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

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Abstract

There have been notable legislative advancements, as well as improvements in corporate governance codes, aimed at protecting stakeholder rights. However, how much protection have they really afforded stakeholders against socially irresponsible corporate behaviour? This article undertakes a comparative analysis of the legal framework underlying South Africa's stakeholder-inclusive approach and Nigeria's environmental, social and governance or sustainability corporate reporting. It identifies a misplaced philosophical background as well as policy misalignment of corporate governance codes and primary corporate law as critical factors that undermine efforts to embed responsible corporate behaviour in order to safeguard the interests of qualified and legitimate stakeholders. It recommends specific amendments to address the ideological defect and align corporate governance codes with primary corporate legislation in these two countries.

Keywords
CAMA 2020, comparative company law, CSR, Nigeria, South Africa, stakeholder protection

INTRODUCTION

Much domestic corporate legislation is largely underpinned by the shareholder primacy theory, a corporate law ideology focused on creating a conducive environment for corporate executives to maximize profits for shareholders with few requirements for safeguarding other rights. Nevertheless, companies are urged to satisfy the interest of persons other than the shareholders. These other persons usually affect, or are affected by, the achievement of a company's purpose, or have a legitimate claim on a company and can exert influence over it, or are exposed to risk whether financial,

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human or environmental as a result of the company's operations.[1] These other persons or entities are the corporate stakeholders.[2]

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

Corporate social responsibility (CSR) arises in corporate governance discourse when stakeholder protection is discussed. CSR appears to be that link between corporate governance and stakeholder protection. While CSR[6] may also be bedevilled by different definitions and conceptions, this article conceptualizes CSR as a regulatory construct by which the interests of corporate executives and directors are aligned with not just the interests of shareholders but also those of a stakeholder group within the company's environment. This company environment includes the company's physical environment (its surrounding land, air and water, together with its host and any impacted communities within its area of operation), its human environment (such as its members and employees), its social environment (its interaction and

1 BU Ihugba "Compulsory regulation of CSR: A case study of Nigeria" (2012) 5 *Journal of Politics and Law* 68 at 69.

2 The stakeholder group includes shareholders, employees, creditors, suppliers, contractors, customers, regulators, host and impacted communities and the media. A business's stakeholder group could be quite difficult to define. For various definitions and conceptions of the group, see among others: RE Freeman et al *Stakeholder Theory: The State of the Art* (2010, Cambridge University Press) at 209; E Freeman *Strategic Management: A Stakeholder Approach* (1984, Pitman) at 31; TM Jones, AC Wicks and RE Freeman "Stakeholder theory: The state of the art" in NE Bowie (ed) *The Blackwell Guide to Business Ethics* (2001, Wiley-Blackwell) 20 at 21 and following; T Donaldson and LE Preston "The stakeholder theory of the corporation: Concepts, evidence and implications" (1995) 20 *The Academy of Management Review* 65 at 88; MBE Clarkson "A stakeholder framework for analyzing and evaluating corporate social performance" (1995) 20 *Academy of Management Review* 92; LJ Mullins *Management and Organizational Behaviour* (2002, Prentice).

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

4 JE Parkinson "Corporate governance and the regulation of business behaviour" in S Macleod (ed) *Global Governance and the Quest for Justice*, vol II "Corporate governance" (2006, Oxford and Portland) 1 at 1.

5 OECD *G20/OECD Principles of Corporate Governance* (2015, OECD Publishing) at 9.

6 In this article, CSR does not represent voluntary corporate charity or philanthropic community development activities beyond the requirements of the law. For a similar conception, see generally, N Amodu "The responsible stakeholder model: An alternative theory of corporate law" (2018) 1/5 *Journal of Comparative Law in Africa* 1; N Amodu "Regulation and enforcement of corporate social responsibility in corporate Nigeria" (2017) 61/1 *Journal of African Law* 105; and AO Adeyeye *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (2012, Cambridge University Press) at 9.

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reputation in society), its economic environment (managing wealth and resources creation and distribution) and political environment (interaction with government and regulatory bodies).

Although CSR is the missing link between corporate governance and stakeholder protection, stakeholder theory and CSR are not exactly the same thing and do not seek to achieve the same goal. As demonstrated below, while CSR is a neutral concept and may not necessarily be contrary to the shareholder primacy theory, stakeholder theory sits on the opposing side of the fundamental assumptions of the shareholder primacy model, especially in stakeholder protection discourse.

The role of CSR and corporate governance in the stakeholder protection discourse must be underscored within the corporate law context. Since it is practically impossible for legislators to envisage or anticipate every mischievous scenario in corporate law and practice, it is virtually impossible for primary legislation to envisage and provide for every possible problem or challenge in corporate law and practice. This means that there will exist certain lacunae to be filled by judicial interpretation and agreed standards, regulations, conventions and best practice codes, which may not have passed through legislative processes. The principles of both CSR and corporate governance (as presently expressed largely in voluntary self-regulatory codes) are thus essentially applicable to fill in these gaps. In addressing stakeholder protection, the principles of corporate governance and CSR are useful tools employed in giving effect to legislative provisions, especially in the absence of case law.[7] This also means that corporate governance and CSR principles should, and will, follow and align with legal provisions. In other words, legislated rules of corporate law should not be at variance with the principles of corporate governance, and vice versa. The OECD Principles of Corporate Governance underscore this point noting that, while the corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources, it should also be consistent with the rule of law and support effective supervision and enforcement.[8] Both primary and secondary legislation usually provide for stakeholder protection by enjoining corporate executives to seek profits for shareholders sustainably, by having regard for the impact of corporate actions on the business's other constituents.[9] Giving effect to legislative corporate law provisions (especially regarding stakeholder management and protection) has led to a proliferation of largely voluntary corporate

7 T Lambooy *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000–2010 and Case Studies* (2010, Kluwer) at 50.

8 OECD *G20/OECD Principles of Corporate Governance*, above at note 5 at 13 and 14 and following.

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

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governance codes of best practice around the world.[10] These codes contain self-regulatory corporate disclosure requirements, enjoining integrated corporate reporting on so-called non-financial (social and environmental) or sustainability matters.

Further to the comment at the beginning of this introduction, although two dominant corporate objective theories (the shareholder primacy and stakeholder-oriented theories) have largely shaped corporate governance and disclosure requirements, and while many requirements appear underpinned by the stakeholder theory, upon critical scrutiny they are essentially conditioned by the fundamental assumptions of the shareholder primacy theory.[11] Shareholder primacy oriented disclosures may be direct or indirect. They are direct if the target benefit is the provision of relevant information to shareholders or towards enhancing shareholder value, or allowing prospective shareholders to decide whether or not to invest in the company. They could be indirectly for the shareholders' benefit when the disclosure regime appears on the surface to accommodate stakeholder engagement, but ultimately enhances the interests of shareholders (both present and prospective). Usually when they are indirect, all activities or major decisions resulting from such stakeholder engagement are subjected to shareholder approval or implementation with little or no further recourse to the stakeholders involved. This article shows how prevalent this indirect shareholder primacy oriented corporate disclosure has been.

The second form of corporate disclosure benefits the larger stakeholder group. This kind of disclosure usually reflects a genuine demonstration of steps undertaken by a company to address its own irresponsible corporate behaviour towards stakeholders. This second disclosure requirement has two targets: raising a company's cost of irresponsible corporate behaviour, as stakeholders are expected to shun such a company upon accessing negative disclosures without credible mitigating procedures; and incentivizing responsible corporate behaviour, the disclosure costs of which ultimately reduce upon the positive reaction of relevant stakeholders to the information disclosed.[12] This theoretical distinction in corporate disclosure requirements is vital, because the purpose of the disclosure usually determines the extent and quality of the disclosure and therefore its efficacy.[13] If a disclosure targets shareholder interests and aims to enhance shareholder value, then the level or extent of information to be disclosed by the companies is likely to be minimal, sufficient to comply with minimum legal requirements, without

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

11 Parkinson "Corporate governance", above at note 4 at 17.

12 Ibid.

13 For empirical data on this, see generally, K Hakkon, P Kwangwoo and R Doojin "Corporate environmental responsibility: A legal origins perspective" (2017) 140 *Journal of Business Ethics* 381.

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necessarily paying attention to the adequacy, accuracy or otherwise of stakeholder information disclosed in the wider public interest.[14]

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

This article argues that answers to these questions in relation to safeguarding stakeholder rights through responsible corporate behaviour transcend compliance with disclosure requirements in corporate governance codes. It also argues that corporate law isolation from the provision of effective stakeholder protection in Nigeria and South Africa is untenable. Following this introduction, the article considers corporate law theories and principles shaping stakeholder protection requirements and their usefulness to stakeholders. It then comparatively analyses corporate law and the CSR legal and regulatory framework aimed at protecting stakeholder rights in South Africa and Nigeria, and highlights factors undermining effective stakeholder protection in their corporate governance and CSR discourse. It recommends additional measures and an alternative approach for stakeholder protection in these states. A conclusion follows.

STAKEHOLDER PROTECTION AND UNDERLYING THEORIES

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

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

14 Parkinson "Corporate governance", above at note 4 at 17.

15 K Marx *Early Writings* (trans and edited by T Bottomore, 1963, McGraw-Hill) at 52.

16 C Sunstein *Legal Reasoning and Political Conflict* (1996, Oxford University Press) at 52.

17 NHD Foster "Company law theory in comparative perspective: England and France" (2000) 48/4 *American Journal of Comparative Law* 588.

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

Shareholder primacy theory

To a shareholder primacy theorist, all directors' duties must be driven to maximize shareholder wealth and value.[21] The theory proceeds on a fundamental assumption that companies and businesses are the private property[22] of their incorporators and as such the success of the company must be taken as the success of its members. Milton Friedman noted that, "few trends could so thoroughly undermine the very foundation of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible"[23] and that "there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say engages in open and free competition, without

18 J Dine *The Governance of Corporate Groups* (2000, Cambridge University Press) at 1, citing S Bottomley "Taking corporations seriously: Some consideration for corporate regulation" (1990) 19 *Federal Law Review* 203 at 204.

19 TK Cheruiyot and P Onsando "Corporate social responsibility in Africa: Context, paradoxes, stakeholder orientations, contestations and reflections" in A Stachowicz-Stanusch (ed) *Corporate Social Performance in the Age of Irresponsibility: Cross National Perspective* (2016, Information Age Publishing Inc) 89 at 95 and 96 and following. See also, E Garriga and D Mele "Corporate social responsibility theories: Mapping the territory" (2004) *Journal of Business Ethics* 53 at 65; JE Parkinson "Models of the company and the employment relationship" (2003) *British Journal of Industrial Relations* 481; J Dewey "The historic background of corporate legal personality" (1926) 35 *Yale Law Journal* 655; R Sacco "Legal formants: A dynamic approach to comparative law" (1991) 39 *American Journal of Comparative Law* 10.

20 For detail of the theoretical underpinnings of corporate actions and CSR generally, see Amodu "The responsible stakeholder model", above at note 6; and N Amodu "Theoretical underpinnings of corporate social responsibility: Victim of ideological clashes" (2014) 3/6 *Journal of Corporate Governance* 1160 at 1214.

21 LM Fairfax "Easier said than done? A corporate law theory for actualizing social responsibility rhetoric" (2007) 59 *Florida Law Review* 771 at 779, citing S Bainbridge "Director primacy: The means and ends of corporate governance" (1997) *Northwestern University Law Review* 547 at 563.

22 L Whitehouse "Corporate social responsibility as regulation: The argument from democracy" in J O'Brien (ed) *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Market* (2005, John Wiley & Sons) 141 at 156.

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

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deception or fraud".[24] Corroborating Friedman, Hayek also argued against the use of corporate property and resources "for specific ends other than those of a long-run maximization of the return on the capital placed under [the company's] control" and further warned that the fashionable doctrine that a company's policy should be guided by "social consideration" was likely to produce most undesirable results.[25]

The good news from this is that this theory absorbs directors from undue distractions and external pressures,[26] especially where CSR and stakeholder management are considered in that manner. The bad news, however, is that this model will not only undermine effective stakeholder protection mechanisms but that it has so dominated corporate law and governance around the world[27] (especially in Anglo-American jurisdictions)[28] that its 21st century proponents argue it should signal the end of corporate law debates on corporate objectives.[29] For instance in the United Kingdom (UK), conscious

24 Id (40th anniversary ed, 2002, University of Chicago Press) at 133. Profits maximization however is not at all costs, as Friedman also acknowledged. The model still recognizes certain restrictions to act within the limits of the law and play "within the rules of the game". However, Friedman appears to take a classic view. More recent exponents of the shareholder primacy model argue that, in the drive for profit maximization for shareholders, corporate executives may simply treat statutory laws and regulations merely as an operational cost and may willingly flout them if the penalties pose no significant risk to the company's bottom line. See JF Sneirson "Shareholder primacy and corporate compliance" (2015) 26 *Fordham Environmental Law Journal* 1 at 4 and 5 and following.

25 F Hayek "The corporation in a democratic society: In whose interest ought it and will it be run?" in M Anshen and G Bach (eds) *Management and Corporations* (1985, McGraw-Hill) 97 at 100.

26 RT Miller "The Coasean dissolution of corporate social responsibility" (2014) 17/2 *Chapman Law Review* 1 at 2.

27 Its agenda and assumptions have also been propagated by international financial agencies, such as the World Bank and the International Monetary Fund, when providing financial assistance to developing countries and advising them on the best route to economic and social development. In fact, the OECD's Principles on Corporate Governance (as revised in 2004), for example, were said to be unashamedly shareholder-oriented: S Soederberg *The Politics of the New Financial Architecture* (2004, Zed Books) at 139. See also, P Ireland and RG Pillay "Corporate social responsibility in a neoliberal age" in P Utting and JC Marques (eds) *Corporate Social Responsibility and Regulatory Governance Towards Inclusive Development?* (2010, Palgrave Macmillan) 77 at 85 and 87; and OECD *G20/OECD Principles of Corporate Governance*, above at note 5, part 5.

28 UK Company Law Review Steering Group, Department of Trade and Industry "Modern company law for a competitive economy: The strategic framework" (1999, Department of Trade and Industry) at 37. J Dine "Jurisdictional arbitrage by multinational companies: A national law solution?" (2012) 3/1 *Journal of Human Rights and the Environment* 44 at 57; P Ireland "Company law and the myth of shareholder ownership" (1999) 62/1 *Modern Law Review* 32; P Davies "Enlightened shareholder value and the new responsibilities of directors" (2005, inaugural lecture at University of Melbourne Law School).

29 H Hansmann and R Kraakman "The end of history for corporate law" in J Gordon and M Roe (eds) *Convergence and Persistence in Corporate Governance* (2004, Cambridge University

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efforts[30] were made to promote a seeming third way theory between the shareholder primacy and stakeholder-oriented theories, called "enlightened shareholder value"[31] (ESV), where extraneous competing interests of certain stakeholders are supposedly balanced, but only for the long-term benefits of the shareholders (ie the maximization of dividends and capital, or share price, growth).[32] However, ESV is still rooted in the shareholder primacy model, having not given the stakeholders any real justiciable rights.[33]

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Press) 33 at 34. See also MJ Roe "The shareholder wealth maximization norm and industrial organisation" (2001) 149 *University of Pennsylvania Law Review* 2063 at 2065.

30 CA Williams and JM Conley "An emerging third way? The erosion of the Anglo-American shareholder value construct" (2004, University of Carolina legal studies research paper no 04-09) at 4, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632347> (last accessed 7 August 2020).

31 C Villiers "Corporate law, corporate power and corporate social responsibility" in N Boeger, R Murray and C Villiers (eds) *Perspectives on Corporate Social Responsibility* (2008, Edward Elgar) 85 at 97 and 98 and following. Villiers notes the similarity between the UK ESV and the Australian "Business approach to corporate responsibility", underscoring the "business case" argument for CSR. This enjoins corporate executives to consider stakeholder interests and report on non-financial matters relating to CSR (regarding employees or the environment, for example) so long as it makes business sense (taking into account cost-benefit implications) to so do and provided such considerations are in relation to the company's overall economic performance and without prejudice to enhancing shareholder value.

32 Ireland and Pillay "Corporate social responsibility", above at note 27 at 85 and 86. See also, J Armour, S Deakin and SJ Konzelmann "Shareholder primacy and the trajectory of UK corporate governance" (2003, ESRC Centre for Business Research, University of Cambridge working paper no 266) at 7, available at: <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp266.pdf> (last accessed 7 August 2020).

33 A Keay and T Iqbal "The impact of enlightened shareholder value" (2019) 4 *Journal of Business Law* 304 at 326; at 319, the authors noted that "as the ultimate aims of the various companies were not considerably different before and after the enactment of ESV and the companies continued to portray themselves as adopting, for the most part, the same approach, it is contended that ESV has not made much difference in practice to the companies studied, certainly as far as aims are concerned, and this may, arguably, be because some or all of the companies studied, perhaps compared with other large companies, were already doing at least aspects of what ESV requires on the basis that it made good business sense". Keay and Iqbal's finding confirmed the results of the evaluation of the UK Companies Act 2006 undertaken by Infogroup / ORC International for the Department of Business Innovation and Skills in 2010; this study found that the enactment of section 172 had not changed behaviour at all among the vast majority of directors, with only 17 per cent of directors indicating that the provision had led to a change in their behaviour: S Fettiplace and R Addis "Evaluation of the Companies Act 2006" (2 August 2010) at 72 and 73, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31655/10-1360-evaluation-companies-act-2006-volume-1.pdf> (last accessed 16 August 2020). See also, J Eijsbouts *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* (2011, inaugural lecture, Maastricht University) at 51; J Abugu "Primacy of shareholders' interests and the relevance of stakeholder economic theories" (2013) 7 *Company*

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Applying the fundamental assumptions of this theory therefore, many cases have held that it will largely constitute an unacceptable corporate waste of time and resources for corporate executives and directors to sacrifice profits, which would otherwise be available to shareholders, on the altar of some grandiose ethical, social or environmental concerns of a stakeholder group.[34] In relation to policy choices, this theory influences arguments that corporate law should focus on providing an enabling environment for businesses to thrive (and maximize profits), while issues relating to corporate responsibility or stakeholder protection against abuses using the corporate form should be resolved within other branches of the law, such as environmental law, human rights law etc.

Stakeholder theory

Edward Freeman made the stakeholder model popular and defined the term "stakeholder" as the "groups and individuals who benefit from or are harmed by, and whose rights are violated or respected by, corporate actions".[35] The stakeholder theory is based on the assumption that companies ought to exist for the mutual benefit of those with relevant interests in or against the companies as a going concern.[36] While the shareholder primacy model is prevalent in Anglo-Saxon jurisdictions, the stakeholder oriented theories have been mostly adopted in East Asia, and continental Europe, in particular The Netherlands and Germany.[37] As may be expected, these stakeholder theories afford some protection for stakeholders. They inform agitation that corporate decisions, actions and inactions must demonstrate due consideration of multiple stakeholder interests, including shareholder interests. Therefore, within the ambit of this model, no singular interest of any stakeholder is

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Lawyer 201 at 204 and 205 and following; and PL Davies *Gower and Davies' Principles of Modern Company Law* (8th ed, 2008, Sweet & Maxwell) at 506 and 507 and following.

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

35 E Freeman "A stakeholder theory of the modern corporation" in LB Pincus (ed) *Perspectives in Business Ethics* (1998, McGraw-Hill) 171 at 174.

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

37 K Hopt and P Leyens "Board models in Europe: Recent developments of internal corporate governance structures in Germany, the United Kingdom, France, and Italy" (2004) 2/1 *European Company and Financial Law Review* 135 at 141; and D Block and A Gerstner "One-tier vs two-tier board structure: A comparison between the United States and Germany" (2016) *Comparative Corporate Governance and Financial Regulation* 1.

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particularly ranked higher than any other.[38] All such interests from different constituents must be balanced in determining the success of the business.[39] The fundamental assumptions behind these stakeholder theories have also been widely adopted in modern legal principles,[40] (business) codes of corporate governance,[41] court judgments[42] and legislation[43] around the world. Further, with the adoption of ESV in the UK, its corporate governance has been described as being in a "state of flux", rather than being really dominated by the shareholder primacy oriented theories.[44] The reason for this assertion is

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38 E Freeman, A Wicks and B Parmar "Stakeholder theory and 'the corporate objective revisited'" (2004) 15 *Organization Science* 364 at 365. It has also been argued that, as the shareholder primacy theorists contend that shareholders may claim private ownership of the company because of their investment, stakeholders such as employees, financiers, creditors and other constituents, who have also invested their skills and monies can (stakeholder theorists argue) lay a similar ownership claim to the company. See S Letza et al "Shareholding versus stakeholding: A critical review of corporate governance" (2004) 12 *Corporate Governance: An International Review* 242 at 251.

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

40 For instance, the weakening, flexing or expansion of the business judgment rule, such that some form of protection is afforded to stakeholders in what is considered legitimate management of a business enterprise; for example, corporate executives may now legitimately increase employees' wages rather than declare profits for shareholders. Also, the definition of a "reasonable takeover" now involves consideration of the impact of the takeover on employees, suppliers, local communities and creditors in determining whether a takeover may be permitted. See among others: *Hampson v Price's Patent Candle Co* (1876) 45 LJ Ch 437; *Shlensky v Wrigley*, above at note 9; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil NL* (1968) 121 CLR 483 at 493; *Teck Corporation Ltd v Millar* (1973) 33 DLR (3d) 288 (BCSC); *People's Department Stores Inc v Wise* (2004) 3 SCR 461; *Lonrho Ltd v Shell Petroleum Co Ltd* (1980) 1 WLR 627 (HL); *Unocal Corporation v Mesa Petro Co* (1985) Del Supr 493 A 2d 946. See also, B Horrigan *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (2010, Edward Elgar) at 108, citing L Stout "Bad and not-so-bad arguments for shareholder primacy" (2002) 75 *Southern California Law Review* 1189 at 1202–03.

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

42 Even courts within Anglo-American jurisdictions have stated that directors may take into account the long-term well-being of a company, as well as the short-term benefits of maximizing profits for the shareholders. See for instance, *Provident International Corporation v International Leasing Corp Limited* (1969) 1 NSWR 424 at 440; *Paramount Communications Inc v Time Inc* 571 A 2d 1140 (Del 1989); *People's Department Stores v Wise*, above at note 40; and *BCE Inc v 1976 Debenture holders* (2008) 3 SCR 560.

43 Companies Act, 2013 (India), sec 166(2); Companies Act, No 71 of 2008 (South Africa), secs 7 and 72(4); Companies Act 2006 (UK), sec 172; and Companies and Allied Matters Act, 1990 as amended (Nigeria), sec 279.

44 KJ Hopt "Comparative corporate governance: The state of the art and international regulation" (2011, European Corporate Governance Institute law working paper, no

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not far-fetched. Even though fundamentally underlain by shareholder primacy theory, there are a number of principles and provisions in the UK Corporate Governance Code[45] and Companies Act of 2006 that still suggests that corporate executives and managers should balance competing stakeholder interests in running companies.[46]

When compared with the shareholder primacy model, the stakeholder model is without doubt more favourably disposed to stakeholder protection by enjoining corporate executives to behave responsibly and manage the company in the interests of not just the business investors but also all stakeholders. However, a major query regarding this model relates to its assumption that ranks shareholder interests and other stakeholder rights as equal. Further, apart from its failure to identify who will qualify as material and legitimate stakeholders of a business, this model also lags in the provision of a practicable paradigm with which corporate executives can actually or effectively balance the so-called *equal* interests of all stakeholders, in the best interest of the company.[47] So, it turns out that, while the stakeholder theory has attractions, especially normatively speaking, it is largely not practical and, while solving the problem of shareholder opportunism, it has led to a more serious problem of stakeholder opportunism.[48] The question then remains, even if directors and shareholders have agreed that there is a need to balance competing stakeholder interests, with what workable theory, regulatory and enforcement regime can this be achieved?

Many scholars have attempted to formulate some middle ground approaches that sit between the two dominant theories.[49] However, the theoretical and regulatory ambits of an alternative model called the responsible

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170/2011), available at: <http://ssrn.com/abstract=1713750> (last accessed 7 August 2020).

45 The UK Financial Reporting Council undertakes regular reviews of the UK code. The latest version of the code is that of July 2018, available at: <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UKCorporate-Governance-Code-FINAL.PDF> (last accessed 7 August 2020).

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

47 A Keay "Stakeholder theory in corporate law: Has it got what it takes?" (2010) 3/9 *Richmond Journal of Global Law and Business* 249 at 300.

48 Ibid.

49 See for instance the arguments and underlying assumptions of theories such as the "team production theory" canvassed by Margaret Blair and Lynn Stout in M Blair and L Stout "A team production theory of corporate law" (1999) 2/85 *Virginia Law Review* 247 and the "entity maximisation and sustainability model" canvassed in A Keay "Ascertaining the corporate objective: An entity maximisation and sustainability model" (2008) 71 *Modern Law Review* 663.

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stakeholder model (RSM)[50] appear most useful for the purpose of this article. RSM rejects corporate law isolation from stakeholder protection, which is cardinal to the shareholder primacy theorists. Within this theory, corporate law (and regulators using corporate law and corporate governance) need not necessarily descend into the arena to prescribe specific internal corporate governance rules for businesses for safeguarding stakeholder interests; since one size never fits all, this writer submits that, under existing conditions, corporate law and policy makers may continue to struggle to recommend effective corporate governance principles (whether in codes or not) for stakeholder protection. This writer reiterates that such efforts in the past have encouraged (and will probably continue to encourage) CSR greenwash[51] and empty or half-hearted compliance with codes of corporate governance without any real value or safeguards for stakeholder interests. This article recommends RSM for effective stakeholder protection, as it assumes the need to enhance shareholder value (wealth creation for shareholders) but, conjunctively, ensures social efficiency through the employment of the principles of corporate law to advance the aggregate welfare of stakeholders. With RSM, the obligation to identify and balance the interests of relevant stakeholders in a manner suitable for the commercial focus of each company rests on that company itself, and is not necessarily imposed by regulators through corporate law. Examples of a few primary corporate stakeholders, such as employees, host communities and creditors, may be mentioned and RSM offers some broad guidelines that companies may use to identify members of their stakeholder group. While the business community would be able to work with having the latitude to determine its own stakeholders, the law safeguards stakeholders by ensuring that, whenever any qualified stakeholder alleges violation of its legitimate interest in the company, both primary and secondary corporate law must provide an avenue for that stakeholder to seek redress and be remedied.

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

51 Corporate greenwash arises where corporate executives and companies pay lip service and only half-heartedly comply with code requirements without embedding those requirements in corporate culture or making them part of the company's so-called DNA. Greenwash involves box ticking disclosures and empty integrated reporting of stakeholder management activities. See M Cherry "The law and economics of corporate social responsibility and greenwashing" (2014) 14 *UC Davis Business Law Journal* 281; and AM Cherry and JF Sneirson "Chevron, greenwashing, and the myth of 'green oil companies'" (2012) 3 *Washington & Lee Journal of Energy, Climate and the Environment* 133 at 140 and 141.

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RSM prescribes a presumptive duty on companies to develop appropriate and suitable stakeholder management and protection techniques. Companies within this framework must establish to regulators what suitable self-regulatory stakeholder mechanism they have employed towards balancing competing stakeholder interests. However, in the event of the failure of such internal self-regulatory frameworks, the law should presume that the business has acted irresponsibly and the company must painstakingly show it had taken verifiable steps to balance competing interests, despite which injury resulted to a victim stakeholder. In other words, because of the power, influence and impact that companies (small, large, domestic or multinational) generally have in society, corporate law and corporate governance must complement each other in providing a clear corresponding obligation on businesses to protect the interests of legitimate and qualified stakeholders. In addition, as a result of corporate power and influence in society, it appears appropriate to impose a rebuttable presumption of guilt whenever a stakeholder alleges a violation. It is left for businesses, in such circumstances, to demonstrate that they have acted responsibly. This article now explores this point and describes how useful this theory may be towards formulating stakeholder protection obligations and requirements in corporate law and corporate governance codes, and addressing CSR greenwash and mindless compliance in Nigeria and South Africa.

COMPARATIVE ANALYSIS OF STAKEHOLDER PROTECTION IN NIGERIA AND SOUTH AFRICA

This section of the article considers the protection of stakeholder interests at the levels of both primary (company law enactment) and subsidiary (regulations and codes) legislation. It also examines the features of techniques used for stakeholder protection in Nigeria and South Africa, together with their theoretical underpinnings, practical manifestations in laws and how effective or otherwise they have been within these business communities.

There are a few interesting primary corporate legislation[52] provisions in the two jurisdictions enjoining corporate executives to safeguard stakeholder interests. Nigeria has just updated its primary corporate legislation following President Muhammadu Buhari's assent to the Companies and Allied Matters Act, 2020 (CAMA 2020) on 7 August 2020. However, this article retains (with necessary clarifications) a few references to the repealed legislation, the

52 There is other legislation covering other aspects of the law outside the purview of this article. For example, in South Africa, see: 1998 National Environmental Management Act; Bill of Rights included in the South African Constitution, 1996; 1995 Labour Relations Act 66; and Broad Based Black Economic Empowerment Act 53 of 2003. In Nigeria, see: FRC of Nigeria Act 2011, secs 11(a) and 50; 2007 Nigerian Minerals and Mining Act No 20, sec 166; 2007 Nigeria Extractive Industries Transparency Initiative Act; and 2007 National Environmental Standards and Regulations Enforcement Agency Act, etc.

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Companies and Allied Matters Act 1990 as amended (CAMA), in order to demonstrate the extent of the legislative improvements (if any) recorded by the new enactment. Section 869 of CAMA 2020 repealed and replaced CAMA.

To begin with, section 279(3) and (4) of CAMA[53] enjoins directors to act in the best interests of the company as a whole, ensuring that the interests of the company's employees are also considered. These provisions include clear references to consideration of other interests apart from shareholder interests, showing that Nigerian primary corporate law takes cognizance of stakeholder protection. 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. For instance, having sought to protect an important stakeholder group such as employees in section 279(3) and (4) of CAMA (now section 305(3) and (4) of CAMA 2020), the same legislation immediately weakens the efficacy of those provisions (at least from the perspective of any victim employee stakeholder) under sub-section (9)[54] to the effect that, even if the corporate executives do not behave responsibly in safeguarding stakeholder interests, only the "company" can complain. The problem is that these sections, in both CAMA and CAMA 2020, respectively 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. The "company" is assumed to mean members or shareholders as a whole, and the best interest or success of the company is taken to mean what is beneficial to the (economic) interests of the shareholders as a whole.[55]

In relation to corporate disclosure in financial statements, Nigerian primary corporate legislation also focuses on the shareholder primacy model without provision for the consideration of important stakeholder interests (such as impacts on community life or the environment) as there are no provisions for non-financial corporate disclosures or (as it is more appropriately referred to in South Africa) integrated reporting on sustainability matters.[56]

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53 See CAMA 2020, sec 305(3) and (4). For a brief history of CAMA, see O Amao "Corporate social responsibility, multinational corporations and the law in Nigeria: Controlling multinationals in host states" (2008) *Journal of African Law* 89 at 95 and 96.

54 Now CAMA 2020, sec 305(9). See also CAMA, secs 314 and 315 (CAMA 2020, secs 374, 375 and following) showing the largely shareholder primacy orientation of the primary corporate legislation, with little or no real value addition for stakeholder protection.

55 *Hutton v West Cork*, above at note 34; *Percival v Wright*, above at note 34; *Dodge v Ford*, above at note 34; *Evans v Brunner, Mond & Co* (1921) 1 Ch 359; *Re Lee, Behrens*, above at note 34; *Rogers v Hill*, above at note 34; *McQuillen v National Cash Register*, above at note 34; *Greenhalgh v Arderne*, above at note 34 at 291; *Gottlieb v Heyden*, above at note 34; *Parke v Daily News*, above at note 34; *Amalgamated Society of Woodworkers of South Africa v Die*, above at note 34; *Michelson v Duncan*, above at note 34. See also Companies Act, 2006 (UK), sec 172.

56 While this is the case under secs 331, 332 and following and schedule 2 of CAMA, however, section 305(3) of CAMA 2020 demonstrates some improvement, as it enjoins corporate directors to have regard to the impact of the company's operations on the

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In summary, the Nigerian primary corporate legislative framework appears progressive following the introduction of CAMA 2020. The provisions of section 305(3) of CAMA 2020 (enjoining directors to have regard, in addition to the interests of the shareholders, to the impact of the company's operations on the environment in the community where the company operates) is commendable. However, the writer's holistic review of relevant provisions on the legal status or obligations of directors and corporate reporting obligations in Nigeria's corporate legislative framework shows that there will not be any substantive change from the previous status quo in stakeholder protection within the Nigerian corporate governance discourse. The effect of the provisions of section 305(3) and (4) of CAMA 2020 appears, at best, a transition from the crude adoption of the traditional shareholder primacy model to its modern variant, the ESV model adopted under section 172 of the UK Companies Act 2006 and critiqued earlier in this article.

South Africa's stakeholder protection provisions in its primary corporate legislation appear better than Nigeria's. However, the effectiveness of such provisions is also a different question. A few of these provisions are examined below. It is impressive that the South African 2008 Companies Act No 71 (SACA) is clear from the outset about its objectives to accommodate stakeholder interests in section 7(d) and (k).[57] Section 72(4)[58] also references a social and ethics committee, while section 76(3)(a) and (b)[59] enjoins directors to act in good faith and in the best interests of the company. While the legislative

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environment in the community where the company operates. Compare with CAMA, sec 334(2)(h) (now CAMA 2020, sec 377(2)(i)) in relation to financial statements containing a "value-added statement for the year", which according to CAMA, sec 335(4) (now CAMA 2020, sec 378(4)) is a report of "the wealth created by the company during the year and its distribution among various interest groups such as the employees, government, creditors, proprietors and the company". This has been interpreted in terms of a stakeholder protection provision. See Amao "Corporate social responsibility", above at note 53 at 101, citing JO Orojo *Company Law in Nigeria* (3rd ed, 1992, Mbeyi & Associates) at 37. Interestingly, the Nigerian 2007 Investments and Securities Act, which established the Securities and Exchange Commission (SEC) and regulates the activities of public liability and quoted companies in Nigeria, also made no provision for integrated corporate reporting (on non-financial matters). Further, while secs 11(a) and 50 of the FRC of Nigeria Act may contain promising provisions for stakeholder protection, the definition of "financial statements" under sec 77 of the act, linking them to the purely shareholder-primacy oriented statements of CAMA and with no reference to stakeholder integrated reporting, has undermined any stakeholder safeguards that secs 11 and 50 might otherwise afford.

57 Compare with CAMA, sec 7(c). See also, FRC of Nigeria Act, sec 11(a).

58 See also 2011 Companies Regulations (South Africa), regs 26 and 43. There are no comparable provision in CAMA or any subsidiary legislation in Nigeria. However, as in South Africa, see the 2013 Indian Companies Act, secs 134(3)(o) and 135, requiring, inter alia, the constitution of a CSR committee on the board of directors of qualifying Indian companies.

59 This can be compared to the wording of CAMA, secs 279 and 283 in Nigeria.

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advancements in sections 7 and 72 of SACA are impressive, the fact that the stakeholder protection recognition provisions are respectively included in the preliminary sections and reduced to board committee considerations leaves a bitter taste, despite the writer's initial commendation. Further, despite the innovations in sections 7 and 72(4), the clear provisions of section 76(3)(b) enjoining corporate executives and directors to perform their functions in the best interests of the company suggest that the shareholder primacy theory still largely underpins the provisions.[60] In recognition of this development, Linda Muswaka concludes that, even though efforts have been made in SACA to ensure that the interests of other stakeholders (not just shareholders) are protected, it seems that the legislation fails to safeguard stakeholders' rights effectively.[61]

While Nigeria has concluded the process of amending CAMA with the introduction of CAMA 2020, South Africa is still involved in an on-going process of amending SACA through the 2018 Companies Amendment Bill. However, a review of this amendment shows no significant improvement in relation to its stakeholder protection provisions. For instance, amendment 14 essentially seeks to subject the social and ethics committee report to discussion by shareholders in general meeting, while amendment 15 (which seeks to amend section 72 of SACA) essentially mandates an externally assured social and ethics committee report but it is still subject to the company politics of shareholders in general meeting.

In the Introduction above, it was noted that corporate governance (as may be manifested in business codes) gives effect to legislated provisions and, as noted in the G20/OECD Principles of Corporate Governance, corporate governance codes should complement primary corporate legislation.[62] In both Nigeria and South Africa, provisions in the codes are targeted, among other aims, at stakeholder protection. While industry players in South Africa have one comprehensive code of corporate governance in the *King IV Report*,[63] the Nigerian business community appears not to be so fortunate.[64]

60 I-M Esser "Corporate social responsibility: A company law perspective" (2011) 23 *South African Mercantile Law Journal* 317 at 324.

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

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

63 *King IV Report on Governance for South Africa 2016* (2016, Institute of Directors in Southern Africa), which replaced the *King III Report on Corporate Governance for South Africa 2009* (2009, Institute of Directors in Southern Africa).

64 See: Code of Corporate Governance for the Telecommunication Industry 2016, issued by the Nigerian Communications Commission (replacing the 2014 code); Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014, issued by the Central Bank of Nigeria (replacing the 2006 code); Code of Corporate Governance for Public

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Following complaints about the multiplicity of codes in Nigeria and recommendations for one comprehensive document,[65] the Financial Reporting Council of Nigeria (FRC of Nigeria)[66] issued the 2018 Nigerian Code of Corporate Governance (Nigerian Code),[67] replacing a controversial 2016 National Code of Corporate Governance.

These documents do indeed contain innovative principles and recommended practices towards stakeholder protection, which certainly deserve commendation. For instance, the provisions of principles 26, 27 and 28 of the Nigerian Code[68] are impressive. Similarly, the South African *King IV Report*[69] includes interesting provisions regarding stakeholder protection. By way of brief history, the *King II Report* of 2002 replaced the *King I Report* of 1994 and was remarkable for acknowledging that there was a need to depart from the corporate governance single bottom line (shareholder primacy) approach to a triple bottom line, which embraces the economic, environmental and social aspects of a company's activities. The *King III Report* of 2009 is

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Companies in Nigeria 2011, issued by the SEC (replacing the 2003 code); Code of Good Corporate Governance for Insurance Industry in Nigeria 2009, issued by the National Insurance Commission; and Code of Corporate Governance for Licensed Pension Fund Operators 2008, issued by the National Pension Commission. They are usually called "sectoral codes", the phrase adopted in this article.

65 Osemeke and Adegbite "Regulatory multiplicity and conflict", above at note 10 at 435.

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

67 The code was adopted as part of the Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018. Certain companies are mandated to report on the application of the Nigerian Code in their annual reports for financial years ending after 1 January 2020 in the form and manner prescribed by the FRC of Nigeria. These companies include: all public companies (whether listed or not); all private companies that are holding companies of public companies or other regulated entities; all concessioned or privatized companies; and all regulated private companies being private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission. The Nigerian Code is available at: <https://drive.google.com/file/d/1_uOzdXFOqexptBQDfDudAvNoIYPjAO27/view> (last accessed 7 August 2020). In any event, other sectoral codes of conduct are still applicable in Nigeria. See paragraph F of the Introduction to the Nigerian Code.

68 This article deliberately excludes references to the Code of Business Conduct and Ethics or the word "ethics" in principles 24 and 25 of the Nigerian Code as they are contextualized in terms of morality. See the definition of "ethics" in the Nigerian Code, para 29.1.9. In Nigeria and many other jurisdictions, good moral values are generally not enforceable unless they coincide with a prescribed legal duty. To be clear, this article's conception of CSR and stakeholder protection measures is not based on morality.

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

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remarkable in refining the triple bottom line concept of *King II* and used the term "triple context", which informed the introduction of the concept of integrated reporting, showing that the differentiating line between the so-called "financial" and "non-financial" matters of a company is becoming blurred and that the dimensions of the economy, society and the natural environment are intertwined and not separate.[70] The *King IV Report* was introduced in 2016 (effective 2017) and improved on *King III*. One of the *King IV Report's* key objectives is addressing mindless compliance with corporate disclosure requirements in corporate governance codes. Unlike the Nigerian Code with its tone of mandatory compliance,[71] the *King IV Report* constitutes a set of voluntary principles and practices to address mindless compliance. The phrase "stakeholder-inclusive approach" appears thematic in the *King IV Report* and informed its key provisions on stakeholder protection.[72]

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

Analysis at the beginning of this section showed that stakeholder protection provisions in the corporate law regimes of these countries can be described as either minimal (as corporate law provisions are shareholder-primacy centric and isolated from stakeholder protection, as in Nigeria) or inadequate[73] (as in the case of South Africa, where the stakeholder-inclusive approach appears

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

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

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

73 DJ Joubert "Reigniting the corporate conscience: Reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange" in C

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enshrined but, upon scrutiny, is essentially reduced to boardroom politics[74] and subjected to shareholders' consideration and manipulation).

Notwithstanding that there are policy advancements in the two jurisdictions in relation to integrated corporate reporting requirements, this article nonetheless submits that the corporate governance codes in these two jurisdictions are defective:[75] there are no clear provisions in the primary corporate law regimes of these countries that demonstrate clear adoption of the stakeholder theory or any of its modern variants mentioned above. This writer submits that the impressive and innovative policies of the stakeholder-inclusive approach and underpinning integrated disclosures in South Africa, and the Nigerian environment, social and governance sustainability disclosure requirements have no strong legislative foundation;[76] the affected codes could be said to have followed different trajectories adopting a stakeholder-oriented approach, compared to the primary corporate laws (which are still shareholder primacy centric), instead of complementing them. The defects in these codes seem accentuated by the legal position in both Nigeria and South Africa that provisions of subsidiary legislation dealing with the same material as provisions of primary legislation cannot amend the provisions in the primary enactments.[77]

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Visser and TT Pretorius (eds) *Essays in Honour of Frans Malan: Former Judge of the Supreme Court of Appeal* (2014, LexisNexis) 183 at 187.

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

75 Relatedly, Ireland Paddy and Renginee Pillay noted: "The 'soft' law of CSR is no match for the 'hard(er)' laws protecting shareholder interest": Ireland and Pillay "Corporate social responsibility", above at note 27 at 79.

76 See similar arguments in Amodu "Regulation and enforcement", above at note 6.

77 *Executive Council, Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa 2000* 1 SA 661 (CC); *Adene and Others v Dantubu* (1994) 2 NWLR (pt 382) 509; *Eko Hotels Limited v FRC of Nigeria* (FHC/L/CS/1430/2012); *NNPC v Famfa Oil Ltd* (2012) 17 NWLR (pt 1328) 148; *Bernard Amasike v The Registrar General of the Corporate Affairs Commission* (2010) NWLR (pt 1211) 337; *Olanrewaju v Oyeyemi and Others* (2001) 2 NWLR (pt 697) 229; *Din v AG Federation* (1998) 4 NWLR (pt 87) 147 at 154; *Governor Oyo State v Folayan* (1995) 8 NWLR (pt 413) 292 at 327; *AG of Lagos State v Eko Hotels Limited and Oha Limited* (2006) NWLR (pt 1011) 3782;

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

It is interesting to note that the *King IV Report* attempts to extend the meaning of "company" to other constituents, stating that "the company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment".[80]

It is also interesting to note that proponents of creative[81] thinking (such as that noted above within the South African stakeholder protection regime) have also sought to rely on inferences or obiter judgments made by judges in cases such as *Minister of Water Affairs and Forestry v Stilfontein*,[82] *De Villiers v*

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Noble Drilling Nigeria Limited v Nigerian Maritime Administration and Safety Agency (2013) LPELR-22029 (CA).

78 Ireland and Pillay "Corporate social responsibility", above at note 27 at 97.

79 Inadequacies in, or a general failure of, the self-regulatory corporate governance approach and codes around the world and the reduction of compliance requirements of corporate governance codes to a box ticking exercise are no longer news. See: Osemeke and Adegbite "Regulatory multiplicity and conflict", above at note 10 at 438; AS van Zyl "Sustainability and integrated reporting in the South African corporate sector" (2013) 8/12 *International Business & Economics Research Journal* 903 at 904 and 905 and following. See Parkinson "Corporate governance", above at note 4, footnote 88 and accompanying text. See also *Nike Inc v Marc Kasky* 539 US 654 (2003); and *Kasky v Nike, Inc* 45 P 3d 243 (Cal 2002) where Kasky filed a lawsuit in California regarding newspaper advertisements and several letters Nike had distributed in response to criticisms of labour conditions in its factories. Kasky claimed that the company made representations that constituted false advertising. Also see, R McCorquodale "Corporate social responsibility and international human rights law" (2009) 87 *Journal of Business Ethics* 385 at 394.

80 *King IV Report*, above at note 63 at 26. See also, I Esser and P Delport "The protection of stakeholders: The South African Social and Ethics Committee and the United Kingdom's enlightened shareholder value approach: Part 1" (2017) 50 *De Jure* 97 at 106 and footnote 33. For similar arguments in Nigeria, see K Aina "Board of directors and corporate governance in Nigeria" (2013) 1 *International Journal of Business and Finance Management Research* 21.

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

82 CSR and stakeholder protection were not direct issues for determination in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W). However, it has been argued that Justice Hussain's allusion to the *King Report* corporate governance requirements in this case (following the mass resignation of corporate executives

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BOE Bank Ltd[83] and *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited*[84] about the importance of corporate executives complying with corporate governance codes such as the *King IV* in running the company. Since it is also the duty of corporate executives to prevent financial loss and avoid unnecessary risks that could affect the company's bottom line or dissipate its assets,[85] it could also be creatively and expansively argued that the provisions of sections 283(1) of CAMA and 305(3) of CAMA 2020 allow directors to pursue CSR and protect stakeholder interests in avoiding unnecessary risk to the company's assets. However, while this may be considered impressive, to a judge and / or a regulator this is nothing but conjecture. Without a clear legislative prescription adopting a stakeholder oriented theory (such as the RSM suggested above), it will be difficult to convince any judge in either jurisdiction that corporate executives have a legal duty actually to safeguard stakeholder interests; the creative arguments set out above will therefore continue to offer no real safeguard for the interests of stakeholders under the present framework in these jurisdictions.

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

Notwithstanding this criticism of the Indian stakeholder protection framework, Nigeria and South Africa may nonetheless draw a few lessons. This

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involved after an environmental (water) pollution scandal) pushed the agenda for stakeholder protection and CSR in South Africa.

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

84 [2015] JOL 33744.

85 P Rott "Directors' duties and corporate social responsibility under German law: Is tort law litigation changing the picture?" (2017) 1 *Nordic Journal of Commercial Law* 9 at 18.

86 See Companies Act 2013 (India), secs 134(3)(0) and 135.

87 Above at note 73.

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article submits that what is missing and should be incorporated in the ongoing corporate law amendment processes in Nigeria and South Africa is a specific duty on the company itself (not on corporate executives or directors, as in India) to ensure qualified, material and legitimate stakeholder interests are properly considered and balanced in determining what is in the company's best interests. This would give impetus to the environmental, social and governance reporting under principle 28 of the Nigerian Code and the stakeholder-inclusive integrated reporting under *King IV*. The activities of the social and ethics committee would also be enhanced in providing real value to stakeholders and ensuring more mindful compliance by corporate executives with stakeholder protection requirements.

While aligning with Irene-Marie Esser's view that it would have been better if the wording of section 76(3)(b) of SACA had been clearer, as the current wording may create the impression that shareholder primacy is still preferred in the South African corporate law system,[88] this article departs from the mainstream notion that she appears to adopt, suggesting that CSR principles and stakeholder protection are better provided for in other aspects of law, not essentially within corporate law.[89] This article submits that wholehearted adoption of the shareholder primacy theory, and the isolation of corporate law from providing an effective remedy for violations of stakeholder rights using the corporate form, have simply become untenable.[90] Even if there once was, there is simply no longer any unassailable reason why corporate law principles, theories and rules should only focus on creating a conducive environment for corporate executives to maximize profits for shareholders and not afford credible requirements for safeguarding all stakeholder rights. All aspects and areas of law (including environmental, human rights, international and corporate law) should be instrumental in moving society closer to something acceptable to the majority. Corroborating this is the submission that corporate law isolation or the claim that corporate law should only serve the interests of the shareholder and managerial elite is highly suspect, especially if we believe that the purpose of corporations is to serve society as a whole, rather than a small, wealthy minority.[91] This article has shown that the revolution away from shareholder primacy oriented provisions in corporate legislation (primacy and subsidiary) appears to have already begun. Section

88 Esser "Corporate social responsibility", above at note 60 at 324.

89 Id at 334.

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

91 WW Bratton and ML Wachter "Shareholder primacy's corporatist origins: Adolf Berle and the modern corporation" (2008) 34/1 *The Journal of Corporate Law* 99 at 151.

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305(3) of CAMA 2020, sections 11(a) and 50(f) of the FRC of Nigeria Act, and section 7(d) and (k) together with section 72(4) of SACA are promising provisions and could be built upon towards effective CSR and stakeholder protection. This article submits that any expansive or creative interpretation afforded to provisions such as those under sections 279(3) and 283(1) of CAMA (or section 305(3) of CAMA 2020) and sections 7(d) and (k), 72(4), 76(3)(b) and 218(2) of SACA, together with inferences from earlier cited cases, will not only stretch the limits of those provisions too far but also amount to precarious handling of such an important aspect of public welfare. Such arguments will only appear protective to stakeholder interests without any real benefits to any victim stakeholder. The real danger to stakeholder protection from this will therefore be that proliferation of this so-called creative expansive thinking may crowd out other suggestions, such as that made in this article for head-on, direct and clear changes to primary corporate legislation. They might end up being used to divert policy makers' attention at a domestic and international level from taking steps such as those recommended in this article.

This article further submits that the primary corporate legislation in both Nigeria and South Africa (and maybe beyond) should be amended specifically to show that it is no longer shareholder primacy oriented or based on the ESV model. Within the framework of the alternative corporate law theory of RSM as described above, this article argues that a duty be imposed, not on corporate executives, but on the company itself to consider, manage and balance competing stakeholders' interests as is considered to be in the best interests of the company. This obligation on the company therefore means that shareholders, as residual owners, will ensure wholehearted and mindful compliance with sustainability and integrated reporting and disclosure requirements, since they know that violation of the legitimate interests of any qualified stakeholder may be very costly to the company, and affect available profits for sharing or drastically dissipate corporate assets and be inimical to their interests as residual claimants. Such an amendment would also include a flexible definition of who may be considered to be qualified, material and legitimate corporate stakeholders (the definition of which will vary from one company to another) at different stages of corporate operations and activities. After such amendments, corporate governance codes in these jurisdictions will truly complement and give effect to the primary corporate legislation. Upon adoption of these recommendations, the business judgment rule with which corporate law has imposed a duty on corporate executives to promote the financial interests and assets of companies will be further expanded to accommodate directors' wholehearted pursuit of CSR and stakeholder protection requirements in the best interests of the company. Further, in light of prevailing modern socio-economic, political and environmental realities, corporate law has come of age, justifiably to impose a duty on companies allowing their directors, guided by the business judgment rule, to act responsibly and exercise their discretion and balance constituents' competing interests without imposing any specific one-size-fits-all measures for

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companies to adopt. Self-regulatory business conduct codes within the business communities and requirements, guidelines and recommendations in corporate governance codes will give effect to the primary corporate legislation for CSR and stakeholder protection. Within the framework of the advocated RSM, the legal duty on companies to protect stakeholders should promote the success of companies as a whole. Company activities and assets will be managed for the ultimate benefit of the shareholders, but only in the sense that they constitute the residual risk bearers or claimants. For such residual risk, shareholders will retain the privilege of appointing competent and responsible corporate executives and directors who shall ensure, while avoiding unnecessary risks to corporate assets, that the company's business is responsible. If such corporate executives, as appointed by shareholders, fail in this legal obligation, qualified and material stakeholders with legitimate interests will have real enforceable rights to seek redress with the regulators or the courts as either jurisdiction may choose.

CONCLUSION

This article has shown that the concept of CSR constitutes a potent corporate governance tool towards safeguarding stakeholder rights. It has also underscored the prevalence of the shareholder primacy theory in corporate Nigeria and how it has metamorphosed into the ESV model under section 305(3) of CAMA 2020. While the South African primary corporate law system may be initially considered improved when compared to Nigeria's, upon scrutiny however, its stakeholder-inclusive approach was found essentially to be hinged on the modern variant of the shareholder primacy model as contained in section 76(3)(b) of SACA. This article argued that references to stakeholder interests under section 7(d) and (k) of SACA or under section 279(4) of CAMA and section 305(4) of CAMA 2020 are insufficient to embed responsible corporate activities in these jurisdictions. The article has recommended that both jurisdictions should harden their existing soft law, largely self-regulatory and voluntary frameworks for stakeholder protection, which appear to promote CSR greenwash and mindless compliance with stakeholder protection requirements. It noted that real protection to stakeholders can only be afforded where the primary corporate legislation is aligned in philosophy, principle and provisions with the impressive sustainability and integrated reporting requirements contained in the respective subsidiary legislation (corporate governance codes) in these jurisdictions. This article has not concluded that formalized stakeholder meetings should be entrenched in primary corporate legislation to rival shareholder meetings. As conceived within the formulated RSM, that would essentially defeat the commercial focus of the company and may stifle investment growth in these jurisdictions. The proposal is to impose a duty on the company itself to consider, manage and balance competing stakeholder interests, which will expand the traditional meaning of "the best interest of the company" in primary corporate legislation. This will not distract companies or their corporate executives from

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their pure commercial focus, but only ensure that "real" protection is afforded to qualified, material and legitimate stakeholders and that corporate executives have "requisite regard" for the protection of stakeholder interests, if they want to remain competitive.

CONFLICTS OF INTEREST

None

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