdictions such as Nigeria.

¹ A.B. Majumdar, (2015). ‘India’s journey with Corporate Social Responsibility – What Next’, 33 Journal of Law and Commerce 165 at 204

² A. Singh and P. Verma, (2014). ‘From Philanthropy to Mandatory CSR: A Journey towards Mandatory Corporate Social Responsibility in India’, 6 European Journal of Business and Management 146 at 147