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Charitable Donations and Corporate Philanthropy: Examining the Trend in the Law Relating to Corporate Social Responsibility in the UK and Nigeria

Dr Babajide S. Shoroye
Senior Lecturer, Department of Business Law, Faculty of Law
Lagos State University, Lagos, Nigeria
Email: drbabasho2000@gmail.com

ABSTRACT

The concept of corporate social responsibility (CSR) finds roots in the stakeholder theory which is in conflict with the orthodox view of the purpose of a company, and by implication, the doctrine of shareholders primacy. What has emerged from the conflictual debate between shareholders primacy and the stakeholder theory is a recognition that in undertaking companies' businesses and making profits for shareholders, directors should consider the interests of other stakeholders such as employees and customers, including the impact of the companies' operations on the environment and local communities. Thus, as part of CSR companies make charitable donations and involve in philanthropies. However, CSR remains at the realm of voluntarism and moral suasion of companies rather than in the spheres of corporate legal obligations to stakeholders. Through the decades, much of the academic discourse has centred on the need for companies to undertake CSR but without examining the traditional view of the law limiting CSR. This article critically examines the concept of CSR from the perspective of company law, and determines its legal status in light of the trend in the provisions of the UK and Nigerian Companies Acts.

Keywords: Corporate social responsibility, Charitable donations, Corporate philanthropy, Shareholder primacy, Stakeholder theory, Companies Act 2006, Companies Act 2020

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I. INTRODUCTION

As far back as 1883, Bowen LJ had opined that ''the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company''[1]. This judicial opinion reflected the common law orthodox view on the purpose of a company; that a company is formed for the sole purpose of maximising value and returns on investment for the company's shareholders. Under this traditional view, the interest of the company is interpreted as coterminous with the interests of shareholders. Though this interpretation is controversial in light of the separate legal entity status of a company[2], it however feeds into the common law doctrine of shareholders primacy which considers the interests of shareholders as the only purpose for the existence of the company.

Charitable donations by a company and other corporate philanthropies come within the concept of corporate social responsibility (CSR) which serves interests and benefits that are outside those of company shareholders. CSR involves a company's commitment to promote or protect the wider interests of people that are outside the company, but who nevertheless stand to affect or be affected by the business or operations of the company[3]. The concept of CSR conflicts with the orthodox view of the purpose of a company, and by implication, the shareholders primacy theory. However, CSR finds roots in the opposing stakeholder theory of the purpose of a company. The stakeholder theory conceives a broader view of the purpose of a company as including the duty to serve the interests of ''individuals and constituencies that contribute, either voluntarily or involuntarily''[4] to the profitable and successful existence of the company.

[1] In the case of *Hutton v West Cork Ry. Co*. [1883] 23 Ch.654, at 673. The case decided the limits of directors' discretion to spend company funds for the benefit of non-shareholders.
[2] See for example, J.E Parkinson, (1993). Corporate Powers and Responsibility: Issues in the Theory of Company Law 77
[3] Jonathan Mukwiri, (2013). Myth of Shareholder Primacy in English Law, 24 EUR. BUS. L. REV.217, 237–238
[4] Post, J. E., Preston, L. E., & Sachs, S. (2002). Managing the Extended Enterprise: The New Stakeholder View. California Management Review, 45, 5-28

The conflictual debate between the doctrine of shareholders primacy and the stakeholder theory is far from settled[5]. At a minimum, what has emerged from the debate is a recognition that in undertaking companies' businesses and making profits for shareholders, directors should consider the interests of other stakeholders such as employees, customers and suppliers, including the impact of the companies' operations on the environment and local communities in which they operate. The response of a company towards embracing the need to include the interests of these stakeholders in its decisions and actions constitutes its CSR. Accordingly, as part of CSR a company may make donations to charities, set up scholarship scheme for children of its employees, provide economic empowerment for indigent members of the local community, provide primary health care services, renovate schools, roads and other socio-economic infrastructure in the community.

In contemporary times, the scope of CSR is even expanded to include the responsibility of companies for their impact on society, such that companies are expected to ''have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations, and core strategy in close collaboration with their stakeholders''[6]. Thus, the concept of CSR is at the intersection of law, social, environmental and behavioural sciences. But while the concept has been well entrenched, its scope formulated and re-formulated, its burden explored, and its benefits postulated in social and management sciences[7], its status in law remains as speculative as it is contested. In particular, CSR remains at the realm of voluntarism and moral suasion of companies rather than in the spheres of corporate legal obligations to stakeholders.

Companies commit to CSR more out of market or reputational imperatives than compliance with legal obligations. As noted by Geethamani, successful ''CSR initiatives take company beyond compliance with legislation and leads them to honour ethical values and respect people, communities and the natural environment''[8]. In spite of the avowed function and necessity of CSR in modern society[9], CSR initiatives have continued to be mostly voluntary and discretional. The debate as to whether companies exist to pursue the interests of shareholders or for the social, economic and environmental benefits of the society as a whole, has taken place outside the ambit of company law. Through the decades, much of the academic discourse has centred on the need for companies to undertake CSR activities but without examining the orthodox view of the law limiting CSR, except where there is a ''business case'' for doing so in line with the shareholders primacy doctrine[10].

In this article, the focus is a critical examination of CSR from the perspective of company law. This article determines whether the shareholders primacy is inherent in company law as it originated from common law; or whether modern Companies Acts in common law jurisdictions such as Nigeria and the United Kingdom only ensure that the consideration of shareholders' interests continue to prevail over the interests of other stakeholders. For instance, under the ''enlightened shareholder value'' principle introduced in the UK Companies Act 2006, companies are required to serve a wider range of interests of other stakeholders only as a means of satisfying shareholders' interests[11]. From the trend in the law since the common law era and up to the current statutory regime, this article determines the legal status of CSR in the UK and Nigeria.

[5] Sometimes referred to as the Berle-Dodd debate. While Berle argued in favour of shareholder primacy, Dodd postulated a counter-argument for stakeholder theory. See Adolf A. Berle, (1931). "Corporate Powers as Powers in Trust" 44 Harv L Rev 1049 at 1049; E. Merrick Dodd, Jr. (1932). "For Whom Are Corporate Managers Trustees?" 45 Harvard Law Review 1145 at 1160

[6] Its expansion now also includes the conduct of suppliers of products to to the company and the uses to which products are put and how they are disposed of after use. See definition of CSR in: European Commission, A Renewed European Union Strategy 2011-2014 for Corporate Social Responsibility, COM (2011) 681, para 3.1

[7] See the works of sociologists and social scientists such as Carroll, A., (1991). 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders', Business Horizons, July-August; Smith, N. Craig (2003), "Corporate Social Responsibility: Whether or How?" California Management Review, 45 (4), 52-76; Garriga, E. & Mele, D., (2004). 'Corporate Social Responsibility Theories: Mapping the Territory', Journal of Business Ethics, 53 (1/2); Sen, Sankar, C. B. Bhattacharya, and Daniel Korschun (2006), "The Role of Corporate Social Responsibility in Strengthening Multiple Stakeholder Relationships: A Field Experiment," Journal of the Academy of Marketing Science, 34 (2), 158-66

[8] S Geethamani, (2017). Advantages and disadvantages of corporate social responsibility. International Journal of Applied Research, 372 – 374

[9] McBarnet, D (2009). 'Corporate Social Responsibility Beyond Law, Through Law, for Law' University of Edinburgh, School of Law, Working Papers. Available at <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1369305

[10] See Andrew Crane, Dirk Matten and Laura J. Spence, (2008). Corporate Social Responsibility: Readings and Cases in a Global Context 22–23; A.B Carroll and Kareem M. Shabana, (2010). The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice, 12 Int'l J. Mgmt. Rev. 85, 86–87; Andrew Johnston, (2017). The Shrinking Scope of CSR in UK Corporate Law 74 Wash. & Lee L. Rev. 1001, at 100

[11] See section 172 of the Act

In part II of this article, the concept of CSR is explored and a common feature in its various definitions is identified as encompassing the voluntary activities of a company towards contributing to the safety, welfare and improvement of the lives and conditions of its stakeholders. The forms and drivers of CSR are identified and a significant distinction is made between charitable donations and corporate philanthropy. In Part III, CSR is discussed in relation to common law, and the doctrine that gave birth to the shareholders primacy and the emergent opposing stakeholder theory relating to the purpose of a company. Part IV determines the legal status of CSR within the provisions of the UK Companies Act 2006 and the Nigerian Companies Act 2020, including the trend in ensuring legal enforceability of CSR. Part V is the conclusion.

II. THE CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY

The wide range of social, economic, ethical and environmental aspects of life and the society implicated in the concept of CSR makes it easier to describe than to define the concept. It also includes issues of human rights, corporate governance, health and safety, and other conditions towards operational and business sustainability of companies. The multifarious aspects of CSR conduce to a company's sense of social responsibility towards the people, community and the environment in which it operates. Most of the so-called definitions of the concept of CSR are more of descriptions of one approach or different initiatives by a company to voluntarily give back to the people or the society impacted directly or indirectly by its operations.

For instance, it has been noted that CSR is ''a commitment to improve community well-being through discretionary business practices and contributions of corporate resources'' [12]. CSR is also noted to be ''fundamentally about ensuring that companies forward broader public objectives as an integral part of their daily activities''[13], and involves corporate actions that ''further some social good, beyond the interests of the firm and that which is required by law''[14]. While articulating the pyramid of CSR, Carroll views the concept as the ''economic, legal, ethical and discretionary expectations that society has of organisations at a given point in time''[15].

And according to McBarnet, CSR essentially involves a shift from profit maximation for shareholders within the obligations of law to responsibility of a broader range of stakeholders, including communal concerns such as protection of the environment and accountability on ethical obligations[16]. A common feature of these definitions or descriptions of CSR is that it is a concept that encompasses the voluntary or discretional activities of a company towards contributing to the safety, welfare and improvement of the lives and conditions of those who are considered as its stakeholders, and these include its employees, customers, suppliers, the environment and local the community. It answers to the definition or description of CSR where a company considers the interests of its stakeholders in its decisions and actions beyond what it is legally obligated to do.

Contrary to Carroll's inclusion of ''legal'' expectation of society as part of the implications of CSR, it is actually the voluntary and discretional nature of CSR that sets it apart from corporate legal obligations. There is no legal obligation on companies to undertake CSR under common law and so far, as discussed in subsequent part of this article, legislators in common law jurisdictions such as the UK and Nigeria have exercised restraint in codifying CSR. Some learned authors categorize as ''CRS Laws'' environmental statutes that impose on companies certain standard operational conduct and best practices, including the prohibition and criminalization of environmental pollution[17]. It is a misconception to view CSR as corporate legal obligations or to categorize statutory prohibition and regulatory requirements as CSR.

[12] Kotler, Philip and Nancy Lee (2004), Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause. (Hoboken, NJ: Wiley & Sons) at p.3
[13] H. Mintzerberg, 'The Case for Corporate Social Responsibility' (1983) 4 Journal of Business Strategy, at p. 3
[14] See Klein, Jill and Niraj Dawar (2004), "Corporate Social Responsibility and Consumers' Attributions and Brand Evaluations in a Product Harm Crisis," International Journal of Research in Marketing, 21 (3), 203-17
[15] Carroll, A., (1991). 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders', op.cit, at p. 36
[16] McBarnet, D 2009 'Corporate Social Responsibility Beyond Law, Through Law, for Law', op.cit at p. 1
[17] Such as the Nigerian Minerals and Mining Act 2007; Extractive Industries Transparency Initiative Act 2007; Harmful Waste (Special Criminal Provisions Act; and National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007. See Chima Mordi, Iroye Samuel Opeyemi, Mordi Tonbara, and Stella Ojo, (2012). Corporate Social Responsibility and the Legal Regulation in Nigeria. Economic Insights – Trends and Challenges, Vol. LXIV, No.1, pp 1-8, at p. 2

Activities and undertakings that constitute CSR fall outside corporate duties or obligations required under common law or statutes. In its essential feature, CSR lacks legal compulsion that is expressed in regulatory statutes which impose obligation on companies in the course of business operations. For example, companies may be subject to a legal obligation to conduct their businesses or operations in a safe, healthy and responsible manner. However, it is inconceivable that companies would be legally obligated to donate to charities and undertake philanthropic projects. Therefore, CSR does not approximate to a ''legal'' commitment by a company to contribute to societal socio-economic development through improving the welfare and quality of life of its employees and customers, including the environment and local community.

Forms and Drivers of Corporate Social Responsibility

Rather than consequent upon the dictates of external legal compulsion, companies initiate CSR policies and strategies out of self-volition and motivation. The positive impact on stakeholders intended under CSR is pursued concurrently as the company strives to maximise the creation of shared value for its owners or shareholders. The company does not abandon or undermine its foundational purpose of existence, to wit, the maximization of value and generation of returns on investments for its shareholders. Afterall, Friedman had famously argued that the one and only social responsibility of business is to use its resources and engage in activities designed to increase profits[18]. As a matter of existential necessity, a company must be a going concern in order to have the capacity for CSR.

Though corporate capacity is necessary for CSR, it is however not a determinant factor for CSR. The voluntary and discretional nature of CSR implies that a company may have the capacity but without the motivation or drive for CSR. Literature on the business case for CSR identifies the drivers of CSR as marketing strategies which benefit the company in the long term and create profitable or respectful relationships with corporate stakeholders[19]. CSR is considered a part of strategic planning for companies that aim to be competitive and successful through improvement of their corporate reputation and public good-will.

Empirical studies have confirmed that the CSR profile of a company enhances corporate and brand image with positive effect on consumers and public evaluations of the company, including patronage of the company's products or services[20]. It is found that CSR is a powerful tool for companies to improve their bottom-line through sales, thereby attracting both internal and external advantages, tangible and intangible benefits[21]. From the studies, such benefits and advantages include higher output, increase in employees' productivity, reduction in operating costs, attraction of new customers, improvement in relations with investors and more access to capital, and mutually beneficial relationship with host communities[22].

While the various corporate benefits and advantages constitute the drivers of CSR, they also create the basis for its criticisms. It is argued that companies develop CSR agenda not because of an altruistic desire to assist in improving the socio-economic welfare and conditions of stakeholders but only to make more profit[23]. The profit motive and other rewards that inevitably accrue to the company in both short and long terms provide the substance of the business case for CSR. Hence, in the absence of legal compulsion for CSR, its voluntariness and altruism are suspect and called into question. According to Smith, ''businesses are opportunistic and driven by shareholder interests'', such that ''there is a fine line between charity and exploitation''[24]. However, the form of CSR such as charitable donations and corporate philanthropy may confirm its voluntary and altruistic nature.

[18] See Milton Friedman, (1970). "The Social Responsibility of Business is to Increase its Profits, NY Times Magazine,13 September, at p. 6
[19] Zhao, J (2017) Promoting More Socially Responsibly Corporations through a Corporate Law Regulatory Framework. Legal Studies, 37 (1). pp. 103-136
[20] See the case studies by Bhattacharya, C. B. and Sankar Sen (2003), "Consumer--Company Identification: A Framework for Understanding Consumers' Relationships with Companies," Journal of Marketing, 67 (2), 76-88; Bhattacharya, C. B., Shuili Du, and Sankar Sen (2005), "Convergence of Interests–Producing Social and Business Gains Through Corporate Social Marketing," Center for Responsible Business (University of California, Berkeley), Working Paper; (2004), "Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives," California Management Review, 47 (1), 9-24
[21] See Fombrun, C. (2005). Building corporate reputation through corporate social responsibility initiatives: Evolving standards. Corporate Reputation Review. Vol. 8(1), Pp. 7-11; Nurn, C. W and Tan, G. (2010). Obtaining intangible and tangible benefits from corporate social responsibility. International Review of Business Research Papers. Vol. 6(4), Pp. 360 – 371
[22] ibid, notes 20 and 21
[23] Geethamani, (2017). Advantages and disadvantages of corporate social responsibility, op.cit, at p. 374
[24] Smith, NC. (2003). 'Corporate Social Responsibility: Whether or How?', California Review, 45 (4), 52-76, p. 71

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In the analysis of the different forms of CSR, Carroll's pyramid of CSR offers the traditional four classifications that represent the voluntary responsibilities of companies towards their stakeholders or outside constituencies[25]. At the apex of the pyramid is *Philanthropic Responsibilities* which have been distinguished between strategic and non-strategic philanthropy models, based on whether or not the philanthropy is driven by profit motive[26]. Strategic philanthropy has the dual objectives of benefitting both the company in terms of business profitability and the socio-economic welfare of its stakeholders.

Non-strategic philanthropy, which have also been referred to as altruistic or benevolent philanthropy[27], is only in the interest and for the benefit of the company's stakeholders. An example of strategic philanthropy is where a company makes contributions to improve the social and economic interests of its employees, customers, or community members with a view to obtaining corporate benefits and advantages. On the other hand, non-strategic philanthropy is exemplified by a company's supports for social causes such as education and health care in the community where it operates, and only for the purpose of contributing to the communal social welfare[28].

Instructively, in the context of Carroll's *philanthropic responsibilities* model, the concepts of charity and philanthropy are sometimes interchangeably used. But in the analysis of CSR along the lines of strategic and non-strategic philanthropies, charity is defined as: ''giving for the sake of giving'' to the community in which a company is located, without consideration of business benefits or advantages[29]. Under this definition, according to Diener, charity is akin to non-strategic, altruistic or benevolent philanthropy, distinguishable from corporate philanthropy which, in this context, means that the company is acting out of the dual objectives of benefitting its business interests and the welfare interests of its stakeholders[30].

From these contextual definitions, therefore, a distinctive and significant line exists between charity and corporate philanthropy which goes to motive as a driving force for the business case for CSR. In spite of the different underlying drivers, however, both charity and corporate philanthropy inevitably contribute to the social, economic and environmental aspects of the society. But as a veritable contributor to the betterment of the society, why has CSR remained a voluntary and discretional corporate undertaking? The next part of this article examines CSR in the context of common law.

III. CORPORATE SOCIAL RESPONSIBILITY UNDER COMMON LAW

In the first quarter of the twentieth century, Berle famously postulated that ''all powers'' granted to a company ''are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears''[31]. But prior to Berle's notable postulation, the position under common law was that shareholders are the primary beneficiaries of the company and therefore directors' fiduciary duties should be exercised in the shareholders' interest, including the maximization of shareholder value[32]. According to Bainbridge, the common

[25] They are (1) Philanthropic Responsibilities (2) Ethical Responsibilities (3) Legal Responsibilities, and (4) Economic Responsibilities. See Carroll, A., (1991). 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders', Business Horizons, July-August, 42. Diener has identified five paradoxes inherent in Carroll's pyramid of CSR and offered an alternative model, the discussion of which is outside the context of this article. See Keith William Diener, (2013). The Charitable Responsibilities Model of Corporate Social Responsibility, Journal of Academic and Business Ethics, 1 – 13

[26] McAlister, D. and Ferrell, L., (2002). 'The Role of Strategic Philanthropy in Marketing Strategy', European Journal of Marketing, 36 (5/6), 609-705, at p. 690

[27] Maas, K. and Liket, K., (2011). 'Talk the Walk: Measuring the Impact of Strategic Philanthropy, Journal of Business Ethics, 100, 445 – 464

[28] Porter, M. and Kramer, M., (2002). 'The Competitive Advantage of Corporate Philanthropy', Harvard Business Review, 5 – 14

[29] See Keith William Diener, (2013). The Charitable Responsibilities Model of Corporate Social Responsibility, Journal of Academic and Business Ethics, 1 – 13

[30] ibid

[31] A. A. Berle, Jr., "Adolf A. Berle, "Corporate Powers as Powers in Trust" (1931) 44 Harv L Rev 1049 at 1049

[32] 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

law contractarian theory of the company considered directors as contractual agents of the shareholders with fiduciary obligations to maximize shareholders' investments[33].

The fiduciary duties of directors were therefore towards promoting the interests of shareholders only, and were not required to undertake any discretional CSR commitments to non-shareholders or other stakeholders of the company. In the opinion of Lord Greene in the case of *Re Smith and Fawcett*[34], directors must exercise their discretion *bona fide* ''in the interests of the company, and not for any collateral purpose''. As agents of the shareholders, directors were thus subject to the fiduciary duty to act in good faith for the benefit and in the best interest of the company, which approximated to the collective interests of the company's shareholders[35].

Though the case of *Foss v Harbottle*[36] had established the separate legal personality of a company, the power and influence of shareholders such as the right to appoint and remove directors allowed them to appropriate the interest of the company as equivalent to their own interests. Also, as contributors of the company's capital, shareholders were effectively treated as the ''owners'' of the company for whose ultimate benefit the company is run[37]. The early case of *Hutton v West Cork Ry. Co*[38] involved a director's discretion to spend company funds for the benefit of non-shareholders, in this case, an employee of the company. Bowen LJ held that ''the general doctrine'' was that the company's funds must be spent ''for purposes which are reasonably incidental to the carrying on of the business of the company''.

In subsequent cases such as *Evans v Brunner, Mond & Co. Ltd*[39] and *Parke v Daily News*[40], this doctrine was upheld and applied accordingly. During those early times the doctrine was also applied in other common law jurisdictions such as the United States, as exemplified in the cases of *Gray v President of Portland Bank*[41] and *Dodge v Ford Motor Company*[42]. In the latter case, it was held that the company had to be run in the interests of its shareholders, rather than in a charitable manner for the benefit of its employees or customers. Justice Ostrander opined that a ''business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end''[43]. It was this common law doctrine that gave birth to the shareholder primacy theory, and the emergent opposing stakeholder theory relating to the purpose of a company.

Shareholder Primacy versus the Stakeholder Theory

The doctrine which stipulated that the purpose of a company is for directors to promote the interests of the company shareholders and not those of non-shareholders made the practice of CSR untenable under common law. More so, the *ultra vires* rule, as laid down in the case of *Ashbury Railway Carriage & Iron Co. v Riche*[44], obligates directors to exercise corporate powers only for the purpose of achieving the business objects of the company. Therefore, shareholder primacy was further fortified by the *ultra vires* rule under common law because CSR policy or initiatives by directors of a company could be caught and invalidated by the rule. It needs to be noted that it was against this common law background that Berle published the article, ''Corporate Powers as Powers in Trust'', in the Harvard Law Review of 1931[45].

Berle argued that directors managed the business of the company as trustees for the company's shareholders, and that all powers granted to a company or to the management of a company, whether under statute or the company's memorandum of association, must be exercised in the interest of the shareholders. Besides the status of shareholders as the capital contributors and effective owners of the company, the shareholder primacy theory is

[33] Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Nw. U.L.Rev. 547
[34] [1942] 1 Ch 304 (CA) 306
[35] See the case of *Re Smith and Fawcett,* ibid
[36] (1843) 2 Hare 461, 67 ER 189
[37] Lance Ang, (2019). Directors' Duties and Stakeholder Interests: A Convergence Towards a Common Law 'Enlightened Shareholder Value' Model? op.cit
[38] [1883] 23 Ch. Div. 654, 673
[39] [1921] 1 Ch. 359
[40] [1962] Ch. 927, 963
[41] 3 Mass. 364 (1807)
[42] 204 Mich. 459 (1919)
[43] Justice Ostrander further opined that: ''The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes''.
[44] (1875) L.R. 7 HL
[45] See A. A. Berle, Jr., "Adolf A. Berle, "Corporate Powers as Powers in Trust" (1931) 44 Harv L Rev 1049 at 1049

defended on the basis that it is essential to have a single, measurable corporate objective in order to hold the company directors accountable[46].

It is contended that if directors were allowed to deviate from the objective of maximising shareholders' wealth, they would inevitably turn to indeterminate balancing standards which provide no accountability, or could make them to be tempted to pursue their own self-interest[47]. However, in opposition to Berle's support of shareholder primacy and its justifications, Dodd had advanced the need for a company social responsibility to non-shareholders[48]. But a noteworthy response to Dodd on the purpose of a company and particularly in the context of CSR, was published by Friedman who noted that it undermines 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''[49].

Friedman argued that ''there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits''[50]. Dodd was further countered by the argument 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-run maximization of the return on the capital of a company''[51]. Shareholders primacy has thus been developed in legal scholarship and remained the prevalent view on the purpose of a company. Similarly, the opposing stakeholder theory has been developed in the literature since 1932 when Dodd noted that ''there is reality and not simply legal fiction'' in the proposition that directors of a company are ''trustees'' for it and not merely for its shareholders, and as such they owe a social responsibility to the company's stakeholders, in addition to its stockholders[52].

A growing body of scholarship promotes the idea that in decision-making, directors of a company should take into account the effect of their actions on the company's stakeholders[53]. Notably, Freeman identifies the various stakeholders of a company as ''any group or individual who can affect, or is affected by, the achievement of a corporation's purpose'', and this group includes ''employees, customers, suppliers, stockholders, banks, environmentalists, government and other groups who can help or hurt the corporation''[54]. The crux of the argument of Freeman and others in his school of thought is that companies have not been managed with a view toward dealing with each of these stakeholders, and effective management requires that they do so[55].

According to Freeman, ''if business organizations are to be successful in the current and future environment'', directors ''must take multiple stakeholder groups into account''[56]. Freeman's argument for a stakeholder philosophy starts from the presumption that globalization, increased competition, and other factors have increased the challenges facing corporate management; and argues that a stakeholder approach is the best way to successfully navigate these changes[57]. The stakeholder theory as developed by Freeman has often been linked to CSR, or used to ground CSR efforts in that it advocates the interests of outsiders to the company. And no distinction is currently recognized between those advocating greater CSR and proponents of the stakeholder theory.

However, it has to be clarified that Freeman's approach is to corporate management rather than CSR initiatives. Freeman noted that taking into account stakeholder interests and managing stakeholder relationships is not about CSR but because it is necessary in order to maximise profits and for value creation. Thus, CSR is only one aspect of the many internal and external challenges faced by corporate managers[58]. Freeman also concedes that a

[46] Lance Ang, (2019). Directors' Duties and Stakeholder Interests: A Convergence Towards a Common Law 'Enlightened Shareholder Value' Model? op.cit
[47] Stephen Bainbridge, (2015). "A Duty to Shareholder Value" New York Times, 16 April, 9
[48] E. Merrick Dodd, Jr., "For Whom Are Corporate Managers Trustees?" (1932) 45 Harvard Law Review 1145 at 1160
[49] Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. TIMES, Sept. 13, 1970
[50] Ibid, at p. 17
[51] F Hayek (1985). "The corporation in a democratic society: In whose interest ought it and will itbe run?" in M Anshen and G Bach (eds) Management and Corporations (1985, McGraw-Hill) 97 at 100
[52] E. Merrick Dodd, Jr., "For Whom Are Corporate Managers Trustees?", op.ct at p. 119
[53] Mark J. Loewenstein & Jay Geyer, (2021). Shareholder Primacy and the Moral Obligation of Directors, 26 Fordham J. Corp. & Fin. L. 105) at p. 113
[54] R. Edward Freeman, et al., (2010). Stakeholder Theory: The State of the Art (Cambridge: Cambridge University Press) at p. 9
[55] See Jacob Hörisch, R. Edward Freeman, And Stefan Schaltegger, (2014). Applying Stakeholder Theory in Sustainability Management: Links, Similarities, Dissimilarities, And A Conceptual Framework, 27 ORGS. & ENV'T 4 (May 27, 2014)
[56] R. Edward Freeman, et al., (2010). Stakeholder Theory: The State of the Art, op.cit
[57] Mark J. Loewenstein & Jay Geyer, (2021). Shareholder Primacy and the Moral Obligation of Directors, op.cit
[58] Ibid, at pp. 114-115

company's dealing with outside stakeholders could only be voluntary, requiring negotiations of common grounds or identifying areas where the corporate and stakeholders' interests converge.

From the foregoing, the conflicting proposition between shareholder primacy and the stakeholder theory gives CSR a dubious status under common law; while the shareholders primacy prevailed, the stakeholder theory only constitutes a subject of conceptual postulations in social and management sciences. And according to Hansmann and Kraakman, ''there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value''[59].

However, the stakeholder theory has much to recommend it to CSR because it argues that corporate managers should consider interests other than those of the shareholders and providers of capital, such as employees, creditors, customers and the community as a whole. But even under the stakeholder theory, a company's dealings with outside stakeholders in the form of CSR is noted to be voluntary, not mandatory or legally obligatory. In the next part, we examine how CSR has been treated in statutory provisions in the UK and Nigeria.

IV. LEGAL STATUS OF CORPORATE SOCIAL RESPONSIBILITY IN THE COMPANIES ACTS OF THE UK AND NIGERIA

There is relatively short history of CSR in the context of statutory framework. While shareholders primacy prevailed under common law, statutory provisions that impact on the practice of CSR first appeared in the erstwhile UK companies Act 1985. Despite or as a result of the status of CSR under common law and statutory provisions, advocates of CSR rely on voluntarism of companies to take cognizance of stakeholders' interests. But ''a ruthlessly shareholder-oriented''[60] model of the company which is in conflict with meaningful CSR appears to have been entrenched in the Companies Acts of the UK and Nigeria. For clarification, there is no statutory provisions relating directly to CSR both in the UK and Nigerian Companies Acts.

Provisions that are relevant to CSR are inferable to the extent that they require companies to have regard for the interests of stakeholders, in addition to the interests of shareholders of companies. For instance, section 309(1) of the repealed UK Companies Act 1985 provided that the matters to which the directors of a company were to have regard in the performance of their duties included the interests of the company's employees in general, as well as the interests of its members. The mention of ''employees'' in the provision represented a slight departure from the orthodox shareholders primacy under common law towards a statutory stakeholder model. But the provision offered no functional impact on CSR, and has been described as ''either one of the most incompetent or one of the most cynical pieces of drafting on record''[61].

According to Johnston, it was a permissive provision that was effectively redundant in practice because of the ever-greater pressure to prioritize the short-term interests of shareholders[62]. However, following a review of the UK company law and the enactment of the extant Companies Act 2006, there is now an approach that is commonly referred to as ''enlightened shareholders value'' principle[63], which invokes an obligation on directors to achieve the success of the company for the benefit of shareholders by taking proper account of all the relevant considerations for that purpose.

In section 172(1) of the Act, such considerations are: (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. This section makes it clear that the purpose of promoting the success of a company is for the benefit of its members as a whole. Thus, directors are required to

[59] 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
[60] P Ireland and RG Pillay, (2010). "Corporate social responsibility in a neoliberal age" in P Utting and JC Marques (eds) Corporate Social Responsibility and Regulatory Governance Towards Inclusive Development? (Palgrave Macmillan) 77 at 91
[61] L. S. Sealy, (1987). Directors' "Wider" Responsibilities—Problems Conceptual, Practical and Procedural, 13 MONASH U. L. REV. 164, at p. 177
[62] Andrew Johnston, (2017). The Shrinking Scope of CSR in UK Corporate Law, 74 Wash. & Lee L. Rev. 1001
[63] See D. Millon, (2012). 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law' in P.M. Vasudev & S. Watson (Eds.), Corporate Governance after the Financial Crisis, Cheltenham: Edward Elgar p.68

create value for shareholders when considering the long-term interests of a company and also to foster relationships with employees, customers and suppliers, including the impact of the company's operations on the community and the environment[64].

The ''enlightened shareholder value'' principle retains shareholders primacy, however, in appropriate circumstances it requires that consideration must be given to a wider range of stakeholders' interests. This makes it legitimate for directors to look after the interests of stakeholders in order to maximise shareholders' interests and maintain the long-term interest of the company[65]. As Millon noted, under the provisions of section 172 companies are obligated to pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests[66]. The obligation created in the section 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''[67]. The section is therefore functionally favourable to CSR in the UK.

In Nigeria, the relevant provisions under the Companies Act 2020 is less favourable. Section 305(3) of the Act requires 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 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''[68]. 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 makes it only two areas of outside interests to be considered by directors, while section 172(1) of the UK Companies Act 2006 lists five stakeholders' interests for directors to consider.

Also, under the UK Companies Act 2006 there is requirement for a strategic report, a disclosure requirement that constitutes an important means of enhancing corporate accountability and improving the transparency of corporate activities. Companies are required to produce a strategic report on environmental matters, company employees, social and community issues ''to the extent necessary for an understanding of the development, performance or position of their business'', information about human rights issues, including information on any related policy and its effectiveness[69]. But under the Nigerian Companies Act 2020 the closest on corporate reporting on non-financial matters is the requirement of a ''value-added statement'' of report on ''the wealth created by the company during the year and its distribution among various interest groups such as the employees, government, creditors, proprietors and the company''[70].

It may be argued that the clear references to consideration of other interests apart from shareholders' interests in section 305(3) and (4) of the Companies Act 2020 shows that Nigerian company law takes cognizance of CSR towards stakeholders and outside interests. However, the value such corporate stakeholders may derive from these sections in relation to the safeguarding of their interests in the running of the company is another question[71]. This is because the implication of section 305(9) of the Nigerian Companies Act 2020 is that in the event that directors fail to consider the interests of employees and the impact of the company's operations on the environment and community, it is only the company that is empowered to enforce the provisions of the section, not the affected stakeholders.

Amodu notes that the problem is because the provisions constitute an 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'', where the company is assumed to mean members or shareholders as a whole, and the best interest

[64] J. Loughrey, A. Keay & L. Cerioni, 'Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance' (2008) 8 Journal of Corporate Law Studies 79 at 86. 90
[65] A. Keay, 'Tackling the Issues of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'' (2007) 29 Sydney Law Review 599
[66] D. Millon, (2012). 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law', op.cit, at p. 58
[67] 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
[68] These provisions first appeared in section 279(3) and (4) of the repealed Nigerian Companies Act 1990, and were adopted from the provisions of the erstwhile UK Companies Act 1985
[69] See sections 414A-D of the Act
[70] See section 378(4)
[71] 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

or success of the company is taken to mean what is beneficial to the interests of the shareholders[72]. It needs pointing out that while the Nigerian provisions are more or less a codification of the common law shareholder primacy, with no significant usefulness to CSR, even the ''enlightened shareholder value'' component of the UK Companies Act 2006 hardly fares any better for CSR.

For instance, it has been argued that in spite of the statutory provisions it is by no means certain that this has changed the extent to which stakeholder interests have been taken into account, and that the contrary has been achieved, with the subjective nature of the duty embedding the common law shareholders primacy more firmly than before[73]. This is in addition to the fact that the duty imposed on directors under the provisions is not enforceable by stakeholders as only shareholders can pursue a derivative action under section 260 of the UK Companies Act 2006, or petition for a court order on the basis of unfair prejudice pursuant to section 994 of the Act. According to Lang, it is not entirely clear whether the changes expected from the intent of the provisions have been achieved[74]. It has been reported that the ''changes thus far appear to represent more of an evolution rather than revolution, but changes have placed renewed emphasis on directors' responsibilities and on planning for the longer term''[75].

Trend in Corporate Social Responsibility and Legal Enforceability

The relevant provisions of the UK Companies Act 2006 and the Nigerian Companies Act 2020 have not made the consideration of stakeholders' interests by company directors a mandatory legal obligation. The progressive attempts at ensuring statutory enhancement of CSR through a more stakeholders-focused approach to performance of directors' duties are belied by a lack of enforcement of the provisions by stakeholders. The non-member stakeholders listed under the relevant sections of the UK Companies Act cannot initiate any proceedings against the directors when there is a breach of the duty to consider stakeholders' interest. Directors are still more focused on creating value for shareholders of companies at the expense of other stakeholders.

One report has found that a number of directors actually believed that they had a legal obligation ''to achieve the highest possible share price in the short-term'' for shareholders[76], rather than long-term business strategies that require a consideration of stakeholders' interests. But the latest effort at ensuring a legally enforceable directors' duty to consider the interests of stakeholders may be found in the UK Companies (Miscellaneous Reporting) Regulations 2018. Pursuant to this regulation, companies are required to include a statement in their strategic report of how the directors have complied with their duty to have regard to stakeholders' interests as listed in section 172(1) (a)-(f) of the Companies Act 2006 when performing their duties.

There are no equivalent subsidiary regulations under the Nigerian Companies Act 2020. And in relation to corporate disclosure in financial statements, the Act focuses on shareholders primacy without provisions for the consideration of stakeholders' interests such as the impact of a company operations on the environment and community, because there are no provisions for non-financial corporate disclosures. Amodu argues that the Federal Reporting Council of Nigeria Act (FRC Act) could have offered promising provisions for stakeholders' protection[77]. However, the definition of ''financial statements'' under the Act approximates to shareholder-primacy based provisions of the Companies Act 2020 which do not include non-financial disclosures such as the interests of employees and customers, or the impact on the environment and the local community.

Significantly, however, the latest Nigerian Code of Corporate Governance 2018 issued in pursuance to the FRC Act contains principles towards the recognition and protection of stakeholders' interests, including best global practices aimed at mainstreaming environmental and communal concerns in corporate decisions, actions and operations[78]. The Code contains self-regulatory corporate disclosure requirements, recommending annual corporate reporting on non-financial matters such as social welfare and environmental policies of the company, in

[72] ibid
[73] David Collison, et al., (2014). "Financialization and Company Law: A Study of the UK Company Law Review" 25 Critical Perspectives on Accounting 5
[74] Lance Ang, (2019). Directors' Duties and Stakeholder Interests: A Convergence Towards a Common Law 'Enlightened Shareholder Value' Model? op.cit, at p. 9
[75] Samantha Fettiplace and Rebecca Addis, "Department for Business, Innovation and Skills: Evaluation of the Companies Act 2006, Volume One" (2 August 2010) at p. 163
[76] See J. Kay, (2012). 'The Kay Review of UK Equity Markets and Long-term Decision Making: Final Report' pp.57–76
[77] In sections 11 and 50 of the Act. See Nojeem Amodu, (2020). Stakeholder Protection and Corporate Social Responsibility from a Comparative Company Law Perspective: op.cit, at p. 439
[78] See Principles 10 – 25 of the Code

a form replica of the requirement for a strategic report in sections 414A-D of the UK Companies Act 2006[79]. However, the principles in the Code are voluntary and contextualized in terms of morality, which are generally not enforceable unless they coincide with a prescribed legal duty[80].

Therefore, the goal of ensuring the consideration of wider stakeholders' interest in corporate decision-making for the purpose of enhancing CSR has not successfully moved from the realm of voluntariness to the sphere of legal enforceability. CSR initiatives such as charitable donations and other corporate philanthropy remain at the discretion of companies, and as such continues to be driven strictly by the ''business case'' for CSR. The implication is that there continues to be an underlying ''win-win'' objective in CSR such that even though companies appear to be ''doing good'' and ''giving back to society'', they are mostly motivated by expectations of benefits such as enhancement of corporate and brand image; positive consumers and public evaluations; increased patronage; attraction of new customers; improvement in relations with investors; and more access to capital.

V. CONCLUSION

The trend in the law relating to CSR is towards ensuring obligatory consideration of wider stakeholders' interests by directors, in addition to the maximization of value for shareholders of companies. Provisions in the UK Companies Act 2006 and the Nigerian Companies Act 2020, though eclipsed by shareholders primacy, serve as a reminder to directors to at least take into cognizance the social and economic welfare of employees and customers, including the interest of the community in which their companies operate, and the impact of their operations on the environment.

An appropriate balance may need to be struck between shareholders primacy and the stakeholder theory through a statutory re-definition of the purpose of a company, in a way to project the understanding that the long-term success of a company is invariably dependent on the well-being of all of its stakeholders. A re-defined purpose of the company can set the stage for a statutory re-enactment of the duties of directors to reflect wider and legal social responsibilities to non-shareholders of companies[81]. Only statutory intervention can reverse the prevailing shareholders primacy and voluntarist approach to CSR by infusing it with legal enforceability.

[79] L Osemeke and E Adegbite, (2016). "Regulatory multiplicity and conflict: Towards a combined code on corporate governance in Nigeria", 133 Journal of Business Ethics, 431 at 433 and 434

[80] Nojeem Amodu, (2020). Stakeholder Protection and Corporate Social Responsibility from a Comparative Company Law Perspective: op.cit. at p. 441

[81] Without a statutory re-definition of the purpose of a company, India became the first country to provide for mandatory CSR policy for companies. Section 135 of the Indian Companies Act 2013 provides that every company that satisfies the prescribed threshold would be required to spend at least 2% of its net profits as CSR expenditure on a list of activities in Schedule VII of the Act. Under the section, companies are required to set up a board committee with responsibilities for formulating and recommending CSR policy, recommending the amount of expenditure to be incurred on CSR activities, and monitoring the company's CSR policy. The detailed legal obligation of CSR is provided under the Companies (Corporate Social Responsibility) Rules 2014. For criticisms and analysis of the provisions, see 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; A.B. Majumdar, (2015). 'India's journey with Corporate Social Responsibility – What Next', 33 Journal of Law and Commerce 165 at 204