ARE 'MODERN' CORPORATIONS AND THEIR DIRECTORS BECOMING TOO POWERFUL, CONTRIBUTING LITTLE TO THEIR NON-SHAREHOLDING STAKEHOLDERS?

Abstract

It can hardly be denied that big corporations are very vital, if not indispensable, to the socio-economic cum political growth of any nation. A number of them contribute immensely to the welfare and well-being of the people by providing employment opportunities to the teeming population, assisting the local communities by way of discharging certain social responsibilities and enrich the government by paying corporate taxes. Some of them have, however, become irresponsible and are hugely engulfed in their inordinate quest to maximise wealth that they care little about the negative impacts of their corporate operations and decisions on the non-shareholding stakeholder constituencies. They are primarily and essentially concerned with the economic well-being of their shareholders to the detriment of other stakeholders. Some of them have amassed so much wealth and such huge power to the extent that they have weakened government's ability to control them. They are also using their ever-increasing power to influence government decision-making process by aggressive acts of lobbying so that laws and regulations that are made are those that favour them. As these companies have become so wealthy, the question, or rather, expectation on the minds of some people is a commensurate increment in their social responsibilities and social responsiveness. This is, most often, not the case as they are preoccupied with furthering the economic interests of their shareholders by maximising the shareholders' wealth. This work thus sets out to stress the importance of the corporations to be mindful and integrative of the interests of the non-shareholding stakeholders. This, it does, using doctrinal research methodology, relying mainly on primary and secondary sources of data. The work concludes that it is in the best interests of the company if their directors are responsible and consider not only the interests of the shareholders but those of other stakeholders.

Keywords: Corporations, Directors, Non-Shareholding Stakeholders, 'Modern', Too Powerful, Nigeria

1. Introduction

'Modern' corporations are one of the biggest, strongest, powerful and most influential institutions in the world today.[1] In their insatiable quest for raw materials and other resources, and their excessive quest to maximise profit and dominate the world market, some of them are aggressively traversing the whole universe, like almighty dinosaur, living at its wake, a lot of destructions, environmental degradation and, in some cases, brazen violation of the domestic laws, rules and regulations of their host communities or countries. Thus, some of them and their subsidiaries have branches in numerous countries, impacting positively or negatively in the lives of the citizens of those countries. Again, some of them have resources that are more than the gross domestic product (GDP) of their host countries.[2] This gives them a high degree of influence in the country's policy-making and implementation and may also affect the corporation's compliance to the laws and regulations of the country, especially if doing so will give them some economic or business advantages. This must have moved Cranston to say that there are certain companies where 'a commitment to commercial success takes precedence over obeying the law. These businesses find it worth-while to continue with practices which cause offences, and treat a degree of wrongdoing as incidental to continuing with their marketing and promotional activities.'[3] In worst case scenario, some of them allegedly have a hand in the change of the government (democratic or undemocratic) of a country. For instance, an American company, United Fruit, was said to have participated in the overthrow of the government of Honduras in 1950. Thus, Reagan asserted that 'corporations are not only much concerned to protect their own immediate legislative interests, but are reaching out in an attempt to create a business-oriented political and social framework within which all public decision-making would be constrained. Instead of the society channelling business decisions within the bounds of public interests, the corporations seek to channel public-interest decisions within business-interest bounds.'[4] The directors of some of these big corporations are also so rich and powerful that the shareholders, especially because of their passivity most often occasioned by their

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[1] Thus, Berle and Means were of the opinion that the 'modern corporation may be regarded as not simply one form of social organisation but potentially (if not yet actually) as the dominant institution of the modern world.' A.A Berle and G.C Means (1932) *The Modern Corporation and Private Property*, New Brunswick and London: Transaction Publishers, at p 313.

[2] In 2017, for instance, Walmart earned more than the whole of Belgium. See www..businessinsider.com, accessed on 20/02/2022. Glencore PLC, a Swiss commodity trading and mining company, has around 160,000 employees working in over 50,000 countries. It produces and trades more than 90 commodities like zinc, copper and oil. It has, as at 2021, a revenue worth of 203.8 billion USD, https.//www.glencorecom, accessed on 19/02/2022. Wilson noted that a corporation, as such, merited to be compared 'with the State itself' G. Wilson (2011) From Black Box to Glocalised Player? Corporate Personality in the Twenty-first Century and the Scope of Law's Regulatory Reach' 62(4) N.L.L.Q 433, at p 443.

[3] R. Cranston (1979) *Regulating Business: Law and Consumer Agencies,* London: Macmillan, at p 140.

[4] M.D Reagan (1963) *The Managed Economy*, New York: OUP, at pp 129-130.

dispersed nature, find it difficult to rein them in. Consequently, a number of them tend to run their corporations as if it were their personal business with their personal interests often conflicting with the corporation's interest, causing them to have little regards to the shareholders' interests and, sometimes, no regards to the interests of the corporation's non-shareholding stakeholder. This is causing palpable fears and concerns to certain corporate watchers who believe that something ought to be done before these huge, uncontrollable and pathologically wealth-amassing corporations take over, dominate, control and rule the world,[5] disregarding, utterly, the welfare and well-being of the corporate stakeholders. Hence, there are calls in some quarters for stiffer regulations and stronger corporate governance and control of these corporations.

2. The Emergency of Big Corporations and the Need for Corporate Control

Sole trade and partnership, the original means of doing business, have some problems or limitations associated with them. They, for instance, did not give much room for business extension and growth, have some difficulties in raising capital (from the members of the public, as well as from financial institutions), partners' liabilities are, in most cases, unlimited and perpetuity, or rather, perpetual succession, of the business cannot be guaranteed. The corporation then emerged; originally, as a means of doing businesses which involved very huge capital far beyond the resources of any single individual – such as railway construction. At that time, the process of incorporating a company was very formal, if not difficult. Charter was required. These challenges were later taken care of. From that point, corporation became perceived as a very spacious or roomy vehicle to carry and accommodate 'passive' investors who wish to invest money in a big business enterprise without being actively involved in the management of the enterprise either owing to want of time or lack of managerial knowhow or both,[6] and, of course, without the risk of losing their personal assets to creditors in the event of insolvency of the company (which may be occasioned by irresponsible managerial decisions over which they have no direct control of). Investing in corporation, thus, became attractive as it could also boast of perpetual succession and ease of raising capital. From that very moment, the society and the government or State saw, in the corporation, the tendency of being too powerful, domineering, pathological and getting out of control. Thus, there was a fundamental distrust of corporate economic, political and social powers. Moves were therefore made to tame it from the outset. These were evident in, among other things, the corporate charters' routinely inclusion of a narrow definition of corporate purpose or objective clause and the strict *ultra vires* doctrine which confined corporate activities within the legislatively imposed boundaries.[7] Again, there were statutory limits on corporate size, wealth/capital and longevity. In late 19th century, however, traditional prohibition of corporate ownership of shares/stocks in other companies was removed, facilitating the creation of gigantic subsidiary or holding companies. Again, capitalisation limits were abolished, presumption of eternal life replaced grants of incorporation for a limited term.[8] Moreover, the object clause and the resultant *ultra vires* doctrine has been seriously watered down,[9] to the extent that companies, in corporate statute of some countries, are given the powers of a natural person of full capacity.[10] What this means is that, currently, the powers of the corporation is virtually unlimited. It can venture into and do whatever legitimate business any human being of full age and capacity can do. All these combined gave rise to the emergence of big corporations with huge economic empires. These empires are entrusted into the hands of very few people or directors to manage and direct,[11] while the contributors of these capital have little or nothing to do with the management of the capital.[12] The directors may have little or no stake, financially, in the company. This gives rise to the problems inherent with agency – popularly referred to in modern

[5] See J. Bakan (2006) *The Corporation: The Pathological Pursuit of Profit and Power*, (rev. ed.) London: Constable, at p 9.

[6] European Commission (EC BULL (BULL) Supp 8/75, at p 16) noted that efficiency demands that the contributors of capital hand over the management of the company's affairs to a smaller group capable of relatively quick and continuous decision making. This also permits the company's affairs to be placed in the hands of those who are equipped with special abilities and skills which are necessary for effective management which many shareholders may not themselves possess.

[7] The *ultra vires* doctrine was declared in the case of *Ashbury Railway Carriage and Iron Company v Roche* (1875) LR 7 HL 653.

[8] See Companies and Allied Matters Act, (CAMA) 2020, s 42.

[9] ibid, s 35 which provides that 'unless a company's articles specifically restrict the objects of the company, its objects are unrestricted' See also CAMA 2020, s 44; O.J Orojo (2008) *Company Law and Practice in Nigeria* (5th ed.), p 16.

[10] See, for instance, CAMA 2020, s 43(1) which provides that 'except to the extent that a company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity.'

[11] The principal function(s) of the board of directors is the management and direction of the corporate activities of the corporation. Thus, CAMA 2020, s 269 provides that 'directors of a company are persons duly appointed by the company to direct and manage the business of the company.' In the same vein, a director was described in *Olufosoye v Fakorede* (1993) I NWLR (pt 272) 947, as a person '........authorised to manage and direct the affairs of the company.' See also *Longe v First Bank of Nigeria PLC* (2006) 3 NWLR (pt 967) 228, at p 270.

[12] See A.A Berle and G.C Means, op cit, n1.

economic parlance as 'agency cost' problems, such as the tendency of abuse of power, managerial shirking of responsibilities,[13] among others.

Put in another way, in most modern corporations, the shareholders are dispersed[14] and management is distinct and divorced from ownership. The directors are not the owners of the company. They are neither the agents of the shareholders nor are they bound to follow their instructions. No doubt, one of the rights statutorily attached to shareholding is the right to vote at the meetings of the company. The importance and impact of this right, however, is steadily diminishing as the number of shareholders in the company is increasing. It diminishes to negligible importance as the company becomes a giant company. Most often, even when they vote, it normally has nothing to do with corporate decision making which is generally made by the board.[15] Again, as the number of a company's shareholders increases, the ability or capacity of each of them to express corporate business-related opinions becomes hugely limited as no one is bound to take notice of them. Undeniably, shareholders are entitled to bring shareholders' action against the corporation and/or its management, requesting that the company be refunded of any losses or damages it may have suffered in case of fraud, theft or wrongdoings by directors or managers. Unfortunately, however, this potent right is hardly utilised and difficult to be put into operations in most public companies which are normally a large, complex and geographically dispersed entity with multiple shareholders and stakeholders. With this vast number of shareholders with radically asymmetric information and fundamentally competing interests, collective action problems are bound to occur as it will prove intractable.[16]

Again, unfortunately, the move in recent times towards large corporations coupled with the increasing complexity of business has necessitated that the board of directors be vested with wide range of discretionary powers in the running of the business of the corporation. Both the common law and the articles of association of the big corporations, most often, vest a wide range of general and specific powers to manage the business of the company on the board.[17]

Furthermore, it has been noted that a board of a public company is usually insulated from pressure from non-shareholding corporate constituencies like employees and creditors. Equally, the diffused nature of share ownership together with regulatory impediments to investor activism has combined to insulate directors from shareholder pressure. Consequently, the board has almost unconstrained freedom to exercise business judgment. Bainbridge termed this 'director primacy' to reflect the board's sovereignty.[18] All these might have moved Blair and Stout to say that directors 'are not subject to direct control or supervision by anyone, including the firm's shareholders.'[19] That shareholder control has become seriously highly weakened in the UK was obviously accepted and captured by the Cohen Committee when it said

> The illusory nature of the control theoretically exercised by the shareholders over directors has been accentuated by the dispersion of capital among an increasing number of small shareholders who pay little attention to their investments so long as satisfactory dividends are forthcoming, who lack sufficient time, money and experience to make full use of their rights as occasion arises and who are, in many cases, too numerous and too widely dispersed to be able to organise themselves.[20]

Dispersal of shareholding has, thus, led to effective control over the company being ceded to the directors[21]. In *Automatic Self-Cleansing Filter Syndicate v Cunningham,* it was said that 'the directors have absolute powers to

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[13] Adam Smith opined that companies are less efficient than partnership or sole trade because managers could never be expected to work as diligently on behalf of others as they would if working for themselves. A. Smith, *An Inquiry into the Wealth of the Nature and Causes of the Wealth of the Nations*, Modern Library edn, 1937, pp 699-700.

[14] Simply put, dispersed share ownership means that shareholders are widely distributed, each holding relatively small stake in the company, thus having little or no incentive to be actively involved in the management of the company. Their company, thus, resorts to engaging directors and managers to run the company on their behalf. The directors, having little or no stake in the capital of the company, they may be inclined to pursue their own selfish goals like better allowances and fringed benefits. This conflicts with the profit maximisation goal of the shareholders.

[15] Supporting this view, Bainbridge said that 'shareholder voting has very little to do with corporate decision making' in public companies. S.M Bainbridge (2008) *The New Corporate Governance in Theory and Practice*, New York: OUP, at p 202.

[16] See S.M Bainbridge, ibid, at p x.

[17] See *Automatic Self-Cleansing Filter Syndicate v Cunningham* [1906] 2 Ch 34, C.A; *Breckland Group Holding Ltd v London & Suffolk Property Ltd* (1988); see also ss 2 and 3 United Kingdom Companies Act, 1985, and Art 70 thereof.

[18] S.M Bainbridge, n15, at pp 11-12.

[19]M.M Blair and L.A. Stout 'A Team Production Theory of Corporate Law' (1999) 85 Va Law Review 247, at p 247. Shareholders are a remote dispersed group with individually little influence and collectively lacking a unified voice on matter of importance. See Brenda Hannigan, *Company Law* (2009) London: OUP, at p 356.

[20] Company Law Amendment Committee, Cmd 6659, /91945), para 7(6) (Cohen Committee). The Jenkins Committee of 1962 held a similar view. See the Report of the Company Law Committee, Cmd 1747 (1962), para 106.

[21] J.Parkinson, *Corporate Power and Responsibility* (1993) New York: OUP, at p 56.

do all things other than those expressly stated to be done by the company shareholders.'[22] Since absolute power corrupts absolutely, the possibility of abuse of these wide powers cannot be rules out. This has therefore necessitated the need for checks (and balances) of the managerial activities of the board to avoid bleeding or rearing corporate overlords or demi-gods. Thus, Stokes said that 'the power which the aggregation of wealth places at the disposal of a corporate sector identifies as a fundamental issue of the company law the regulation of the activities of those who control the company.'[23] Similarly, Grantham noted that 'since the appearance of the first joint stock companies, the need to balance the freedom to conduct business against the scope of managerial abuse of corporate power has been recognised.'[24] Consequently, though the law and the court, in line with business judgment rule,[25] have refused to review the board's business discretions,[26] they have stood against the tide of human nature to act not in self-interest but in the (overall) interests of the company. Agreeing with this point of view, Bainbridge wrote that 'the discretionary authority of the board of directors must be insulated form shareholder and judicial oversight in other to promote efficient corporate decision making.' He, however, added that because directors are obligated to maximise shareholder wealth, there must be mechanisms to ensure directors' accountability.[27] Equally, equity saw in the trust-like characteristics of the board's position the scope of possibility of abuse. Thus, since the earliest times,[28] fiduciary obligations were placed on directors in respect of their powers.[29] These duties require the directors to exercise their powers not for their personal interests, but for the purpose for which they were conferred. The question then is for what purpose were these powers conferred on the board? Is it solely for profit maximisation for shareholders in utter disregard to the impacts of its corporate activities on the environment and on the non-shareholding corporate stakeholders?

We have seen from the above analysis, how powerful and rich some big companies and their board have become. This must have moved Berle and Means to say that the 'modern corporation may be regarded as not simply one form of social organisation but potentially (if not yet actually) as the dominant institution of the modern world.'[30] Similarly, Wilson noted that a corporation, as described above, merited to be compared 'with the State itself.'[31] If modern corporation has become a dominant institution with magnitude of power, influence and resources comparable to that of a nation, then, it may not be too much to expect it to discharge responsibilities similar to that of a sovereign State.[32] A State discharges its responsibilities not only to her citizens but to all who are legitimately living within its territorial boundaries. Again, a State performs or discharges not just social responsibilities to the people but also economic, political, religious cultural, security-related and other similar responsibilities to them. Corporate pluralists or stakeholder advocates[33] such as - Andrew Keay, Margareth Blair, Janice Dean - are thus expecting similar wider responsibility from the company. They are of the view that a lot of stakeholder, not only shareholders, contributed to the success of the company. Company employees, its

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[22] [1906] 2 Ch 34, CA, at p 42. Consequently, once directors act within their powers, they may take decisions against the wishes of the majority of shareholders. See A. Dignam and J. Lowry (2010) *Company Law*, New York: OUP, 5th ed, at p 275.
[23] Stokes 'Company Law and Legal Theory' in Twinndy ed, *Legal Theory and Common Law*, (1986), p 155.
[24] R. Grantham 'The Content of Directors' Duty of Loyalty' (1993) pp 149-167, at p 149.
[25] The term 'business judgment rule' is an inevitable corollary of the separation of ownership and control. It is a common law doctrine in corporate law which stresses that courts defer to or respects the business judgment of the corporate board. It is anchored on the principle that the board of directors of a company are 'clothed with the presumption, which the law accords them, of being motivated in their conduct by a bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge.' *Gimbel v Signal Cos*., 315 A. 2d 599, at 608 (Del.. Ch 1974). See also Bainbridge, n14, at p 111. This rule helps to guard the board against frivolous legal allegations about the way it conducts business or makes business-related decisions. The rule is rooted on the corporate principle that the board is presumed to act in good faith, that is, within the fiduciary standards of loyalty, prudence and care which it owes to the company. Consequently, the court will not review or question the business decisions of the board unless there exists evidence that the board has blatantly breached some rules of corporate conduct or acted against the company's interests or those of its stakeholders.
[26] Thus, in *Kamin v American Express Co* (383 N.YS2d 807 (Sup Ct. 1976) where the plaintiff challenged the board's decision to declare an in-kind dividend of shares in a second company, the court stated that 'the directors' room, rather than the court room, is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations, or tax advantages.' Similarly, former Delaware Chancellor, Allen, said in *Re RJR Nabisco, Inc. Shareholders Litigation* (1989 WL 7036 (Del. Ch. 1989) that 'to recognise in courts a residual power to review the substance of business decisions for 'fairness' or 'reasonableness' or 'rationality' where those decisions are made by truly disinterested directors in good faith and with appropriate care is to make the courts super-directors.'
[27] S.M Bainbridge (2008) n15, at p 106.
[28] The decision in *Charitable Corporation v Sutton* (1742) 2 Atk 400, is cited as the oldest example.
[29] CAMA 2020 retains this fiduciary placement on the directors. It provides in s 305(1) that a company's director 'stands in a fiduciary relationship towards the company and shall observe utmost good faith towards the company in any transaction with it or on its behalf.'
[30] Berle and Means, n1, at p 313.
[31] G. Wilson, n2, at p 443.
[32] Of course, to whom much is given, much is expected.
[33] At the moment, stakeholder advocates believe that the board are not paying adequate attention to the interests of non-shareholding constituencies. They therefore opined that corporate law reform is necessary to make the company more responsible and responsive to the interests of wider constituencies.

customers/clients, creditors etc are parts of the success-story of every company. In the same vein, the residents of the local communities in which the company operates whose environment may have been suffering pollutions as a result of its corporate activities deserve some thoughts or considerations as well. All these groups and many more are viewed by these pluralist crusaders as corporate stakeholders[34] who have a stake in the company. Thus, Goyder stressed that 'the social role of the big company is becoming so important for the community that the way in which big companies discharge their social responsibilities is of immediate concern to all of us.'[35] While accepting the above quoted assertion, Lipton and Rezenbaum added that 'the corporation affects the destinies of employees, communities, suppliers and customers. All these contribute to and have a stake in the operation, success and direction of the corporation.'[36]

The above position will certainly not augur well with shareholder primacy or shareholder value[37] advocates who strongly believe that corporations owe a duty solely to their shareholders and the duty is nothing else but profit maximisation for its shareholders. That is, to make as much profit as is legally possible for its shareholders.[38] Thus, Friedman Milton strongly insisted that the social responsibility of business is to increase profit. He said that the shareholders engage the board to 'conduct the business in accordance with the shareholders' desires, which generally will be to make as much profit as possible.'[39] Again, Lantos[40] strongly averred that directors cannot be public-spirited with corporation's resources; otherwise it will be a serious breach of their duties to the company, especially the common law duty which they owed to the company to carry out their directorial duties in the best interests of the company.[41] The best interest of the company has variously been equated with the economic interests of its shareholders as it is generally accepted that the duty is to further or enhance the economic interests of the company shareholders.[42] The shareholder value advocates believe that if directors were to consider the interests of other non-shareholding constituencies, it will undermine the profit that would, otherwise, be available to the shareholders - the 'owners' of the company. To them, stakeholder approach or model will confuse the board as it leads to indeterminable results as corporate decision-making under the approach/model creates a 'two masters' problem. Thus, Bainbridge – a strong supporter of shareholder primacy or value maximisation model – argued that directors should not be allowed to deviate from shareholder wealth maximisation, lest, it will inevitably lead to indeterminable balancing standards – balancing the obviously competing interests of the various non-shareholding stakeholders which, in most cases, will be in conflict not only with one another but also with the economic interest of the shareholders.[43] Again, in the absence of clear standards, directors will be tempted to act in self-interest, 'directors who are responsible to everyone are accountable to no one', he argued.[44] This perception that company should play only economic role was very common up till 20th century as a company was perceived as 'a black box by which the company was largely isolated from its broader social and political environment.'[45] This is principally as a result of the fact that it was the market forces – demand and supply – that predominantly regulated corporate activities as against legal/state legislation. This *laissez-faire* ideology and certain judicial formulations have ended up in generating a notion that a company is 'a black box divorced from its broader social, political and ethical environment.'[46] This view-point has however attracted series of criticisms as it has caused some of the big corporations to be ruthless and pathological in its endless pursuit of maximum profit for its shareholders,[47] and in some cases, non-challant to the environmental degradations its activities are causing and the destruction of the means of livelihood of its host communities. Operations of the multinational

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[34] Corporate stakeholders may simply be defined as those who affect or are affected by the corporate activities of the corporation.
[35] Goyder, *The Responsible Company* (1961) Oxford: Blackwell, at p 7.
[36] Lipton and Rezenbaum, 'A New System of Corporate Governance: The Quinquennial Election of Directors' (1991), The University of Chicago Law Review 187, at p 192.
[37] The central idea of 'shareholder primacy' is that shareholders' (economic) interest should take priority among those of non-shareholding constituencies both in corporate Law and in managerial decision making.
[38] Supporters of shareholder value/primacy approach justify their position by claiming that shareholders are residual claimants as they are the recipients of the company's residual income and are exposed to its residual risk. As the company's residual claimants, shareholders do not get a return of their investments until all other claims on the company have been met.
[39] M. Friedman (1970) 'The Social Responsibility of Business is to Increase Profit' New York Times Magazine, 32-33, 122-126, September 13.
[40] G.P Lantos (2002) 'The Ethicality of Altruistic Corporate Social Responsibility 19(3), Journal of Consumer Marketing 203, at p 205.
[41] See *Re Smith & Fawcett Ltd* [1942] Ch. 304, at p 306. This common law duty is, undoubtedly, owed not to individual shareholders but to the company, that is, shareholders as a group. See *Foss v Harbottle* (1843) 2 Hare 461. As such, the duty is enforceable by the company. See s 305(9) of CAMA 2020. See also s 170 of the UK Company Act, 2006.
[42] See *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, at p 291; *Park v Daily News Ltd* [1962] Ch 927 at p 963.
[43] S.M. Bambridge, n15, at p 66.
[44] Ibid, at 67.
[45] Gary Wilson, n2, p 434.
[46] Ibid.
[47] The fruits of a policy of profit maximisation accrue to the shareholders as dividends and increase in share values.

oil companies in the oil-rich Niger-Delta region of Nigeria[48] is a case in point where countless and unprecedented oil spillages have not only made lives miserable but have also thrown the Niger-Deltans who are mainly farmers and fishermen out of business. In 2019, Commissioner for Environment in Bayelsa State, Udengs Eradiri, cried out that the State once offered rich pickings and bounty harvests for fishermen and farmers. Then, oil companies came 'and wrought an environmental catastrophe.' Continuing, he said that he is informed, 'almost every day of another oil spill in the state. Most of the time, little or nothing is done to clean up the mess.'[49] Gas flaring – a process where natural gas associated with petroleum extraction is burned off in the atmosphere - is also very negatively impacting not only on their environment but also on their health, as it creates acid rain.[50] Their water is badly polluted. They suffer immeasurably, as they receive little or nothing in return from both the government and these big companies operating over there.

It thus becomes obvious that over concentration on or too much devotion to shareholder interests will work or occasion hardships and would impose costs on various other stakeholders, such as employee layoffs, plant closure, poor or barely acceptable salaries/wages and working conditions, environmental pollution, and financial restructuring beneficial to shareholders at creditors' expense.

3. Conclusion

Unfortunately, this non-inclusivity of the non-shareholding stakeholder's interest, though very common in Nigeria, is not limited to Nigeria only. Thus, in the United State of America, Michigan Supreme Court held in *Dodge v Ford Motor Co*[51] that 'a big corporation is organised and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.' Reacting to the situation in the United Kingdom, Miles bemoaned that 'official recognition of the interests of companies' stakeholders in the United Kingdom had, on the whole, been lukewarm.'[52] This must have moved the country to make some far-reaching changes in their 2006 Companies Act, moving away from her shareholder primacy inclination to what it called 'enhanced shareholder value' (ESV) approach, with corporate integration of the interests of the stakeholders widely encouraged and promoted.[53] The UK Conservative Government had, earlier in 1973, appreciated and acknowledged the need for board to discharge its obligation and responsibilities not only to the shareholders but also to the wider stakeholders when it said that

> …The government are specifically recognising, in the context of company law, the generally accepted fact that ownership involves responsibilities as well as rights. This requires the company directors, on behalf of the shareholders, to discharge their social responsibilities as well as to protect their legitimate interests. The board of companies and their management thus have a manifest obligation towards all those with whom they have dealings – and none so more than the employees of the company.[54]

Nigerian corporate legislation can borrow a leaf from the UK and make a shift from its shareholder primacy approach whereby directors are asked to 'have regards' to the interests of others, which they can only do if doing so will promote the overall economic interest of the company as the directors' overall duty remains the promotion of the interests of the company. In other words, they are not duty-bound to integrate these other interests, as their duty is primarily owed to the company alone which is generally accepted to be owed to the shareholders. It is

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[48] Oil was first extracted in the Niger-delta by Shell – a Dutch company - in the year 1956. Since then, many international oil companies have extracted oil from across the region. According to Guardian Newspaper,, communities in the Niger-delta have serious environmental catastrophe. It claims that about 40 million litres of oil are spilled yearly in the region. Its farmland and water have been cloaked in oil, contaminating crops and exposing people to high levels of heavy metals like lead, chromium and mercury. The Guardian Newspaper, 'This Place Used to be Green: The Brutal Impact of Oil in the Niger Delta', Friday, 6 Dec, 2019. https://www.theguardian.com/global-development/2019/dec/06/this-place......, accessed on 12/02/2022.

[49] The Guardian Newspaper, ibid.

[50] Nigeria is one of the very few countries were gas flaring is still being practiced. Instead of processing gas, oil companies in Nigeria resort to the cheaper option of burning it as a waste product, disregarding its huge environmental and health impacts.

[51] 170 N.W 668, 684 (Micch. 1919).

[52] L. Miles (2003) 'Company Stakeholders: Their Position under the New Framework' 24(2) Company Lawyer, 56-59.

[53] In the words of Alistair Darling (he was the UK Secretary of State for Trade and Industry in 2006 when the Bill was being debated in the floor of the House), ESV recognises that directors will be more likely to achieve long term sustainable success for the benefit of their shareholders if their companies pay attention to a wide range of matters. It requires the board to promote the success of the company in the collective interest of the shareholders, but, in doing so, it will have regard to a wide range of factors, including the interests of the employees and the environment. A. Darling, House of Commons Second Reading, 6thJune 2006, Colum 125.

[54] Department of Trade and Industry, White Paper, Company Law Reform, Cmnd 5391, London: HMSO, 1973, p 5. ESV cannot be said to be a purely pluralist approach. It is however better than purely shareholder primacy approach. The major difference between the two approaches has to do which what should happen on those occasions when there is a conflict of interest between those of the company shareholders and other non-shareholding stakeholders. The ESV maintains that the shareholder interests should prevail, while the pluralist model dictates that the board should balance the relevant interests without giving automatic priority to those of the shareholders, with the aim of maximising the welfare of the relevant stakeholders in aggregate.

apparent that the end target of ESV is to have a significant behavioural effect or change on the directors, thereby causing them to be integrative of stakeholders' interests than imposing enforceable mandatory duty on them to do so, as imposing such a duty will be difficult to be enforced.[55] While we are waiting for the much needed change to the Nigerian company law, the board which is said to function as the 'corporate conscience'[56] setting the overall standards and reviewing major corporate plans from both legal and ethical standpoint, can still decide be integrative and stakeholder-friendly. Mills echoed the same viewpoint when he said that the board is 'the keeper of the company's conscience and the measure of corporate morality.....The effective company meets its creditors on time; does not abuse its suppliers or maltreat its physical environment; it clinically correct with its customers, employees, auditors, analysts, shareholders lenders and taxmen'[57] This wider stakeholder approach is highly advocated by the writers as the traditional narrow perception that directors owe their duties just to the shareholders is no longer in tandem with modern realities and thus can no longer remain sustained.[58] Big company, being a key player in the economy of any nation, should not be isolated from its broader environment. There should not be a distinct dichotomy between its economic and social roles. It should, rather be a 'glocalised player open to its environment.'[59] This is one of the major ways it can attain greater institutional legitimacy and wider acceptability.[60]

[55] One of the major reasons why the UK Company Law Review Steering Group (CLRSG) rejected pluralist approach is the issue of enforcement, that is, the practical difficulty in enforcing it. See CLRSG, Modern Company Law for a Competitive Economy: Completing the Structure (London DTI, 2000), para. 3.5. It appears unrealistic or probably undesirable to expect a court to sit in judgment on whether the directors had struck what the court considered to be an appropriate balance between the competing interests of the stakeholders. No doubt, such matters do not easily or readily lend themselves to legal analysis.

[56] *Institute of Directors, Guideline for Directors* (1995) Directors' Publications, 6th edn., at p 15.

[57] G Mills *Controlling Companies*, Unwin Hymen, (1998), at p 21.

[58] Thus, in *Lonrho v Shell Petroleum* (1980) 1 WLR 627, at p 634, Diplock LJ stressed that the 'best interest of the company might not be exclusively those of its shareholders but may include those of its creditors.'

[59] Gary Wilson, n2 at p 434.

[60] Dahl strongly believes that 'every large corporation should be thought of as a *social enterprise*; that is, as an entity whose existence and decisions can be justified only insofar as they serve public or social purposes.' R.A Dahl (1972) ' A Prelude to Corporate Reform' Business and Society Rev. 17 (emphasis in original)