POSSIBLE MEASURES NIGERIA MAY TAKE TOWARDS IMPROVING GOOD CORPORATE STAKEHOLDING AND SOCIAL RESPONSIBILITY PRACTICES IN THE COUNTRY*

Abstract

There is the belief in so quarters that some of these big public companies, especially multi-national oil companies operating in Nigeria are not living up to the expectations in the areas of being effectively responsible as a good corporate citizens and being integrative of the interests of the wiser constituencies as well as adopting CSR practices that are truly beneficial to the people. Allegations abound of the adoption of environmental unfriendly practices by these companies resulting in grave environmental degradation in their host communities. These irresponsible activities are causing a lot of untold hardships on the people, as they result to loss of their peoples' means of livelihood – the people are predominantly farmers and fishermen, death of aquatic animals and plants, health hazards, amongst others. These have caused series of problems/misunderstanding amongst the host communities and these companies, often resulting in civil unrest, protests, kidnapping of some the workers of these companies, institution of legal actions against these companies, etc. It is believed that the situation obtainable in Nigeria is different (at a huge/great variant with that obtainable) from those available in other advanced countries where companies adopt the best corporate practices and are hugely concerned with the impacts of their corporate activities on their wider stakeholder groups. It is believed some of these countries adopted some measures which 'forced' those big, otherwise, wealth-maximisation-conscious companies operating in those jurisdictions to be civil, responsible and responsive. The writer therefore deemed it proper to look into some of the measures Nigeria may take to make the companies operating therein to be responsible, broader-minded and stakeholder oriented. In doing this, doctrinal research methodology was adopted. The writer is optimistic that the adoption of the measures suggested in this work will help immensely in making companies operating in Nigeria to be more socially responsible, responsive and integrative, instead of their current disposition of over-indulgence in insatiable wealth accumulation and maximisation.

Keywords: Corporate Stakeholding, Social Responsibility, Good Possible Measures, Nigeria

1. Introduction:

It may not be easy to controvert the fact that there is a great need for many public companies operating in Nigeria to adopt more stakeholder-oriented and environmental-friendly programmes and policies. Doing so will go a long way in assuaging the grievances of many stakeholders, especially the inhabitants of the local communities upon which they operate – the people of the Niger-Delta region quickly comes to mind whose environment has been unspeakably degenerated and gravely messed-up by these companies. No doubt, companies can, on their own accord or volition and without any external pressure, chose to be broad-minded, sensitive to and integrative of the wider stakeholders' interests and concerns, notwithstanding that such a company is operating in a shareholder-primacy or shareholder wealth maximisation jurisdiction.[1] The chances of the companies that are, generally, profit-maximising conscious to do such without any outside push or pressure is, however, slim. External influence or pressure by way of either a change in corporate legislation as regards the corporate objective in Nigeria,[2] or on the board composition, amongst other options, is therefore suggested. Thus, in an attempt to increase the social behaviour or responsibility of companies, a model of corporate approach holds that the conditions for social/wider responsibility are not met where deciding whether or not to be integrative is left merely at the discretion of the (enlightened) management team. The model, instead, views socially responsible behaviour as a product of decision-making processes that are open to influence by the constituencies affected by corporate activities. The source of this influence exerted on the company can either be from the 'outside' or from the 'inside' of the corporation. It is from the 'outside' where the company and the affected parties are in a sort of a bargaining relationship, or where the affected parties have other means of mounting pressure on the company. The influence is from the 'inside' where, for instance, the representatives of the affected parties are given the opportunity to participate in the corporate decision-making processes. The above model therefore entails seeking to empower third parties in order to increase their ability to shape or influence company (social) policies,[3] instead of

* **By John Arinze EZE, PhD,** Lecturer, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam, Anambra State, Nigeria. Email: ja.eze@coou.edu.ng; aribest01@yahoo.com. Telephone: +2347038584399; and

* **Patricia Chinwe ILOKA, LL.B, BL, LL.M, PhD,** Lecturer, Department of Private and Public Law, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Anambra State, Nigeria. Phone No: 08035696281, Email: chypat4@gmail.com

[1] See Eze, J.A (2021) 'Can Directors in a Shareholder Primacy and Enlightened Shareholder Value (ESV) Regimes be Public-Spirited?' 3(1) *COOUJCPL* 21.

[2] See Eze, J.A (2017) 'The Corporate Objective Question: In whose Interests should a Company be Run in Nigeria?' 3(1) *COOULJ* 147.

[3] This has the tendency of working out better if the management are already receptive (that is, positively disposed) to third-party interests.

endeavouring to invoke the board's voluntary response, by ensuring that directorial decision-making complies with procedural standards that integrate the appropriate other-regarding attitude.[4]

Let us now look at some of the (corporate) reforms that may aid Nigeria in inducing her corporations to be more socially responsible and integrative, starting with the need to increase the circulation, within the company's policy-makers, of vital information regarding the impacts (especially the negative ones) of the company's activities on its stakeholders.

2. Improving the In-Flow of Information

One of the ways of making corporations more responsible is by ensuring that there is improvement in the flow of vital information within the company's policy-making body. It is believed that if the company decision-makers are adequately informed about the consequences of the company's activities on the stakeholders, they are more likely to be considerate and responsible in their corporate policies, and make adjustments, where necessary, to mitigate the harsh impacts of those decisions. Thus, it is alleged that there are 'circumstantial evidences that actors will make some attempt to incorporate new information into their actions and [e.g.] with the case of environmental information, this can be expected to have the effect both of making actors more environmentally aware and having a direct influence on decisions taken.' [5] One of the ways of increasing the flow of information within the company is through legal regulations. Imposing legal obligations on the company can influence the quantity and quality of information companies gather, for instance, imposing a duty on companies to report on certain and specific impacts of its activities on, say, the environment. In a bid to comply with that legal regulation or obligation, the company will be forced to monitor the outflow of waste materials resulting from its production processes. Such information gathered helps increase the company's awareness of the impact of its activities and can therefore aid the company in its (environmental) policy-makings.[6] Again, a specific duty can be imposed on companies to obtain and analyse information on specific areas or objects. This may be primarily aimed at broadening the cognitive base on which company decisions are made.

Though it is important that the company collects information about the impacts of its corporate activities on stakeholders, it is more imperative that the information so collected should reach the relevant decision-makers in the company, lest, it may not be (properly) utilised and therefore become ineffective.[7] Legal intervention can be an effective way in making sure that the relevant information acquired gets to the appropriate authority within the company. This may be achieved by mandating the appointment of specific director(s) with specified responsibility on the area in question, and with specific requirement that the director(s) must be familiar with a given class of information. This will leave the director(s) involved with no other option than to make efforts to gather in the specific area as much information as possible and disseminate same, as well as familiarise themselves with the relevant knowledge as their ignorance in the particular area will no longer be accepted as an excuse. One of the consequences of adequate information flow in a company is that it brings about the internalisation of public/societal values and expectations in corporate decision-making. When company's decision is made on an adequate informational base, it has a potential of leading to an informed and positive response to issues of stakeholder welfare that is more generous than that required by substantive regulation.[8]

Apart from improving the inflow of information, other ways by which companies can be made to be more integrative, accommodating and socially responsible include: extension of directors' fiduciary duties to cover the interests of affected constituencies; increased disclosure requirements; mandatory consultation and expanded board representation. We are now going to treat each of them in details, starting with considering the possibility of extending the board's 'scope' of duties.

3. Extending the Scope of Fiduciary Duties

[4] See generally, Parkinson, J (1993) *Corporate Power and Responsibility*, Oxford: OUP at pp 365-366. Similarly, Teubner wrote that 'reflexion cannot be voluntary but needs to be stimulated by powerful external forces. Personal voluntaristic 'responsibility' is not the central question.' Teubner, G 'Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalisation of Corporate Responsibility', in K.J Hopt and G Teubner (eds.) *Corporate Governance and Directors' Liabilities*, (1985), Berlin: de Gruyter, at p 165.

[5] Gray, R (1990) *The Greening of Accountancy: The Profession after Pearce*, at p 78. Stone has earlier made a similar assertion when he wrote that one of the ways of increasing corporate responsibility is by expanding company's 'information nets.' Stone, C.D (1975) *Where the Law Ends: The Social Control of Corporate Behaviour*, New York: Harper and Row, chs 16 and 17.

[6] See Parkinson, J (above, n 4), at p 366.

[7] Unless where a failure to respond is likely to attract legal sanctions, the decision whether or not to respond to the information made available to the company remains at the option of the management.

[8] See Parkinson, J (above, n 4)**,** 367-369.

Nigeria practices shareholder primacy approach[9] under which directors' fiduciary duties are owed solely to the company (ie, shareholders as a whole),[10] and enforceable, as a general rule, by the company itself.[11] It is thought that one of the ways by which a company can be made to incorporate the interests of certain non-shareholding stakeholders in corporate decision-making is by extending the directors' fiduciary duties to accommodate those interests. By extending these fiduciary duties, the board will now be forced to integrate the specified non-shareholding stakeholders' interests and can be sued by the stakeholders if they fail to do so. It has, however, been doubted if the extension of directors' fiduciary duties (in this regard) offers much realistic possibilities in themselves of altering company behaviour against the will of the management. According to Sealy, duties owe to corporate stakeholders who have potentially conflicting interests are for all practical purposes unenforceable, as the inevitable resultant disputes where the interests of one of the stakeholder groups are advanced at the expense of another or others do not give rise to justiciable issues.[12] Parkinson[13] notes that multi-constituency duties might, in theory, be either an objective or a subjective duty. Objective duties require the court to consider whether in the court's view, the directors' behaviour adequately observes and respects the interests of the relevant constituencies.[14] Imposing such objective duty may pose some challenges.[15] Parkinson, for instance, stresses that disputes about when profit-seeking should be constrained in favour of the interests' of non-shareholding groups and to what extent, and about when the interests of the non-shareholding groups should be traded off against each other are not amenable to resolution by reference to general standards. In other words, there is no one standard-fits-all. Thus, Chirelstein[16] emphasises the impossibility of reflecting a 'complex social purpose in a set of standards precise enough to be includable in a business corporation statute, intelligible to lawyers and enforceable by the courts.'[17] It is also doubtful if the problems can be overcome by a 'code of conduct' enforced through quasi-judicial body, in order to determine if in any given case management has had due regard to the interests of the stakeholders.[18] The Confederation of British Industry (CBI) also opposed the enforcement mechanism.[19] The issue could have been made a subject of external regulation and the need for internal response would have been side-tracked (or reduced greatly) if to say that the situation was amenable to a giving standard that fits all situations. The elusiveness of appropriate general standards is central in the case of profit-sacrificing social responsibility. The court will be required, upon the default of such standards, to engage in an *ad hoc* assessment of the way in which management had chosen to balance the relevant interests. However, as noted by Lord Wedderburn, requiring the courts to administer corporate policy 'by choosing between the different versions of the 'reasonable balance' of interests in practice [is] something judges certainly would not do and are not equipped to do.'[20] Sealy opines that a test of 'fairness' would not take the matter any further, since it is only a particular

[9] This is a type of corporate objective whereby promoting, furthering, enhancing and maximizing the economic interests of the shareholders is the sole duty or sole concern of the directors and everything they do is geared or channeled towards that end. For a detailed discussion of the meaning of shareholder-primacy or profit maximization approach, see Eze, J.A (2017) 'The Corporate Objective Question: In Whose Interests should a company be Run in Nigeria?' 3(1) COOULJ 147. That Nigeria practices shareholder primacy approach can hardly be doubted as this is evident in Companies and Allied Matters Act (CAMA) 2020, s 305, esp., 305(3) which imposes a duty on the directors to act in what he believes to be 'in the best interests of the company.' The expression 'best interests of the company' has severally been equated and synonymous with the best interests of the shareholders which is deemed achieved or fulfilled once the shareholders reap maximally the fruits of their investment in the company either through appreciation in the share value of the company or through the payment of (huge) dividends to them. See Eze, J.A (2017) 'Shareholder Activism as a Possible Catalyst for Corporate Non-shareholders' Inclusivity' 3() COOULJ 170, esp., at p 188. See also Ferran, E (1999) *Company Law and Corporate Finance*, London: OUP, at p 126.

[10] See *Percival v Wright* [1902] 2 Ch 421. See also Eze, J.A (2018) 'To Whom do Company Directors Owe their Directorial Duties? The Position in Nigeria and the United Kingdom' 1(1) *COOUJCPL* 112; Companies and Allied Matters Act (CAMA) 2020, s 305(2).

[11] Rule in *Foss v Harbottle* (1843) Hare 461. This common law decision/position has been codified in the CAMA 2020 (ibid), s 305(9).

[12] Sealy, L.S (1987) 'Directors' 'Wider' Responsibilities- Problems, Conceptual, Practical and Procedural' 13 *Mon University Law Rev*, 164, at p 175. Referring to a form of multi-beneficiary duty which was previously a part of German company law, Vagts said that 'the evidence......points strongly to the conclusion that this is not the sort of concept that gradually acquires shape and substance through case-to-case adjudication but rather one that continues to shift around uneasily.' Vagts, D.F (1966) 'Reforming 'The Modern' Corporation: Perspectives from the German' 80 Harvard Law Rev 23, at pp 46-47.

[13] Parkinson, J (above, n 4), at p 370.

[14] But, as already noted, the court is generally reluctant and uncomfortable with reviewing the business decisions of the board - which is precisely what the said objective duty is asking it to do.

[15] See Eze, J.A (2022) 'The Possibility of Imposing Enforceable Legal Duty on the Board with Respect to the Interests Non-shareholding Stakeholder Groups' 13(2) NAUJILJ 40.

[16] Chirelstein, M.A 'Corporate Law Reform' in J.W McKie (ed.) *Social Responsibility and the Business Predicament* (1974) 41, at p 76.

[17] This difficulty that would be faced (in making this assessment and reassessment by the board and the court respectively) must have informed the UK government's adoption of subjective duty in section 172 of the Companies Act 2006.

[18] See UK White Paper, *Company Law Reform* (Cmnd. 5391, 1973), para 57.

[19] CBI, *'The Responsibilities of the British Public Company'* (1993) paras 12 and 13.

[20] Lord Wedderburn 'The Legal Development of Corporate Responsibilities' in K.J Hopt and G. Teubner (eds.), *Corporate Governance and Directors' Liabilities* (1985) 3, at p 15. Even if they are capable of doing such, they will not do so as it negates

way of characterising the issues at stake and therefore does not offer any additional determinate guidance.[21] A subjective duty would require the court to decide whether or not the board had approached the task of balancing the relevant stakeholders' interests in 'good faith'. That is – whether the directors believed that their decision was an appropriate one, bearing in mind its impacts on the constituencies involved. But, as earlier noted, except in cases of gross abuse of position, even in cases where the board has a duty to act solely in the interests of the shareholders, it has always been difficult to counter the board's claim that they acted in the interests of the beneficiary.

Obviously, multiple constituencies present additional difficulties as they present almost an unlimited scope for arguing that an apparent slighting of the interests of one group is essential in order to safeguard the interests of the other or others. Establishing that the board did not believe that its decision represented the best available compromise would therefore most often prove to be impossible. Consequently, multi-beneficiary duties 'are liable to collapse into mere permissions,'[22] notwithstanding being couched in mandatory language. It may therefore be concluded that although extending directors' fiduciary duties - whether the 'objective' or 'subjective' form - is not pointless, it would, however, not lead to much substantive pressure being mounted on directors/managers to depart from their preferred course of action. Broadening of directors' discretion allowing them to depart from the requirement of profit maximisation to social responsibilities, in appropriate circumstances seems to be the preferred and more practicable option. That may prove a necessary adjustment in creating an appropriate legal setting for changes in management behaviour which is the intended consequence of other methods of inducing social responsibility. Thus, Parkinson opines that: 'A reformed fiduciary duty might accordingly stipulate that the directors are under the obligation to conduct the business for profit, but that in doing so, they must take account of affected interests (which might be specified).'[23] In order to ensure that the board considers the interests of the affected constituencies, a duty to disclose if and how they have done so may be imposed on it. This will be considered below.

4. Disclosure of Corporate Social Performance Requirements

This has to do with enhancing the ability of third parties to influence company social behaviour - achievable by enhancing the third parties' position by increasing their level of knowledge about the company and its activities through corporate information availability. It is hugely believed that the availability of information is a pre-requisite for effective public pressure for improved corporate social, ethical and environmental performance.[24] In other words, owing to the raised profile of corporate responsibility issues, coupled with the more intense scrutiny to which corporate activities are subjected to and the seemingly readiness of major market actors and others to use their position to influence corporate conduct, companies are increasingly being forced to be more concerned with and sensitive to the way their social, ethical and environmental performance is being perceived. Again, changes in the nature of the economy have resulted in the increased in significance of intangibles to the company - like brands or corporate reputation. At the root of all these is the availability of detailed and quality information to the stakeholders and other major actors and regulatory agencies upon which they can make informed decisions about the company and, where necessary, put pressure on them for a change or make regulatory interventions as the case may be.[25]

It should be pointed out that the mere fact that companies are under a duty to disclose information will not by itself ensure that they will change their behaviour. Currently, environmental and social reporting is becoming common amongst big companies. However, even when the information is disclosed, its completeness and reliability cannot be vouched. This notwithstanding, the importance of social performance disclosure cannot be

or is contrary to the business judgment rule. Business judgment rule simply represents the free hand the law and business tradition gave the directors in the management of the business, insofar as they acted in good faith, notwithstanding that the said business decision resulted in a loss of business for the company or, upon a hind-sight, the board would have taking another line of decision.

[21] Sealy, L.S (above, n 12), at p 175. The above are some of the classic problems of corporate pluralism. See, Eze, JA (2018) 'Issue with the Adoption of Corporate 'Pluralist' Approach' 1(1) *COOUJCPL* 231.

[22] Parkinson, J (above, n 4) at p 371.

[23] Parkinson, ibid, at p 371. Obviously, this suggestion of his was adopted in the UK Companies Act 2006, s 172.

[24] Parkinson, J (2003) 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame' 3 JCLS 3, 11.

[25] This increased in sensitivity does not, however, necessarily imply improvements in the way companies manage their responsibilities, as they may, instead, resort to image-makings to create the impression/appearance of change, or adopt a defensive stance (stressing the (high) costs of embarking on the needed changes or compliance to higher standards alleging that it damages its competitiveness and in turn, pose risks to jobs), or embark on diversionary expenditures on philanthropic gestures orchestrated to enhance the reputation of the company, without actually addressing the underlying problems in their core business processes.

over-emphasised.[26] It is essential in balancing and supplementing purely financial indicators of company performance. A belief that 'openness in company affairs is the first principle in securing responsible behaviour' underlies recommendations in the 1973 UK White Paper, *Company Law Reform*,[27] for a more comprehensive disclosure framework. One of the most carefully worked-out and ambitious programme of social disclosure proposed in the UK was the one put forward by Social Audit in 1973.[28] It was partially in response to the 1973 White Paper. Its recommendations demanded for detailed reporting on, among others, employment practices and industrial relations, consumer affairs, and environmental issues. The reason for demanding such disclosure is partly to 'shame' the company into better performance,[29] or more positively, to incentivise the managers into meeting higher standards.[30] The Accounting Standards Steering Committee seemingly agreed with this when it insisted that 'managements naturally respond to those indicators by which they consider their performance is judged, and strive to achieve and present results accordingly. Special attention is bound to be given to those areas where the spotlight falls.'[31] Currently, the spotlight is increasingly been beamed on corporate social performance and the extent of integration of the interests of non-shareholding stakeholders. This may therefore cause the management to endeavour to improve on its integrative and social/ethical performance, as failure to do so may attract negative reactions from the stakeholders and the regulatory agencies – whose attention is awakened by the availability of reliable corporate information.

The constituency group that is in the best position to sanction management for anti-social conduct or pressurise them into becoming more socially responsible is the shareholders. They can be able to use internal democratic processes[32] and market controls available to them to attempt to secure improvements in the company's social profile. They are more likely going to do so if the act or omission in question is such that paints the company in negative light before the public and thus has the tendency of depleting the company's profit and/or share value in the capital market. It is, however, doubtful that 'conventional' shareholders will respond attentively and proactively to disclosures about the social record where the corporate irresponsible behaviour has no impact on profits, especially where improvements would be likely to reduce profitability.[33] Credence is added to this claim by *Social Audit* which, after carrying out a survey among institutional shareholders, came to the conclusion that most institutional investors perceive themselves as 'acting almost exclusively on behalf of, or for the benefit of their own shareholders, clients, supporters, or policy-holders and feel bound to reflect this in their investment policies. The question of a separate responsibility to society for the performance of the companies invested in arises therefore only incidentally, if at all.'[34]

---

[26] Thus, the UK Company Law Reform Committee (1973) said that 'the bias must always be towards disclosure, with the burden of proof thrown on those who defend secrecy.' White Paper, Company Law Reform (Cmnd. 5391, 1973), para 57.

[27] White Paper, *Company Law Reform* (Cmnd 5391, 1973), para 10. For the discussion of this, see Gray, R, Owen, D & Maunders, K (1987) *Corporate Social Reporting: Accounting and Accountability*, (Hemel Hempstead) at pp 39-42.

[28] See 'The Case for a Social Audit' (1973) 1 Social Audit 4; Imberg, D & MacMahon, P (1973) 'Company Law Reform' 2 *Social Audit* 3.

[29] Managers and directors generally make efforts to avoid any (corporate) information that would be embarrassing if publicised. They usually value their professional reputations; and are reluctant to have their personal and professional failings exposed. They are also displeased to be linked with a company that is held in low public esteem. See Parkinson, J (above, n 4), at p 373.

[30] Company's response (to this demand for disclosure) may trigger the necessity for it to systematically collect information in order to comply with the obligation to disclose. This may induce a process of moral reflection amongst the top management team. Being better informed about the impacts of the company's activities, managers may, on their own accord, adopt higher standards of social ethical and environmental performance: Parkinson, J (above, n 24), at p 4. See also Stone, C.D (1975) *Where the Law Ends: The Social Control of Corporate Behaviour*, New York: Harper & Row, ch 18.

[31] The Accounting Standards Steering Committee, *The Corporate Reporting* (1975), at 38.

[32] For instance, the statutory right of appointing and removing of directors vested on them. See CAMA 2020, s 273.

[33] Seemingly, most of the corporate ultimate beneficiaries will have an orientation or disposition similar to that stated above. Though survey evidence exists which suggests that a majority of pension scheme members would like their funds to use their voting rights to put pressure on the companies they invested in to improve their social performance, (Simpson, A 'Money Talks: The Rise of Socially Responsible Investors' in R Cowe (ed.), *No Scruples?* (2002) London: Spiro pp 21-22), the tendency that many of them would wish their pension funds to do so to the financial detriment of the fund is doubtful. See generally, Eze, J.A (2017) 'Shareholder Activism as a Possible Catalyst for Corporate Non-shareholders' Inclusivity' 3(1) *COOULJ* 170.

[34] 'The Case for a Social Audit' (1973) 1 *Social Audit* 4, at 9. That notwithstanding, some institutional investors still pay good degree of consideration to company's social status before investing in them, and some engage the company's management in active discussion with a view to bring about an improvement in the company's social performance. See Eze, J.A (ibid). In the UK, institutional investors got a boost to embark on these types of activities by the amendments made to the Pensions Act 1995, requiring pension fund trustees to divulge 'the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments' and 'their policy (if any) in relation to the rights (including voting rights) attached to shares.' Pension Act 1995, s 11A, added by the Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations 1999, SI 1999/1849. Other contributors to the growth in socially responsible investments (SRI) include: the creation by investment management firms of SRI funds; and the development of consultancies that monitor and benchmark corporate social performance on behalf of their investor

It is inferable from the above finding that pressure for a changed corporate behaviour that goes beyond that required for short-term profit maximisation is likely to come mainly from ethical investment bodies or other organisations which are particularly sensitive to ethical issues, and from those who have acquired shares specifically for the purpose of campaigning for a change in the company's policy. Ethical investors can achieve this through certain ways - which include – by: refusing to invest in companies that are ethically unsound; disinvesting from such a company if the unethical conduct is on a significant scale - this may lower the company's share price sufficient enough to force the management to reconsider the company's policy;[35] making efforts to remove the members of the board and what Parkinson termed a 'policy of positive engagement' - that is, an attempt to raise standards of performance in portfolio companies through dialogue or voting.[36] However, there are a number of difficulties associated with this, not least the low level of ethical investors' stake in the company. There is also the noted reluctance of the institutional investors to intervene/interfere in the affairs of investee companies, as well as the collective action problems. Added to these are the agency problems and conflict of interest affecting shareholder and external fund manager relationships; and the characteristic lack of support from conventional investors. All these can cause the effectiveness of ethical institutional investors to be minimal.[37] The significance of these efforts lies more in their ability to influence a company's behavioural change by concentrating public attention on the company's ugly or irresponsible record(s) than in their direct effects. But, as part of a broader strategy, they may yield results.[38] Similar positive result is expected where companies operating in Nigeria are mandated to consult with wider stakeholders, in certain cases, before taking actions especially in sensitive issues or matters that will have grave impact on the wider stakeholder constituencies. This will now be considered below.

5. Mandatory Consultation

Nigeria can make certain statutory provisions whereby companies are mandated to consult the stakeholders on specified issues, and opportunity is given to the stakeholders to make their views known on corporate issues affecting their interests with a view of effecting a change in the (proposed) company policy. In the UK, for instance, there are certain aspects of industrial relations where consultation is mandatory. They include - health and safety issues,[39] redundancies,[40] and transfer of undertakings.[41] Consultation has the possibility of aiding the company in accommodating wider interests, just like most other processes that expand the cognitive base of decision-making. In Nigeria, directors are elected by the shareholders and they are primarily shareholders' representatives; answerable and accountable not to any other person whose lives their actions shape but (to) shareholders only. Furthering shareholders' interests is the board's principal concern. We are now going to consider if this single constituency-minded approach may be changed by altering the composition of the board through including representatives of other stakeholders in the board.

6. Broader Participation in Corporate Governance: Altering the Composition of the Board

Ibrahim *et al* suggest that a company's directorial type affects CSR decisions, as outside or independent directors appear more concerned about the social and wider responsibilities of the company.[42] Thus, there are some proponents put forward in recent times aimed at broadening participation in the corporate board - through altering or modifying its composition - so as to make its approach more inclusive, integrative and socially responsible. Among them, two models are the most popular. The first model targets at giving the company a 'conscience' by inserting persons who have the faculty, sensibility and sensitivity (public-oriented or public-spirited individuals) into the board: it is the strong position of Hemingway and Maclagan that directors' personal values strongly

clients and sometimes coordinate investor engagement. See Simpson, A 'Money Talks: The Rise of Socially Responsible Investors' in R Cowe (ed.) *No Scruples?* (2002) London: Spiro, p 23.

[35] There will always be, however, ready buyers – in a well functioning capital market- for shares in companies that ethical funds/investors reject to buy or disinvest from 'and so (except where poor social, ethical and environmental performance is reflected in poor financial performance) share price and the cost of capital for those companies will be unaffected.' Parkinson, J (above, n 24), at p 18. See also Herman, E.S *Corporate Control, Corporate Power* (CUP, 1981), at p 269; Williams, C.A (1999) 'The Security and Exchange Commission and Corporate Social Transparency' 112 *Harvard Law Rev* 1197, at p 1287.

[36] Parkinson, J ibid, at p 18.

[37] See Stapledon, G.P (1996) *Institutional Shareholders and Corporate Governance*, New York: OUP, ch 10. Myners Review couched it thus - there is a 'general reluctance to tackle corporate underperformance in investee companies, particularly pre-emptive action to prevent troubled companies developing serious problems.' Myners, P, *Institutional Investment in the United Kingdom: A Review* (London, HM Treasury, 2001), 10.

[38] See Stevenson R.B (1980) *Corporations and Information: Secrecy, Access and Disclosure*, (Baltimore) at p 139.

[39] Health and Safety at Work Act 1974, s 2.

[40] See Employment Protection Act 1975, ss 99-107.

[41] See Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006.

[42] Ibrahim, N.A, Howard, D.P & Angelidis, J.P (2003) 'Board Members in the Service Industry: An Empirical Examination of the Relationship between Corporate Social Responsibility Orientation and Directorial Type' 47(4) *Journal of Business Ethics* 393.

influence the company's CSR policies.[43] The second one aims to give the representatives of the stakeholder groups a direct input into corporate policy. This, however, is usually concerned primarily with the representation of the employees. Proposals for the first kind have been made chiefly in America; and those of the second have been made mainly in the Europe. Among the best proposals put forward in America are those of Stone,[44] and Nader *et al*. Stone suggested the appointment of 'general public directors' ('GPDs'). The GPDs, which would normally be (in) the minority of the board, would be nominated by the State agency. The appointment would, however, requires the approval of the board, which would also have the power to remove them. The nominees should include mainly people of proven integrity and with vast experience, for instance, semi-retired executives and academics. Some of the functions of the GPDs include: working towards the improvement of inflow of information - for example, by commissioning impact studies - which should not be limited only to the usual environmental and safety concerns, but may extend to any other area where there is a possibility of harm to others; and outflow of information, especially to public authorities. For instance, GPDs might disclose timely any harmful or unconventional practices of the company which affect negatively any given stakeholder group, thereby prompting speedy response of the appropriate regulatory agencies. As regards strengthening the company's 'conscience', GPDs would perform a 'superego function', attempting to inject into its thinking an awareness of the needs, expectations and interests of others and a willingness to consider alternatives to narrowly conceived self-interested action.[45] It is believed that GPDs would invigorate the board's cognitive element of responsibility, and may therefore 'broaden the board's horizon [and].....stimulate action not previously contemplated.'[46] Positively, this may lead to increase in profit-neutral or social-enhancing responsibilities. The effectiveness of the proposal may, however, be affected by the minority status of the GPDs in the board. Again, in their bid to retain the goodwill of the management, the potency of the GPDs' policy proposals may be toned down - as any of the GPDs that are seen to be radical or as not having primarily the financial interests of the company at heart would find the management unreceptive. Furthermore, as the GPDs would be selected mainly from amongst the established business individuals, it is doubtful that they would normally see the company's responsibilities as extending much beyond compliance with law and the maintenance of reputation of the company and that of the management team.[47] And, for the fact that the board members have the right to veto the nominees, they may screen out any nominee perceived as a boat-rocker. Again, the very fact that the members of the board will be given the right to remove any of these GPDs will likely affect its potency and effectiveness as the board can easily remove any of such directors, especially radical and public-spirited ones, whose genuine and people-oriented views they consider unfavourable to the company. This may also cause some of such GPDs who are conscious of retaining their position in the board to water-down their activism or public-oriented disposition. On a happy note, the GPDs would not, at least, be initially selected by the management and therefore would not be 'tied to the inside hosts by some sort of personal or business relationships.'[48]

Nader, *et al*,[49] proposed, instead, (for) the appointment of 'constituency' directors (CDs) as a way of increasing corporate cum directorial social responsibility. The CDs would neither be elected by nor accountable to the affected stakeholder group(s). They would rather be appointed by the shareholders. Obviously, this is to prevent the CDs from furthering the interests of the individual constituencies they represent to the detriment of the company's financial wellbeing and the interests of other stakeholder groups.[50] Accordingly, the CDs would have a duty 'to balance responsibility for representing a particular social concern against responsibility for the overall health of the enterprise.'[51] They would sit on a 'supervisory board'; and their power/responsibility would include the selection and removal of the chief executive and the right to veto the appointment of other senior officers, and to approve or veto executive business policies. The interests they are going to represent include employee welfare,

[43] Hemingway, C.A and Maclagan, P.W (2004) 'Managers' Personal Values as Drivers of Corporate Social Responsibility', 50(1) *Journal of Business Ethics* 33.
[44] Stone, C.D (1975) *Where the Law Ends: The Social Control of Corporate Behaviour*, ch 15.
[45] Parkinson, J (above, n 4), at p 387.
[46] Brudney, V (1982) 'The Independent Director – Heavenly City or Potemkin Village?' 95 *Harvard Law Review* 597, at p 651.
[47] In a research conducted by Aupperle *et al* (1985) a sample of executives confirmed economic responsibility as their highest priority. This is followed by the legal, ethical and the discretionary CSR components: Aupperle, K.E, Carroll, A.B & Hatfield, J.D (1985) 'An Empirical Investigation between Corporate Social Responsibility and Profitability' 28 *Academy of Management Journal* 446. A similar finding was made by Moore and Richardson who observed that economic component continued to be emphasised in the UK, with the main responsibilities being seen as producing goods and services and obeying the law: Moore, C and Richardson, J (1998) 'The Politics and Practice of Corporate Responsibility in Great Britain', in L.E Preston (ed.) *Research in Corporate Social Performance and Policy*, Greenwich: JAI Press, Vol. 10, pp 267-290. See also O'Dwyer, B (2003) 'Conceptions of Corporate Social Responsibility: The Nature of Managerial Capture', 16(4) *Accounting, Auditing and Accountability Journal* 523.
[48] Herman E.S (1981) *Corporate Control, Corporate Power*, New York: CUP, at p 48.
[49] Nader, R, Green, M and Seligman, G (1976) *Taming the Giant Corporation*, New York: Norton.
[50] Ibid, at p 124.
[51] Ibid, at p 125.

consumer protection, environmental protection, and community relations. There would also be CDs with individual responsibility for shareholder rights, compliance with law, finance, purchasing and marketing, management efficiency, and planning and research. This would thus ensure that 'each important public concern would be guaranteed of at least one informed representative on the board.'[52]

For the very fact that the CDs have control over executive and other key appointments, and over major policy issues, they seem capable of achieving more socially-oriented and positive results than that proposed by Stone. This is especially so if the CDs are prepared to work together as a team in the face of management opposition. On the other hand greater doubt is cast with the CDs than with the GPDs as regards the motivation of the former to impose stiff or appreciable constraints on management. This doubt borders on the fact that they are appointed by the shareholders rather than by the constituencies whose interests they are to represent and therefore owe their appointment/position and thus loyalty to their appointers – the shareholders. They are therefore unlikely going to be decisive and resolute in their efforts to curtail corporate profits in the interests of the affected stakeholders.[53] In other words, the institutionalisation of conflict between role and loyalty (that is, monitoring role of CDs and loyalty to their appointers respectively) has therefore casts serious doubt on the potency and effectiveness of the said proposal. Thus, Engel notes that 'the authors never adequately explained why shareholders in public corporations - who to date have shown little interest in anything but profits and for the most part expended little energy on internal corporate affairs to further even that goal - should suddenly start choosing and ousting directors.....with an eye to the general social good.'[54]

Parkinson agreed with the above view, noting that though the CDs may record some success in channelling information about the company's potential social impact into its decision-making processes and perhaps in suggesting minor modifications in policy to accommodate third-party interests, 'they cannot be expected to achieve a significant shift in corporate values.'[55]

The above approach has a major difficulty which needs overcoming if the independent directors were to have any significant impact on company's (social) behaviour. That is, there seems to be the need for a set of relatively concrete substantive principles to guide their (independent directors') conduct. Thus, Parkinson noted that the rationalisation of social responsibility as a process concept is appropriate for purposes of analysis, but at the level of implementation, in the absence of the said principles, it is doubtful that independent directors will be able to carry out the coherent action necessary to deflect management from conventionally self-interested and shareholder-primacy policies.[56] In the words of Schelling, the problem they are confronted with is that 'there is often no source of reliable guidance, no acknowledged source of policy, no easy choice between the responsible and the selfish.'[57] That is, though a set of substantive principles around which to organise the activities of independent directors are necessary, they tend to prove elusive.

As gathered from the foregoing, neither the Stone nor the Nader *et al* proposals involve the direct representation of the affected constituencies on the board by directors elected by and accountable to the constituencies concerned. The target of their proposed reforms is thus to 'inject another-regarding dimension into decision-making procedures, in furtherance of an aim of moralising the enterprise.'[58] It is thus good to consider if having stakeholder constituency representatives within the board will proffer solutions to the shortcomings of the model discussed above.

7. The Second Model - Stakeholder Groups Representation within the Board

Some of stakeholder advocates solicit for broader representation of major non-shareholding corporate stakeholders in the board.[59] Chayes, for instance, criticised corporate law's conventional focus on shareholders' representation and perception as the sole 'members' of the company: 'A concept of the corporation which draws the boundary of 'membership' this narrowly is seriously inadequate.....A more spacious conception of 'membership', and one closer to the facts of corporate life, would include all those having a relation of sufficient

---

[52] Ibid.
[53] See Conrad, A.F (1977) 'Reflections on Public Interest Directors' 75 *Mich Law Rev* 941, at p 956.
[54] Engel, D.L (1979) 'An Approach to Corporate Social Responsibility' 32 *Stan Law Rev* 1, at p 91.
[55] Parkinson, J (above n 4) at p 389.
[56] *Ibid*.
[57] Schelling, T.C 'Command and Control' in J.W McKie (ed.), *Social Responsibility and Business Predicament* (1974) Washington: Brookings Institution 79, at p 90.
[58] Parkinson, J (above, n 4), at p 389.
[59] Germany's codetermination system allows workforce representatives sit on the supervisory board. See Roe, M.J (1999) 'German Codetermination and Securities Markets' 5(3) *Columbia Journal of European Law* 3, at p 9. Similarly, Japan's relational board structure includes representatives of employees, creditors and suppliers. Salacuse, J (2004) 'Corporate Governance in the New Century' 25 *Comp Lawyer* 69, at p 75.

intimacy with the corporation or subject to its power in a sufficiently specialised way.'[60] In his opinion, there ought to be 'an institutional arrangement appropriately designed to represent the interests of a constituency of members having a significant common relation to the corporation and its power.'[61] As said earlier, the first model has some shortcomings. Principally among them is - what is the best way to deal with the issue of role and loyalty? The second proposed reform of the board endeavours to avoid this difficulty by giving a voice within the company to stakeholder groups affected by corporate activities, thus enabling or prompting improved company policies to emerge as the product of dialogue or bargaining.[62] The said reform proposal is thus based on the principles of 'free dialogue' whereby a communicatively rational integration of interests is achieved.[63] Alternatively, the target may be to redirect company policy through negotiation and compromise. Parkinson is of the view that some of the problems common with attempting to influence company policies and behaviour from outside the board, *viz*: lacks of adequate information, weak bargaining position, *etc* are surmountable if the interest groups were given a decision-making role within the company's board.[64] Among the entire stakeholder representation scheme, employee representation is the most highly developed in both theory and practice. Employee representation is, however, not traditional in Nigeria. But, board level representation of purely private interests, for instance, those of a bank or a major customer has been in practice in some jurisdictions for a long time. Employee representation on the board reflects the special status of employees as participants in the company whose interests rank almost alongside those of the shareholders. Making workable the interest group representation within the company decision-making structure poses certain practicality problems. Ideally, all the groups on whom the company has significant impact ought to be represented - as the desired proper balancing of interests will not be achieved except in that way. But the issue is - how workable or practicable is it for such interest groups to be individually represented in the board? The effects of company's policies are complex and virtually infinite. Thus, securing representation for all affected groups will normally be impossible. This impossibility is brought to bear by Parkinson who posed a question thus: as well as the communities in which company's plants are sited- which may be worldwide, should not the communities from which the company obtains its raw materials, or even from which its main suppliers obtain their materials, also be represented?[65]

Undoubtedly, there are some groups whose representation is generally unnecessary or even undesirable. Though the fortunes of suppliers and immediate customers may be greatly tied up with those of the company, these are often themselves large companies. Consequently, a mutual board representation of such interests would lead to a cartelisation of business whose effects would be 'worse than the disease' it is meant to cure/redress.[66] Though representation of smaller but defined trading partners may not pose the same problem raised above, it gives rise to yet another problem: as a company usually deals with a large number of such small companies, how then would a suitable scheme of representation be worked out? Obviously, they cannot be individually represented. It is likely that their interests may conflict - as each may want a larger deal or share of the company's business - the possibility of their interests being jointly (and at the same time, ably) represented is therefore questionable.

The proposition for an environmental representative seems to be more realisable. But environmental issues are multi-dimensional. This therefore poses another challenge as efforts to avoid one form of environmental problem or damage may give rise to another one.[67] This is coupled with the fact that environmentalist may have varied and divergent interests and views as regards the environmental impact(s) of corporate activities. These may therefore necessitate the need for many environmental constituencies to be represented.

Another issue has to do with how to elect or select the constituency director(s) that will represent the interests of the affected constituencies in the board. Some of these affected groups are not easily definable or recognisable.[68] Thus, reacting to the issue of consumer group, Bullock Committee (UK) observed that 'there is no recognisable consumer constituency.....and therefore no way in which a guardian of consumer interests could be appointed to the board through representative machinery.'[69] This problem may, however, be solved by government taken the

[60] Chayes, A (1959) 'The Modern Corporation and the Rule of Law', in E. Mason (ed.), *The Corporation and the Modern Society*, Cambridge: Harvard University Press 25, at p 41.
[61] Chaye (*ibid*).
[62] See Steinmann, H 'The Enterprise as a Political System', in K.J Hopt and G Teunber (eds.) *Corporate Governance and Directors Liabilities* (1985), Berlin/New York: Walter de Gruyter & Co, 401.
[63] Steinmann *(ibid).*
[64] Parkinson, J (above n 4), at p 390.
[65] Parkinson (*Ibid*) at p 391.
[66] Eisenberg, M.A (1976) *The Structure of the Corporation*, Boston & Toronto: Little, Brown & Co, at p 21.
[67] Parkinson, J (above, n 4), at p 391, cited an example thus: a decision not to site a factory in a rural location in order to save a natural habitat might result in its being sited in an urbanised area where it would worsen air pollution.
[68] This is not, however, applicable to every constituency- for instance, employees and local community voting mechanism if not already in existence, can be sorted out more easily.
[69] Report of the Committee on Industrial Democracy (Cmnd. 6706, 1977), at 55-56.

responsibility of appointing the individual director(s) to represent each individual constituency group.[70] As the constituency directors' mandate is not from the constituency they are appointed to represent, the question is: how then will the government appointees be very keen on representing the interests of the constituencies that did not elect, appoint or contribute anything or ideas towards their emergence as their directorial representatives, and who obviously have no right to effect their removal from the position? When the issues of the interests to be represented and modes of selecting their representatives are laid to rest, the next issue is whether the public directors should constitute a minority or a majority of the board. If they were to be a minority, the same doubts expressed in relation to Stone's proposals about the prospects for the minority directors' ability to re-orient the company's behaviour become applicable here. It appears that board representation (of various major constituency groups), as opposed merely 'public-spirited' directors, seemingly has the prospect of injecting a more authentic understanding of the position (and a more positive appreciation of the interests) of affected constituencies into company decision-making.[71] This is accentuated by the fact that one of the chief significances of board representation may be viewed as – improving the constituency's access to information. That being the case, a minority directorship may prove sufficient, allowing the various constituencies – armed with detailed information about the company and its policies - to perform their more conventional role of exerting pressure from the outside with increased potency.

8. Conclusion

A number of persons have been concerned with and thinking about the possible ways to make big public companies to be environmental and stakeholder-friendly, especially in the under-developed and developing countries to which Nigeria belongs to. The possibility of imposing mandatory duty on the board to integrate stakeholders' interests has been considered by many,[72] but it appears currently difficult if not impossible to be implemented. Other alternatives that can have or achieve the desired end have been considered in this work. As can be gathered from the discussions above, most of those alternatives are fraught with one short-coming or the other, making the achievement of the targeted result doubtful. This notwithstanding, consideration and adoption of some of the above-discussed measures, (either they are mandated by corporate legislation to do so or they chose to do so on their own volition), will certainly help the companies operating in Nigeria to be integrative, ethically, socially and environmentally responsible as it/they has/have the tendency of, if not any other thing, conscientise and incentivising the board to be broader and pluralist is thinking, instead of the myopic consideration and furtherance of purely shareholders' interests that is commonly witnessed in a shareholder-primacy jurisdiction like Nigeria.

[70] See Jones, T.M and Goldberg, L.D (1982) 'Governing the Large Corporation: More Arguments for Public Directors' 7 Academy of Management Rev 603; Beck, S.M 'Corporate Power and Public Policy', in L Bernier and A Lajoie (eds.), *Consumer Protection, Environmental Law and Corporate Power* (1985), Toronto: University of Toronto Press 181, at p 210.
[71] Parkinson, J (above, n 4), at p 392.
[72] See, for instance, Eze, J.A (above, n 15).