

https://dspace.org/

Investigating the continued applicability of the enlightened shareholder value approach in company law

Hayath, Batool

2023
University of the Witwatersrand, Johannesburg
https://hdl.handle.net/10539/38655
Hayath, Batool. (2023). Investigating the continued applicability of the enlightened shareholder value approach in company law [Master's dissertation, University of the Witwatersrand, Johannesburg]. WireDSpace https://hdl.handle.net/10539/38655

Downloaded from a DSpace repository. https://dspace.org/

INVESTIGATING THE CONTINUED APPLICABILITY OF THE ENLIGHTENED SHAREHOLDER VALUE APPROACH IN COMPANY LAW

by

BATOOL HAYATH

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Supervisor: Professor Tshepo H. Mongalo

September 2023

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG | WITS SCHOOL OF LAW

DECLARATION

I, Batool Hayath, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



Batool Hayath
22 September 2023

ACKNOWLEDGEMENTS

I would like to extend my sincere appreciation and thanks to my supervisor, Prof T Mongalo, for his most valuable input, and his continuous guidance and support throughout this research process.

ABSTRACT

Whether the objective of a company is purely the maximising of profits for its shareholders (the so-called ‘shareholder primacy’) or whether companies should also be run for the benefit of other stakeholders is a subject of much debate. Such debates have been in existence for quite some time, and they relate to two opposing schools of thought, one being the shareholder value theory and the other being the stakeholder value theory. This paper considers these two approaches and how they gave rise to a third approach, being the enlightened shareholder value approach (ESV). ESV is said to be a hybrid of the two approaches, and its adoption has found favour in certain jurisdictions such as the United Kingdom and South Africa. The main aspects of ESV are discussed in this paper. It also looks at how, on the basis that ESV gives precedence to shareholder interests (and merely provides for stakeholder interests to be considered as a means of enhancing shareholder value over time), its adoption has not resulted in substantial changes with regards to the protection of other stakeholders. In this regard, this paper considers an alternative to such theory, being the concept of the ‘purposeful business’, which has been advocated by the British Academy, and that, in light of the challenges facing society and other stakeholders today, such approach may be better suited as opposed to the ESV in helping to advance the interests of other stakeholders as a matter of pursuing the corporate purpose and/or objective.

Keywords: Shareholder primacy – pluralism – stakeholder theory – shareholder value – enlightened shareholder value – purpose of companies – best interests of the company – British Academy – purposeful business – profitable solutions to people and planet

TABLE OF CONTENTS

ABSTRACT i

I INTRODUCTION 1

II SHAREHOLDER VERSUS STAKEHOLDER THEORY AND THE ULTIMATE RISE OF ESV 3

(a) The entrenchment of shareholder primacy 3

(b) Stakeholder theory: A contender against shareholder primacy 9

(c) The rise of ESV 12

III A BRIEF OVERVIEW OF THE POSITION IN COMMON LAW JURISDICTIONS SUCH AS THE UK, SOUTH AFRICA AND US 13

(a) The UK 13

(b) South Africa 14

(c) The US 16

IV IS THE ESV ALL THAT IT SETS OUT TO BE? 17

V SHOULD ESV MAKE WAY FOR THE CONCEPT OF A 'PURPOSEFUL' BUSINESS OR COMPANY? 24

VI CONCLUSION 26

BIBLIOGRAPHY 28

I INTRODUCTION

The role that companies play in society has been the subject of fierce debate in company law.[1] The issue is whether a company is to be seen as a vital part of our society, or as merely another form of business entity.[2] Related to this is the question of whether 'modern corporate law' continues to emphasise that a company's essential purpose is that of creating wealth or maximising profits — and thus, whether directors should manage companies for the sole benefit of shareholders — or whether they are to also 'act in the interests of other stakeholders'.[3] The view that companies must be managed exclusively for their shareholder's benefit is also known as, among other terms, 'shareholder primacy' or 'shareholder wealth maximisation', which tends to be a dominating view within corporate practice.[4]

In this regard, when managing companies, the interests of shareholders are given primacy — the directors' function being that of shareholder profit-maximisation.[5] This is contrasted with pluralism or the pluralist view, whereby shareholders are seen as being one of a number of other constituencies, with other stakeholder interests also being recognised, or even prioritised, in certain instances.[6] Such stakeholders include, among others, employees, investors, consumers, creditors, the public and environment.[7] With the pluralist view, it is emphasised that a company that is socially responsible will give consideration to the impact its activities has on stakeholders.[8] Under such approach, directors are to favour stakeholder interests over those of shareholders if doing so 'would be in the interests of the company in its extended sense'.[9]

---

[1] See, for example, Farouk HI Cassim 'Introduction to the new Companies Act: General overview of the Act' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) 20; and Zachary Cheers *The Corporate Social Responsibility Debate* (unpublished Honors Program thesis, Liberty University, 2011) 4 which notes the strong debates surrounding the role of business. The 'sharp debate' is also pointed out in Robert B. Bieck, Jr. & Kenneth J. Najder 'A short primer on the heated debate over corporate governance' (2022) X *The National Law Review* 1 available at *https://www.natlawreview.com/article/short-primer-heated-debate-over-corporate-governance*, accessed on 22 September 2022.

[2] Farouk HI Cassim 'The duties and liabilities of directors' in Cassim et al op cit note 1 at 517.

[3] Ibid.

[4] Judd F. Sneirson, 'The history of shareholder primacy from Adam Smith through the rise of financialism' in Beate Sjåfjell & Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2019) 73. See also Lynn Stout 'The troubling question of corporate purpose' (2013) 3 *Accounting Economics and Law: A Convivium* 64. That shareholder primacy describes our 'legal regime today' is pointed out in Ann M. Lipton 'What we talk about when we talk about shareholder primacy' (2019) 4 *Case Western Reserve Law Review* 866. Also see Michael Marin 'Disembedding corporate governance: The crisis of shareholder primacy in the UK and Canada' (2013) 39 *Queen's Law Journal* 225 and 245.

[5] Irene-marie Esser 'The enlightened-shareholder-value approach versus plurism in the management of companies' (2005) 26 *Obiter* 720.

[6] Ibid at 720–21.

[7] Ibid at 720.

[8] Cassim op cit note 2 at 518.

[9] Ibid.

Debates regarding in whose interests companies should be managed have been going on for a considerable amount of time, with the famous debate between Professors Berle and Dodd dating back to the 1930s.[10] According to Berle, companies or their management must exercise their powers solely for the shareholders' benefit, with the company's sole object being the making of profit for the company's shareholders.[11] Dodd, however, disagreed that the company's sole object was to maximise profits.[12] Dodd viewed the company as 'an economic institution', which not only performs 'a profit-making function', but also a social service.[13] Regarding these debates, the issue often becomes one of whether stakeholder interests 'must' be taken into account by directors.[14]

According to United Kingdom (UK) law, one 'may' take the interests of other stakeholders into account only if it results in the company's interests (being the collective body of shareholders) being served.[15] This also appears to be the general position in the United States of America (US).[16] As noted below, while a majority of US states adopted the Model Business Corporation Act (2002) (Model Act), which favours shareholder primacy, most states (Delaware being an exception) also adopted corporate constituency statutes,[17] which, while not 'requiring' directors to give consideration to non-shareholder interests, 'explicitly allow' directors to do so.[18]

Thus, the company's main aim remains that of maximising profits, with other stakeholder interests being considered only if it results in shareholder interests being promoted over the long term.[19] Shareholder interests thus prevail if there are any conflicts between the shareholder interests and those of other stakeholders.[20] Such approach is termed the 'enlightened shareholder value' approach (ESV).[21] With ESV, shareholder wealth maximisation should be pursued by companies with a long-term view, whereby sustainable

[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid at 519.
[15] Ibid.
[16] Ibid.
[17] Tshepo Herbert Mongalo *Corporate actions and the empowerment of non-shareholder constituencies* (unpublished PhD thesis, University of Cape Town, 2015) 107–08.
[18] N. Craig Smith & David Rönnegard 'Shareholder primacy, corporate social responsibility, and the role of business schools' (2016) 134 *Journal of Business Ethics* 467.
[19] Cassim op cit note 2 at 519.
[20] Ibid.
[21] Ibid.

growth is sought alongside profits that are based 'on responsible attention to the full range of relevant stakeholder interests.'[22]

While the ESV approach is different from the pluralist approach — as shareholder interests are recognised as having priority — it can still be seen as an alternative version to the more narrow approach of shareholder primacy.[23] With ESV, the long-term success of business is dependent on companies giving consideration to the interests of all those who are impacted by, and make a contribution to corporate activity.[24] In the UK, the ESV approach is provided for in s 172 of the Companies Act 2006 (UK Companies Act).[25] South Africa has also given preference to this approach.[26]

This paper will consider whether the move towards an ESV approach has had a substantial impact and whether it continues to be relevant in today's modern society or whether further consideration should be given to the concept of a 'purposeful business' as proposed by the British Academy.[27] In doing so, this paper will consider the two main schools of thought regarding in whose interest companies should be run; the manner in which ESV came to exist; its adoption in certain jurisdictions like South Africa and the UK, and the general position in the US. It will then look at whether the adoption of ESV has resulted in any major changes with regards to other stakeholders or whether it should make way for an approach more attuned with the modern world. In this regard, it will be argued that the ESV approach, which ultimately favours shareholder primacy, and gives priority to shareholder interests, has had a limited overall impact in protecting other stakeholders. Perhaps the time has arrived to give consideration to an alternative approach of 'purposeful business', which has been advocated for by the British Academy.[28]

II SHAREHOLDER VERSUS STAKEHOLDER THEORY AND THE ULTIMATE RISE OF ESV

(a) The entrenchment of shareholder primacy

Corporate goal or objective is seen as a notion that is quite varied, all−encompassing and open−ended, and, for several years, has taken the form of 'an abstract concept in the corporate

[22] David Millon 'Enlightened shareholder value, social responsibility, and the redefinition of corporate purpose without law' in P.M. Vasudev & Susan Watson (eds) *Corporate Governance after the Financial Crisis* (2012) 68.
[23] Ibid.
[24] Ibid.
[25] Ibid at 69.
[26] Cassim op cit note 1 at 20.
[27] See note 248.
[28] Ibid.

vocabulary'.[29] Two contrasting schools of thought have emerged in this regard; being the shareholder value and the stakeholder theories.[30] Each theory aims to establish what would be the most idyllic theoretical framework that underlies 'the corporate objective' and may thus define 'the scope of company law.'[31] Pluralism is aligned with the stakeholder theory,[32] and shareholder primacy, with shareholder value theory.[33]

Within Anglo-Saxon[34] jurisdictions, the shareholder value theory has been dominant and is representative of the 'traditional approach to corporate objective'.[35] This was premised on the view that shareholders own the company (because they contribute financial capital), thus being the company's residual claimants.[36] They have a primary stake regarding the operation of the company, benefiting from increases in profits, suffering losses when the company is not profitable or becomes insolvent.[37]

According to Velasco, the generally accepted, traditional view that shareholders are owners of companies has seen decline amongst scholars in recent times.[38] The 'law and economics movement' introduced the contractarian theory, according to which companies are incapable of being owned and instead comprise 'a nexus of contracts' between different parties.[39] While shareholders are not seen as having superior roles (their rights being limited to those in the contract), contractarians believe shareholder interests must be pursued as this is what they contracted for, and due to it being an efficient outcome.[40]

However, the contractarian 'pro-shareholder position' is not one that follows 'inevitably from the basic premises'.[41] For instance, 'progressive corporate law scholars' developed a communitarian theory, which, while accepting certain underlying principles of

---

[29] Stelios Andreadakis 'Enlightened shareholder value: Is it the new modus operandi for modern companies?' in Sabri Boubaker, Bang Dang Nguyen & Duc Khuong Nguyen (eds) *Corporate Governance Recent Developments and New Trends* (2012) 416.
[30] Ibid.
[31] Ibid.
[32] Paul F. Skilton & Jill M. Purdy 'Authenticity, power, and pluralism: A framework for understanding stakeholder evaluations of corporate social responsibility activities' (2017) 27 *Business Ethics Quarterly* 106.
[33] Sneirson op cit note 4 at 84.
[34] The Anglo-Saxon corporate governance model is prevalent in countries such as the US, UK, 'Canada, Australia and other commonwealth countries' excerpt from A.C. Fernando *Business Ethics and Corporate Governance* 2 ed (2012) available at *https://www.oreilly.com/library/view/business-ethics-and/9789332511255/xhtml/c14s10.xhtml*, accessed on 8 December 2022.
[35] Andreadakis op cit note 29 at 417.
[36] Ibid.
[37] Ibid.
[38] Julian Velasco 'Shareholder ownership and primacy' (2010) 2010 *University of Illinois Law Review* 898–900.
[39] Ibid at 899.
[40] Ibid.
[41] Ibid.

contractarian theory, reaches different conclusions.[42] Communitarians also believe shareholders are not owners, however, they see companies as constituting a 'nexus of relationships' as opposed to contracts.[43] According to communitarians, companies should not be run solely in shareholders' interests (as they lack special status in companies) but rather that of society.[44] Communitarianism is thus reflective of stakeholder theory, as it requires the interests of all stakeholders to be taken into account.[45]

Velasco believes the traditional view remains viable because critics have not successfully disproved it, their arguments merely relating to why shareholders 'should not be' owners and not 'that they are not owners'.[46] Some of the arguments include, among others, that companies are incapable of being owned;[47] that shareholders lack control and are not the only residual claimants.[48] Velasco's response is that while companies are intangible, one can have ownership interests in intangible things.[49] He maintains that even if property is considered a bundle-of-rights and not a thing (the realist view), it does not preclude shareholders from being seen as owners holding only certain rights associated with ownership.[50] He argues that absolute control is never conveyed with ownership, maintaining that even an absence of control is not sufficient grounds to argue that shareholders are not owners.[51] In any event, shareholders have a level of control exercised indirectly through elected directors.[52]

He notes that only shareholders meet the definition of being residual claimants (a justification for shareholder primacy) — the companies' profits thus directly affecting them.[53] If considered residual claimants, he argues, shareholders and owners would be indistinguishable.[54] Velasco notes that shareholder ownership becomes important with respect to corporate governance and if shareholders are owners, corporate governance must reflect this as 'both end and means', thus shareholder interests must be pursued.[55] Stout disagrees that assumptions underlying shareholder primacy, i.e. shareholders being owners and sole residual

[42] Ibid.
[43] Ibid at 899 and 925.
[44] Ibid at 899.
[45] Matthew T. Bodie 'The next iteration of progressive corporate law' (2017) 74 *Washington and Lee Law Review* 748.
[46] Velasco op cit note 38 at 901.
[47] Ibid at 903.
[48] Ibid at 907 and 912.
[49] Ibid at 903.
[50] Ibid at 906.
[51] Ibid at 907−08.
[52] Ibid.
[53] Ibid at 912−13.
[54] Ibid at 915.
[55] Ibid at 944.

claimants etc., are empirically accurate, noting that companies can be utilised by different persons for different purposes.[56] Özyürek believes shareholders cannot, technically, be called owners as the company's property belongs to the company (shareholders having no direct proprietary rights).[57] Furthermore, property rights have limitations and do not justify harmful activities, with ownership creating certain duties for the owners (if companies are property, this opposes the view that directors must act for shareholders alone).[58]

Nevertheless, corporate practice gives precedence to shareholder primacy, which is contrasted with the concept of 'corporate sustainability', whereby broader objectives would be served.[59] This imperative of maximising shareholder profits tends to discourage corporate sustainability (even if profitable), due to an assumption this would result in reduction of profits, and on the basis that companies should not be carrying out 'public−minded activity'.[60] Sneirson, who considered this in the context of US corporate law, argues that this idea of profit maximisation (prevalent in shareholder primacy) is more of an 'entrenched social norm' as opposed to 'a legal requirement'.[61]

Sneirson argues that profit maximisation, such that directors must put shareholders first, with the aim of maximising share value and 'eschewing' other stakeholder interests, is not mandated by US corporate law.[62] In fact, most corporate codes provide for a departure from such approach.[63] For instance, they provide for corporate fiduciaries to take into account other stakeholders' interests when considering merger proposals or the company's future direction.[64] There is also uncertainty regarding 'decisional corporate law' with only a few cases (such decisions, however, being *dicta*) asserting that the corporation's main purpose is that of making profits.[65]

Delaware has taken a nuanced approach, whereby regard may be had for other constituencies, with the requirement to benefit shareholders being mandatory.[66] Sneirson notes that while a limited number of cases might, in principle, endorse shareholder primacy, such

---

[56] Stout op cit note 4 at 65.
[57] Mehmet Özyürek 'A critique of the corporate governance approaches from a deontological perspective: Can the corporate objective embrace the interests of employees?' (2018) 9 *International Journal of Society Researches* 2488.
[58] Ibid at 2489.
[59] Sneirson op cit note 4.
[60] Ibid at 73−4.
[61] Ibid at 74.
[62] Ibid.
[63] Ibid.
[64] Ibid. These codes are collectively known as 'corporate constituency statutes' and are part of the states' corporate legislation.
[65] Ibid at 74−5.
[66] Ibid at 75. Also see Bieck & Najder op cit note 1 regarding the approach of Delaware courts.

concept is more of a 'powerful social norm'.[67] One that drives directors to maximise returns for shareholders due to the perception that this is expected, and a possible belief that it is required by law.[68] Shareholder primacy is also largely reinforced through market forces with much attention being given to share prices.[69] However, share prices are criticised as not being a wholly accurate indicator of corporate performance.[70]

The foundation of shareholder primacy was laid down by Adam Smith in 1776 when he stated that, when individuals act to further their own self-interests, those acts, through an 'invisible hand', merge together, serving interests of society as a whole.[71] The belief was that individual entrepreneurs (the owners) would be driven by self-interest to ensure efficient use of labour and industrial property to grow their business so as to reap profits — presenting a sequence of 'ownership, control, full access to profits, efficiency' (Smith's Chain).[72]

Economic theorists had to, however, adjust their theories as this concept was misaligned with 'manager-run' companies, which saw managers prioritising their interests instead of their investors (such conflict being an 'agency-cost').[73] However, 19th and 20th century neoclassical economists found a way to apply Smith's Chain to modern company structures by substituting 'owner-entrepreneurs' with shareholders.[74] To counter the agency–cost issue, shareholders (who were subject to exploitation by managers) had to become the focal point, with managers being obligated to give primacy to shareholder interests.[75] This, arguably significant change, to Smith's theory brought about the concept of shareholder primacy,[76] which became further entrenched over time.

In the 20th century, to address the issue of managers dealing with shareholders as they pleased (fiduciary duties having not yet been imposed), the corporation's purpose was restricted to profit generation, as reflected in[77] the Supreme Court of Michigan case of *Dodge v Ford Motor Co*[78] (which decision, shareholder primacy supporters viewed as authority for their position).[79] It held, *inter alia*, that corporations are carried on for the primary purpose of

[67] Sneirson op cit note 4 at 76.
[68] Ibid.
[69] Ibid.
[70] Mehmet op cit note 57 at 2493.
[71] Ibid at 2487. Sneirson op cit note 4 at 77. Andreadakis op cit note 29 at 416.
[72] Sneirson op cit note 4 at 77.
[73] Ibid at 77−8.
[74] Ibid at 78.
[75] Ibid. Marin op cit note 4 at 236−7.
[76] Sneirson op cit note 4 at 78−9.
[77] Ibid at 79.
[78] 170 NW 668 (Mich.1919).
[79] Sneirson op cit note 4 at 80.

profiting shareholders and that directors' powers should be utilised purely for that purpose and no other.[80]

The 1920s and 1930s then ushered in the famous debates between Berle and Dodd.[81] Berle had concerns regarding the apparent unlimited power of corporate managers,[82] noting that:

> 'all powers granted to…management of a corporation…are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears…'[83]

He suggested that corporate managers be treated as trustees with a fiduciary obligation of acting for the shareholders' benefit, on the basis that shareholders 'owned' corporations — a duty of care thus being owed by managers to such shareholders.[84] The owners gave 'control of the company' to the directors (being persons more skilled and suitable to achieve its goals).[85] The shareholder value principle extends the 'separate of ownership and control' theory by prioritising shareholder interests over others'.[86]

Dodd rejected Berle's view, believing companies to be economic institutions with broader responsibilities.[87] Requiring that managers act solely for the shareholders' benefit results in other stakeholders being ignored — the better approach being that managers act as fiduciaries of the corporation itself (not its members).[88] However, he noted managers would have to be given a degree of freedom to balance out conflicting interests of various constituencies, also recognising that allowing such discretion (to manage corporations such that it benefits possibly conflicting constituencies) could be dangerous.[89] Berle asserted that weakening the fiduciary constraints placed on managers could result in them pursuing self-interests (under the pretense of 'social responsibility') to the detriment of all parties.[90]

With the rise of the 'law and economics movement' in the 1960s, Henry Manne, focusing on economic efficiency, transformed Berle's approach to shareholder primacy (of deterring managerial overreach), with Manne favouring profit maximisation (not just 'sufficient profits'), such that shareholder primacy and corporate sustainably became

---

[80] Ibid at 79 and Cheers op cit note 1 at 5−6.
[81] Sneirson op cit note 4 at 80−1.
[82] Ibid at 80.
[83] A.A. Berle, Jr. 'Corporate powers as powers in trust' (1931) 44 *Harvard Law Review* 1049.
[84] Sneirson op cit note 4 at 80.
[85] Andreadakis op cit note 29 at 417.
[86] Ibid.
[87] Cassim op cit note 2 at 518.
[88] Sneirson op cit note 4 at 81.
[89] Ibid.
[90] Ibid.

incompatible.[91] Friedman also believed social responsibility would have negative consequences.[92] However, Özyürek argues that regarding costs 'created by corporate externalities' for non-shareholders, the efficiency argument does not justify shareholder primacy (directors tend to externalise costs on to non-shareholder groups, thus, shareholder primacy could contribute to, for example, unsafe products. Therefore, to justify it through efficiency, 'costs created to other stakeholders must also be considered').[93]

Daniel Fischel brought forth his views on shareholder primacy in the 1970s, focusing on economic efficiency and problems arising when ownership and control are separated, particularly, in the context of agency–costs (which tended to be severe with hostile takeovers).[94] He sought alignment between shareholder interests and managers, whom he perceived to be agents of shareholders with a duty of ensuring maximum shareholder returns, thus acting in their 'financial best interests' (disregarding other constituency interests).[95] It is also believed that Friedman's 1970 essay set the model of shareholder primacy, which noted that business's only social responsibility is the use of resources and engaging of activities to increase profits.[96]

Shareholder primacy arguments, however, rests largely on the notion of shareholders being owners, which, as noted, has been subject to opposing arguments. Regarding companies, Raynor notes the privilege of limited liability that corporate law provides, with shareholders' capital risks being limited to their investment.[97] By separating owning of shares versus assets etc. public companies are distinguished from sole proprietors/partnerships, with shareholders being 'suppliers of capital', not owners.[98]

(b) Stakeholder theory: A contender against shareholder primacy

Stakeholder theory also saw development in the 1970s, a concern being whether an alternative to the shareholder value theory was warranted.[99] Whether such theory resulted in stakeholder claims being ignored and whether there should be a widening of directors' duties to cover non-

---

[91] Ibid at 81−2.
[92] Cheers op cit note 1 at 6.
[93] Mehmet op cit note 57 at 2493.
[94] Sneirson op cit note 4 at 82.
[95] Ibid.
[96] Milton Friedman 'The social responsibility of business is to increase its profits' *The New York Times* 13 September 1970. Also see Bieck & Najder op cit note 1.
[97] Michael E. Raynor 'End shareholder value tyranny: put the corporation first' (2009) 37 *Strategy & Leadership* 5.
[98] Ibid.
[99] Andreadakis op cit note 29 at 418.

shareholder interests, was the focus of this development.[100] Stakeholders became less keen to invest in companies which focused solely on promoting shareholders' economic interests, with shareholder value theory starting to impede the trust relationship with stakeholders of companies, thus impacting profits over the long term.[101] Dodd, in fact, identified in the 1930s, that because there was no legal requirement requiring directors to be extensively loyal to shareholders, management should not be subject to shareholder constraints and instead be encouraged to become 'servants of the community'.[102]

Such theory developed further in the 1960s and 1970s, whereby stakeholders were considered integral to the company's decision-making processes,[103] the corporate objective being partly based on the level of satisfaction of all stakeholders.[104] However, while gaining popularity during the 1980s, it could not adequately replace shareholder value theory as it lacked clarity regarding the term 'stakeholders' and how such theory 'works in practice',[105] ultimately fading pursuant to the 'growth and greed attitudes of the 1980s'.[106]

The rise of financialism in the 1980s brought shareholder primacy to the business world, with corporate success being measured based on stock prices (commonly known as 'share price' in South Africa).[107] Share-ownership, particularly through other funds became widespread, with institutional investors emphasising that companies be managed for the shareholders' benefit.[108] Furthermore, managers increasingly received stock options as compensation (leading to executives becoming focused on returns for shareholders as a way of self-enrichment over the short-term).[109] The corporate space saw a 'cultural change', focusing on a shareholder centric view, requiring a proper representation of shareholders — some arguing that shareholder primacy won the debate 'by the year 2000'.[110]

Clarke notes the global financial crisis can be attributed to leading banks who favored profitability and their capacity for deliverance of shareholder value over that of risk management and customer service commitments.[111] Towards the late 1990s and early 21st

[100] Ibid.
[101] Ibid.
[102] Ibid at 418−19.
[103] Ibid.
[104] Mehmet op cit note 57 at 2496.
[105] Andreadakis op cit note 29 at 419.
[106] Ibid.
[107] Sneirson op cit note 4 at 83.
[108] Ibid at 84.
[109] Ibid at 83. Thomas Clarke 'The contest on corporate purpose: Why Lynn Stout was right and Milton Friedman was wrong' (2020) 10 *Accounting, Economics, and Law: A Convivium* 7.
[110] Sneirson op cit note 4 at 84.
[111] Clarke op cit note 109 at 16.

century, the stakeholder theory resurfaced, pursuant to concerns regarding the manner modern companies operated globally from a 'social and environmental' perspective.[112] Scandals had hit the corporate world and stakeholder theory was gaining traction amongst companies as an attractive choice, pursuant to the fraudulent and the opportunistic culture brought on by the pressure of gaining immediate profits.[113] Companies were being expected to show that business operations had regard to environmental and social factors, the company's goal being to flourish all principal stakeholders.[114] Shareholders enjoyed no primacy, but, due to being stakeholders, still had their interests promoted.[115]

Stakeholder theory assumes that values form an explicit 'part of doing business' and is a rejection of 'the separation thesis' (according to which 'ethics and economics can be neatly and sharply separated').[116] While its potential to be of practical use to management was promoted, this was undermined due to implementation concerns, including, *inter alia*, practical issues such as stakeholder groups' conflicting interests, with directors being unable to strike the right balance between them.[117] Freeman et al, however, argue that issues regarding different stakeholder conflicts also arises with the shareholder view.[118] They note that under stakeholder theory, managers in fact have more resources and capability to address such challenges, as their offer can exceed financial rewards to include 'language and action' to show the value held for other group relations.[119]

Furthermore, such theory does not result in managers being completely risk averse and stakeholders often view their interests as being joint rather than opposed.[120] While having only one responsibility, i.e. profit maximisation, might be convenient, this 'distorts reality' and cultivates a worldview where directors fail to see themselves 'as moral agents' owing a responsibility towards a range of groups (where managerial responsibility is reduced to making profits and lacks talks of moral behavior, this has a greater potential of fostering unethical behaviour).[121] Nevertheless, supporters of such theory have not provided guidance regarding how such theory be put into practice, many criticising it for its lack of clarity and vagueness.[122]

---

[112] Andreadakis op cit note 29 at 419.
[113] Ibid at 420.
[114] Ibid.
[115] Ibid. Also see R. Edward Freeman, Andrew C. Wicks, Bidhan Parmar (hereafter Freeman et al) 'Stakeholder theory and "The Corporate Objective Revisited"' (2004) 15 *Organization Science* 366.
[116] Ibid (Freeman et al) at 364.
[117] Andreadakis op cit note 29 at 421.
[118] Freeman et al op cit note 115 at 365.
[119] Ibid.
[120] Ibid at 366.
[121] Ibid at 367.
[122] Andreadakis op cit note 29 at 421−22.

An issue had thus arisen, as on the one hand there seemed to be a collapse of the shareholder value theory, while the stakeholder theory failed to convince many that it would be a viable solution.[123]

(c) The rise of ESV

This, however, gave rise to the ESV approach, as introduced by Jensen, who looked beyond both shareholder and stakeholder theories.[124] Importantly, ESV does not reject the maximisation of shareholder value as the main aim of companies, however, recognition is given to the fact that such value cannot be maximised if stakeholders are not taken care of.[125] The long-term success and value of a company depends on its ability to maintain relationships with all its stakeholders.[126] ESV rejects the shareholder primacy argument that moral goals should not be pursued at the cost of profits, as being ethical or socially responsible is not a contradiction to one's obligation of maximising shareholder value.[127]

ESV is considered a hybrid approach, which retains shareholder primacy, but considers a long-term approach and promotes all stakeholders' welfare.[128] Some viewed ESV as merely serving the realities of shareholders, however, it soon became to be seen as a middle-ground between the two theories.[129] It was ultimately seen as a single solution for two issues, as more consideration is given to stakeholders, while shareholders can retain their goal of profit maximisation.[130] ESV was formulated as an additional approach on offer to managers, with a focus on balancing stakeholders (which can only occur if one considers all factors impacting the company's performance) and promoting long-term sustainability.[131]

While ESV still takes into account wealth maximisation, it is considered more 'enlightened' than shareholder primacy because profit maximisation is not considered the sole objective, but rather serves to confirm the adequate management of companies.[132] ESV is different to the stakeholder theory because it does not require managers to manage the needs

[123] Ibid at 422.
[124] Ibid.
[125] Ibid. Mehmet op cit note 57 at 2495.
[126] Andreadakis op cit note 29 at 422−23. Mehmet op cit note 57 at 2494.
[127] Andreadakis op cit note 29 at 423.
[128] Ibid.
[129] Ibid at 424.
[130] Ibid.
[131] Ibid. Millon op cit note 22 at 79.
[132] Andreadakis op cit note 29 at 424.

or interests of all the stakeholders.[133] The next section will consider the current position in the UK, South Africa and US.

III A BRIEF OVERVIEW OF THE POSITION IN COMMON LAW JURISDICTIONS SUCH AS THE UK, SOUTH AFRICA AND US

(a) The UK

In the UK, the ESV approach is expressly provided for in s 172(1) of the UK Companies Act.[134] Section 172(1) requires that directors, in carrying out their duty of promoting the company's success for its members benefit 'as a whole', have regard to a number of matters, such as, *inter alia*, employee interests, company's impact on the community and environment, and long-term consequences of decisions.[135] William notes how such list of items are couched in general terms, being read more as a 'list of exhortations to "good" conduct by directors', instead of specifically instructing them to carry out or refrain from carrying out certain actions.[136] Directors need only 'have regard' to such matters as they discharge their ultimate duty (promoting the company's success for its member's benefit).[137]

Between the '1990s and early 2000s', the UK Company Law Review Committee (UK Committee) carried out a review of company law in the UK, recommending ESV's inclusion into the UK Companies Act.[138] The UK Committee gave consideration to whether director's duties should continue to follow the common-law approach, which placed focus on shareholders, or whether there should be a shift along the lines of the pluralist approach.[139] While being sympathetic with the idea that businesses be carried out in such manner that various stakeholder groups enjoy enhanced welfare, it believed that 'a clear obligation' be placed on directors to ensure companies are managed in a competitive and focused manner, without being turned into political or moral arbiters.[140]

ESV was thus favoured over a pluristic approach.[141] According to the UK Committee, adopting the ESV approach allows one to maintain the fundamentals regarding the duties of directors and rectify the approach of some directors who manage companies based on a short-

---

[133] Ibid.
[134] Richard Williams 'Enlightened shareholder value in UK company law' (2012) 35 *UNSW Law Journal* 360.
[135] Ibid and s 172 of the UK Companies Act.
[136] Williams op cit note 134.
[137] Ibid.
[138] Ibid at 361.
[139] Ibid.
[140] Ibid.
[141] Ibid.

term approach and for narrow interests.[142] It did not, however, intend for a change to the main objective of companies, being that of shareholder value, but rather that, in achieving such objective, other stakeholder interests also be factored in.[143]

(b) South Africa

In South Africa, a policy paper was issued by its Department of Trade and Industry (DTI), regarding proposed reforms to company law in the country.[144] As noted by the DTI, under the common law, a duty is placed on directors to 'act honestly in the interests of the company', which goes as far back as the English case of *Hutton v West Cork Railway.*[145] Under the common law, 'the interests of the company' was interpreted as being the interests of the company's shareholders as whole.[146] The DTI policy considered the differences between the shareholder value, ESV and pluralist theories, noting that if one implements the pluralist theory, this would require a change of the legal position, whereby the 'interests of the company' would have to be defined to include other stakeholders and not just shareholders.[147]

However, adopting the ESV would require much less reform as the main objective of the company would continue to be that of wealth maximisation.[148] This was the preferred approach in South Africa, which follows the view that one may take other stakeholders interests into consideration if doing so is in the company's interests, and to the extent a conflict exists between the two interests, shareholder interests would prevail.[149] The South African Companies Act No 71 of 2008 (Act), does not, however, give formal recognition to other stakeholder interests, subject to a few exceptions,[150] for instance, provision has been made for certain rights and the granting of certain remedies to certain stakeholder groups such as employees, their trade unions and minority shareholders.[151]

Furthermore, s 72(4) of the Act provides for the appointment of a social and ethics committee in certain instances, whose function includes monitoring the contribution of the

[142] Andrew Keay & Taskin Iqbal 'The impact of enlightened shareholder value' (2019) 4 *Journal of Business Law* 3.
[143] Ibid at 4.
[144] DTI 'South African Company Law for the 21st Century: Guidelines for Corporate Law Reform' (GN 1183 in GG 26493 of 23 June 2004) (hereafter the DTI Policy).
[145] 23 Ch D 654 and ibid at 20.
[146] DTI Policy op cit note 144 at 20.
[147] Ibid at 22–3.
[148] Ibid.
[149] Cassim op cit note 1 at 20–1.
[150] Ibid.
[151] Dennis Davis (ed), Walter Geach (ed) & Anneli Loubser et al *Companies and Other Business Structures* 4 ed (2019) 12.

company with regards to developing the community within which it operates, including, among others, the environment of the company and public safety.[152] Apart from the aforementioned, it seems the approach taken in South Africa is that stakeholders should consult separate pieces of legislation to safeguard their interests, as opposed to looking at the Act.[153]

Save for the mentioned exceptions, the Act does not expressly place a mandatory or 'legally enforceable duty on directors' requiring them to take non-shareholder interests into consideration.[154] However, s 7 of the Act sets out broad purposes, such as, *inter alia*, promoting compliance with the Bill of Rights; developing the economy through high corporate governance standards pursuant to 'the significant role' companies play 'within the social and economic life of the nation'; reaffirming the company's concept 'as a means of achieving economic and social benefits'; the efficient recovery of distressed companies whereby the rights/interests of relevant stakeholders are balanced; and responsible management of companies.[155] Thus, one could potentially argue that, when read in line with the broad purposes of s 7, the s 76(3)*(b)* duty to act 'in the best interests of the company' (discussed below), requires an interpretation extending beyond just the shareholders (although not explicitly stated as such).[156]

Other legislation tasked with directly promoting stakeholder interests includes the Labour Relations Act 66 of 1995, legislation regarding Black Economic Empowerment and certain environmental and consumer protection laws.[157] Beyond this, particularly regarding corporate governance aspects, the promoting of interests of other stakeholders has been left to a large extent to the King Code of Governance for South Africa.[158] The King Code is not mandatory but rather voluntarily and thus cannot be legally enforced.[159] However, it does have legal relevance, with courts taking account of 'corporate governance practices' on certain occasions.[160] The King Code follows a 'triple bottom line' approach taking into account the 'economic, environmental and social aspects of a company's activities.'[161] Directors thus have a responsibility regarding stakeholder relationships, but must still account to shareholders.[162]

---

[152] Cassim op cit note 1 at 21.
[153] Ibid.
[154] Cassim op cit note 2 at 520.
[155] Section 7 of the Act. Mongalo op cit note 17 at 188.
[156] Ibid.
[157] Cassim op cit note 2 at 521.
[158] Ibid. The current version being the Institute of Directors Southern Africa 'King IV Report on Corporate Governance for South Africa, 2016' (King Code).
[159] Ibid.
[160] Ibid.
[161] Esser op cit note 5 at 722.
[162] Ibid.

The King Code, which has application to all types of business entities, places a strong emphasis on the importance to be attributed to the interests of stakeholders.[163]

However, it still remains more of a recommended code, as opposed to a mandatory one that all companies must abide by, thus resulting in the permissive nature of the promotion of non-shareholder interests in South Africa.[164] Nevertheless, it is worth noting that the King Code position which emphasises a 'stakeholder-inclusive approach', could be argued to impact directors' interpretation of the 'interests of the company' when carrying out their duties, as the King Code requires them to give consideration to not just shareholders, but 'all sources of value creation'.[165]

(c) The US

The general jurisprudence in the US places acknowledgement on the primacy of shareholder interests (although the adoption of constituency statutes by some states do place recognition on non-shareholder interests), with the general rule being that interests of non-shareholders should only be considered in light of shareholder interests.[166] In the US, corporate law has been assigned to state legislatures.[167] Due to such states having placed significance on the formation of capital, this has led to most states having entrenched the theory of shareholder primacy within their statutes, which position has been further enhanced by their adoption of the Model Act[168] (which has been prepared by the American Bar Association (ABA)).[169] While many such states adopted corporate constituency statutes, which aim to broadly encompass other stakeholder groups, shareholder primacy underlies their statutes, due to their permissive nature and failure to provide for enforcement action by such stakeholder groups.[170]

Regarding directors' duties, the Model Act provides that when officers perform in their official capacities, they must, *inter alia*, act 'in good faith'; with a duty of care; and in such a way that such officer reasonably believes is in the corporation's best interest.[171] The third duty has been noted to resemble that of shareholder primacy, however, some uncertainty exists regarding whether the term 'best interests of the corporation' could also extend to non-

[163] Cassim op cit note 2 at 521.
[164] Ibid at 521−22
[165] King Code op cit note 158 at 25–6. Section 7 of the Act.
[166] DTI Policy op cit note 144 at 22.
[167] Mongalo op cit note 17 at 232.
[168] Ibid.
[169] Smith & Rönnegard op cit note 18 at 466.
[170] Mongalo op cit note 17 at 232.
[171] Smith & Rönnegard op cit note 18 at 466−67.

shareholders.[172] Generally, however, the duty to act in the best interests of the corporation is equated with acting in the shareholders' best interests.[173]

Constituency statutes were adopted pursuant to the 'short-term' approach evident in decision-making within the corporate sphere, which had arisen due to the shareholder-focused corporate objective.[174] Such statutes aimed to amend the main corporate objectives in respect of public corporations (they were initially restricted to permitting boards to consider other stakeholder interests in the takeover context, thus granting them a wider basis to reject hostile takeovers).[175] However, despite their adoption, as noted, shareholder primacy dominates the legal framework — such statutes generally being merely 'permissive in nature' (except for Connecticut, where consideration of non-shareholder interests is mandatory), with the consideration of non-shareholder interests occurring 'through the prism of the "corporation,"' (being synonymous with shareholder interests).[176]

Furthermore, the ABA holds the firm view that provisions regarding non-shareholder constituencies should not make its way into the Model Act.[177] Nevertheless, constituency statutes are still prevalent in a majority of US states.[178] The Model Act is considered a general corporate statute, which states can choose to adopt as their own corporate statute.[179] As such, a large number of states have adopted either the entire or a substantial portion of the Model Act into their own corporation statutes.[180] The corporate governance aspects of those states in which the Model Act has been adopted, have been founded on the shareholder primacy approach.[181]

IV IS THE ESV ALL THAT IT SETS OUT TO BE?

Various advantages have been noted regarding ESV's adoption (some have been alluded to in earlier sections of this paper), for instance, regarding the UK Companies Act, adopting ESV was without disruption as changes were not required to the company's main object or directors' tasks.[182] In addition, by giving attention to external and internal constituencies, it places focus

[172] Ibid.
[173] Ibid.
[174] Mongalo op cit note 17 at 107.
[175] Ibid.
[176] Ibid at 111, 232 and 137.
[177] Ibid at 107.
[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] Ibid at 108.
[182] Dr. Osama Mustafa Mudawi & Dr. Elfadil Timan 'Does the concept of enlightened shareholder value

on benefits over the long term, thus resulting in the company's sustainability.[183] However, several drawbacks also soon became evident,[184] as it adopted not only certain advantages but also negative aspects of the shareholder and stakeholder theories.[185]

ESV has been subject to criticism in a number of respects, a main one being that it is in fact shareholder-oriented,[186] raising the question as to whether it truly is more beneficial than pure shareholder primacy. This is because shareholder interests continue to hold central importance, with directors being obligated to act in a manner that promotes company success such that it is beneficial to 'its members as a whole'.[187] Despite directors being required to consider various factors when they determine how best to carry out such duty, the result tends to be more shareholder-centric, thus raising concerns as to whether ESV is truly an efficient theory, and whether it does in fact provide adequate protection to other stakeholder groups.[188] Furthermore, like stakeholder theory, ESV is said to lack precision because no guidance is given to directors regarding the balancing of all stakeholder interests and the extent to which a deviation from profit maximisation can or should occur.[189] Importantly, ESV also fails to provide for accountability by directors to stakeholders, such that stakeholders in fact have limited means of bringing actions to protect their interests.[190]

However, those who favour ESV believe that its replacement of shareholder primacy results in a substantial difference being made.[191] The Business Roundtable, an association consisting of CEO's of leading American companies,[192] in its 'Statement on Corporate Governance' of 1997, initially showed a preference for the shareholder value approach, which position changed in its statement of 2019, where it was pledged that value would be delivered to all stakeholders.[193] While the Business Roundtable does not believe that, if value is delivered to stakeholders, that this would be detrimental for shareholders, it does clarify that shareholder interests are not repudiated by its 2019 statement.[194] A large number of corporate leaders also

---

succeed in bridging the gap between the shareholders and stakeholders value theories?' (2018) 8 *Business and Economic Research* 61.

[183] Ibid.

[184] Andreadakis op cit note 29 at 425.

[185] Ibid.

[186] Ibid.

[187] Ibid.

[188] Ibid.

[189] Ibid. Also see Mehmet op cit note 57 at 2495.

[190] Andreadakis op cit note 29 at 425.

[191] Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita 'Does enlightened shareholder value add value?' (2022) 77 *Forthcoming, The Business Lawyer* (Discussion Paper No.1077) 13.

[192] 'Business Roundtable' available at *https://www.businessroundtable.org/about-us*, accessed on 18 August 2022.

[193] Bebchuk, Kastiel & Tallarita (hereafter Bebchuk et al) op cit note 191 at 3 and 7−8.

[194] Ibid at 8.

tend to embrace the ESV approach, however, they do point out that the attention given to other stakeholders is a means of increasing shareholder value.[195] Bebchuk et al argue that, the view that a substantial difference is made when shareholder value is replaced with ESV, is based on a misperception regarding the extent to which one encounters 'win-win situations', whereby business decisions would result in shareholders as well as stakeholders benefitting.[196] Such view does not take into account that corporate managers are often faced with trade-offs of a significant nature between the interests of shareholders versus those of stakeholders.[197] Where a company might have taken every opportunity to 'improve shareholder value by improving stakeholder welfare,' one could still be in a position where additional opportunities might arise to further improve the welfare of stakeholders, however, at the shareholder's expense.[198] Thus, all stakeholder interests are not necessarily inseparable over the long term as alluded to by the Business Roundtable.[199]

Bebchuk et al further note that a number of 'serious societal problems' which underlie present debates regarding corporate purpose tends to involve situations presenting significant trade-offs as opposed to win-win options between stakeholders and shareholders.[200] In addition, under the traditional shareholder value approach, directors are required to consider all factors that could impact shareholder value in the long term (this would include applicable stakeholder issues).[201] Bebchuk et al thus raise an important question whether there would be cases where the corporate actions chosen under an ESV approach would be deemed more favourable than those chosen under the shareholder value approach, in relation to stakeholders.[202] In their analysis they found that one cannot expect a material improvement regarding the treatment of, and protection afforded to, stakeholders if one were to move from the shareholder value to the ESV approach.[203] They also noted that, while it might not be harmful to adopt a change towards ESV, one negative aspect that could be introduced in such circumstances is the 'expectations about the prospect of such improvements', on the basis that such expectations could be merely illusionary and not reflective of meaningful changes.[204]

---

[195] Ibid at 10.
[196] Ibid at 13.
[197] Ibid at 13−14.
[198] Ibid.
[199] Ibid.
[200] Ibid at 14.
[201] Ibid at 16.
[202] Ibid.
[203] Ibid at 27.
[204] Ibid.

Furthermore, the effect of ESV, which has been expressly included in the UK Companies Act has also been the subject of consideration by many. As noted, s 172(1) of the UK Companies Act places a duty on directors to, *inter alia*, ensure the promotion of the company's success as a means of benefitting its members.[205] In doing so, they must take into account the factors set out in such section.[206] A main concern regarding ESV's adoption and s 172 was the limited guidance given to directors regarding what should be done by them and the manner they should act.[207]

Keay and Iqbal carried out a study on various large listed companies in the UK (in the retail industry) to determine whether ESV had an impact in changing the way they operate.[208] In assessing whether corporate aims had changed upon implementing s 172, they found that only one company clearly stated, as an ultimate aim, the enhancing of the value of shareholders (however, it did acknowledge the importance of other stakeholders in its reports).[209] The remaining seven companies seemed to have aims aligned with a broader approach, which seems to have greater focus on stakeholders (however, no company expressly stated that its affairs were being run to benefit all or a majority of its stakeholders).[210]

According to Keay and Iqbal, while the emphasis such companies placed on other stakeholders is worth noting, in this case, it could still be said that shareholder value was being practiced by such companies as such theory does also provide for companies to take other stakeholders into account.[211] They also found that the main goal of a majority of companies, while subject to minor variations, generally remained the same upon implementing ESV, thus practically, ESV had not made a substantial difference to such companies, particularly regarding their aims.[212] Keay and Iqbal note this could possibly be because such companies had already been putting into effect certain aspects of ESV as it 'made good business sense.'[213] Others have noted how ESV merely treats other stakeholder interests instrumentally as opposed to giving such interests any intrinsic weight.[214]

With regards to indicating an adoption of ESV, expressly mentioning s 172 and the directors' process of decision-making, it was found that the impact was varied between the

[205] Keay & Iqbal op cit note 142 at 2.
[206] Ibid.
[207] Ibid at 5.
[208] Ibid at 6.
[209] Ibid at 11−12.
[210] Ibid.
[211] Ibid at 12.
[212] Ibid at 14−15.
[213] Ibid at 15.
[214] Mehmet op cit note 57 at 2495.

companies studied.[215] Three companies made explicit mention of the s 172 duty, and tried to convey the manner in which it was fulfilled.[216] This indicates that some difference was made in practice by the ESV approach, as such acknowledgements are a reflection that certain measures are being adopted by some companies as a means of demonstrating their director's awareness of their duty to consider stakeholder interests (which are also being communicated to shareholders).[217] However, as noted, the impact has not been constant as most companies made no explicit mention of the s 172 duty.[218]

Regarding whether the companies reported on stakeholders, as noted in s 172, and whether changes to such reporting occurred upon its implementation, it was found that companies had been addressing the factors set out in s 172 before the enactment of such section, with their being no substantial difference in such reporting following the implementation of ESV.[219] However, none of the companies reports provided insight as to how stakeholder interests were being balanced or the steps taken to find a balance between the varying interests.[220] Neither did they set out the 'actual decision-making process of the directors' and their balancing of the factors.[221] Thus, ESV's adoption did not have much impact on stakeholder reporting or the manner in which directors discharged their duties under s 172.[222] One would have expected companies to have been more explicit regarding their awareness of the section and their compliance with such duties.[223]

Other comparable studies indicated that s 172's enactment had not resulted in changes in the behavior of a large number of directors, with some interviewees in other studies noting that s 172 barely made a difference.[224] Others noted that s 172 lacks proper application and compliance, with the Financial Reporting Council having stated that companies must be compelled to ensure more efficient reporting regarding the fulfillment of their duty set out in s 172.[225] Marin notes that shareholder primacy remains alive in the UK, with wider community interests still being subordinated to the 'maximisation of shareholder value'.[226] While failing to consider interests of other stakeholder interests could, theoretically, impose liability, in

[215] Keay & Iqbal op cit note 142 at 15 and 17.
[216] Ibid at 17.
[217] Ibid.
[218] Ibid at 17−18.
[219] Ibid at 18.
[220] Ibid.
[221] Ibid at 18−19.
[222] Ibid at 19.
[223] Ibid.
[224] Ibid at 20.
[225] Ibid at 22.
[226] Marin op cit note 4 at 239−40.

practice, standing is not given to other stakeholders to bring claims for directors' breach of duty and derivative actions can only be brought by shareholders.[227]

According to Keay and Iqbal, ESV had a limited impact regarding the making of significant changes to the manner that companies and their boards operate and report on compliance with their duties.[228] They note that the fact that even the government gave an indication of the need for reform regarding the manner ESV operates is evident of the fact that there is concern regarding ESV's impact.[229] They also note that some might argue that a major flaw with ESV is the fact that stakeholders are not given rights to ensure that ESV has been complied with.[230]

According to Williams,[231] ESV's inclusion results in UK law's duty of loyalty being given a different presentation to the duty (under common law) to act *bona fide* in the company's best interest, however, there is uncertainty regarding the extent to which 'the substance of the duty' has been altered with the enactment of the ESV principles.[232] As noted, the core duty remains that of promoting member interests with directors only being required to 'have regard' to the ESV related principles.[233] The s 172 duty is to the company, with outsiders (regarding solvent companies) not being in a position to enforce same.[234] Williams believes ESV does not result in any substantial changes regarding the UK company law approach to stakeholders.[235] He notes, for instance, that despite the 'expanded list of ESV principles' under s 172, such provision 'does little more' than merely stating explicitly what has been understood implicitly under the common law, being that to have regard to other stakeholder interests is an important part of managing companies for shareholders' benefit.[236]

The procedural limitations and difficulties in enforcing ESV principles through, for instance, director duties etc. under such section prevent such provisions from being an 'agent for change' and as acting as a catalyst for developing the protection of stakeholders beyond the scope of the common law.[237] Regarding South Africa, while the DTI alluded to South African company law following the ESV approach, subject to limited exceptions, no express

[227] Ibid at 240.
[228] Keay & Iqbal op cit note 142 at 24.
[229] Ibid at 24−25.
[230] Ibid.
[231] Williams op cit note 134.
[232] Ibid at 361.
[233] Ibid at 362.
[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Ibid at 362 and 376.

recognition is given to stakeholder interests in the Act.[238] Section 76(3)*(b)* of the Act requires directors to, *inter alia*, exercise their powers 'in the best interests of the company', however, the Act does not define the concept of 'best interests of the company'.[239] As such, one is required to resort to the common law, where such phrase is said to mean 'the interests of shareholders collectively', thus being all 'present and future' shareholders.[240] This implies that the Act follows the shareholder-oriented approach, with stakeholder interests being subordinate to that of shareholders.[241] However, as noted above, reading s 76(3)*(b)* in line with s 7, could potentially raise the argument that such phrase be interpreted to extend beyond just shareholders.[242]

As noted above, certain provisions of the Act do, however, seem to provide for an extended standing to other stakeholders, but in most cases, one would still have to consider whether the acts taken were in the 'company's' best interests, as opposed to that of the stakeholders.[243] Thus, while South African company law apparently favours an ESV approach, with attempts having been made to include interests of stakeholders in certain instances, primacy is still given to shareholder interests.[244] Adequate protection is not afforded to other stakeholder interests as they are not given direct rights.[245] The Act does not impose any affirmative obligation on directors to take into account other stakeholder interests, the protection of which has been left to forces beyond the Act.[246] The Act also fails to provide adequate enforcement measures, thus one cannot consider it to be a legal measure that is effective enough for stakeholders who wish 'to uphold their rights'.[247]

As is clear from the above, adoption of the ESV approach has not brought with it adequate change with regards to the interests of other stakeholders. The question is whether companies should start looking beyond the limits of ESV and consider the adoption of a new approach. The British Academy in its 'final report of the Future of the Corporation Programme' was of the view that the debates of shareholder versus stakeholder interests is now sterile and

---

[238] Cassim op cit note 1 at 20.
[239] Linda Muswaka 'A critical analysis of the protection of stakeholders' interests under the South African Companies Act: (Part 1)' (2014) 5 *Mediterranean Journal of Social Sciences* 62.
[240] Ibid.
[241] Ibid.
[242] Mongalo op cit note 17 at 188.
[243] Muswaka op cit note 239 at 62–3.
[244] Ibid at 65.
[245] Ibid at 63.
[246] Ibid.
[247] Ibid at 65.

instead, it advocates for the adoption of the concept of a 'purposeful business'.[248] This concept will be considered further in the next section.

V SHOULD ESV MAKE WAY FOR THE CONCEPT OF A 'PURPOSEFUL' BUSINESS OR COMPANY?

The aim of the British Academy's Future of the Corporation programme was to explore the role business has in society and it considers the potential that business has to 'address problems of people and planet'.[249] It notes the various challenges such as climate matters, social exclusion and inequality and other universal challenges that we face, and how business's engagement in such challenges is not something that will occur automatically.[250] Many policies and practices in business consists of features which place focus on mostly financial goals without looking at solving the issues faced by the 'people and planet'.[251] It notes the growing support for purposeful businesses and argues for changes to policies and practices whereby the putting into effect of corporate purposes can be supported and decision makers be held accountable.[252] It defines the term 'purposeful business' as being 'a system in which the purpose of business is creating profitable solutions for problems of people and planet, and not profiting from creating problems.'[253]

The businesses' purpose provides clarity regarding what both board and shareholders consider as legitimate sources of profits and thus the shareholder's capital return.[254] Where corporate purpose forms part of director responsibilities, it establishes 'a principle of not profiting from detriments' and that companies would 'commit to upholding' of stakeholder interests.[255] To enable purposeful businesses, a 'permissive legal, regulatory, governance and reporting framework' is required.[256] While such a framework is evident in the UK, it lacks sufficient accountability for purposeful business and the implementation of same.[257] To ensure

---

[248] The British Academy 'Policy & practice for purposeful business' *The final report of the Future of the Corporation Programme* 2021 (British Academy Report). The British Academy is 'UK's national academy for the humanities and social sciences' disciplines including law (ibid). It invests in research and projects in the UK and globally, aiming to influence policy through collaboration between business, scholars, civil society and government (ibid).
[249] Ibid at 6.
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Ibid.
[254] Colin Mayer 'What is wrong with corporate law? The purpose of law and the law of purpose' (2022) *European Corporate Governance Institute*-Law Working Paper No.649/2022 10.
[255] Ibid.
[256]British Academy Report op cit note 248 at 6.
[257] Ibid.

an effective reform, the aforementioned framework and the mechanisms of accountability and implementation are required.[258] Regarding accountability, such framework is used to hold companies accountable for complying with the corporate purpose underlying the purposeful business.[259] Implementation entails 'ownership…finance, innovation and investment' whereby one harnesses the potential that markets have to provide for profitable solutions which are beneficial to employees, customers, society, investors, the community and environment.[260]

The British Academy notes additional factors that can ensure accountability is strengthened, for example, that regulators must be given additional powers such that they can hold directors accountable for their corporate purposes; and for companies to ensure that purpose is central to their annual reporting and demonstrating how they can deliver same.[261] The British Academy favours a shift away from the notion of corporate purpose being tied to the furthering of shareholder interests, to one recognising the role business plays in dealing with challenges faced by the world today.[262] Emphasis is placed on businesses addressing challenges in a manner that is 'commercially viable, profitable and financially sustainable' but at the same time avoiding making profits in a way that is detrimental to stakeholders.[263]

It focuses on eight principles being 'law and regulation, ownership and governance, measurement and performance, and finance and investment'.[264] Regarding company law's role with regards to establishing accountability pertaining to corporate purpose, particularly — in relation to directors' duties — the British Academy notes that the debates regarding shareholder and stakeholder theories, which dominate corporate law, tend to miss the point.[265] It argues that the issue is not whose interest should be promoted but rather how one can promote both interests by way of solving problems of 'people and planet' in a profitable manner.[266] The focus of companies thus being shifted from a particular group to carrying out the act of profitably solving issues.[267] It proposes changes to, for instance, company law, such that a duty is placed on directors to determine the company's corporate purpose and to implement it; and for

[258] Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid at 7.
[262] Ibid at 10.
[263] Ibid at 11.
[264] Ibid at 16.
[265] Ibid at 21.
[266] Ibid.
[267] Ibid.

governments to publish guidance regarding the manner in which companies can include purpose into their legal forms such as in their constitutional documents.[268]

It is argued that the proposal by the British Academy, regarding the concept of a purposeful business, is what we need in order to avoid companies profiting from the problems created, such as those related to the environment, corporate scandals, fraud etc. all of which impact society at large, and that a focus be placed on profitable solutions being emphasised as a means of enhancing the lives of all stakeholders.[269] As is evident from the above discussions, while a number of jurisdictions tend to favour ESV and while stakeholder interests are given consideration under such approach, as compared to a pure shareholder value approach, both such approaches ultimately favour shareholders. A move to ESV does not in fact provide substantial changes as compared to what the position would be under the shareholder value theory.[270] Perhaps the stance taken by the British Academy (discussed above), being that the issue should move beyond whose interests should be favoured (and thus be a move away from the debate regarding whether ESV should be adopted or replaced by some other theory), to rather looking at how profitable solutions can be put in place to the problems and challenges faced by society, should be preferred.

VI CONCLUSION

Companies contribute significantly to social renewal and the creation of wealth.[271] Company law, in turn, substantially impacts on our economy generally, and more specifically with regards to commercial activity.[272] Many challenges face our society today, including environmental issues, pandemics, inequality, technological impacts 'on the future of work' and social exclusion.[273] Concerns have been growing regarding the impact corporations have on various stakeholders such as employees, communities within which they operate, customers and suppliers, and the environment.[274] There has been an increased support for the development of 'rules and arrangements that would produce a capitalism that works for all stakeholders'.[275]

---

[268] Ibid at 22.
[269] Ibid at 55.
[270] As detailed in this paper (for instance see note 203).
[271] Cassim op cit note 1 at 3.
[272] Ibid.
[273] British Academy Report op cit note 248 at 56.
[274] Bebchuk et al op cit note 191 at 1.
[275] Ibid.

A substantial difference of opinion exists as to the manner in which this should be achieved.[276] As noted above, the stakeholder and shareholder value theories are contrasting schools of thought, each trying to establish an idyllic theoretical framework with regards to the corporate objective of companies.[277] However, in corporate practice, shareholder primacy seemed to be the chosen approach, with wealth maximisation being the goal of companies.[278] The ESV approach, referred to as a hybrid between the two views, soon made its way into the limelight, its aim being not to do away with shareholder primacy but rather to also provide for consideration of other stakeholders, on the basis that long-term shareholder value requires that interests of other stakeholders are also taken into account.[279] Unfortunately, however, while ESV might provide for consideration to be given to other stakeholders, as discussed above, it still places value on shareholder primacy and it has been argued that its implementation has failed to provide any substantial benefit to society or other stakeholders.[280]

In light of the various shortcomings noted in respect of ESV, it has been argued that the concept of purposeful business[281] should be given consideration by companies, and governments and regulatory bodies globally. A number of points have been made by the British Academy, for instance, that businesses should aim to provide for corporate purposes, with the focus being on creating profitable solutions as opposed to profiting from the creation of problems.[282] It also noted that the debates regarding whether particular interests should be favoured under the various theories should instead see a shift towards giving consideration to the solving of problems in a profitable manner.[283] This is argued to be a commendable approach which could be to the ultimate benefit of all of society as whole, while still ensuring that businesses are commercially viable and profitable.[284]

[276] Ibid.
[277] Andreadakis op cit note 29 at 416.
[278] Sneirson op cit note 4.
[279] Andreadakis op cit note 29 at 422−24.
[280] Bebchuk et al op cit note 191 at 1.
[281] British Academy Report op cit note 248.
[282] Ibid.
[283] Ibid at 21.
[284] Ibid at 10−11.

BIBLIOGRAPHY

BOOKS

Davis D (ed), Geach W (ed) & Loubser A et al *Companies and Other Business Structures* 4 ed (2019) Oxford.

excerpt from Fernando A.C *Business Ethics and Corporate Governance* 2 ed (2012) available at *https://www.oreilly.com/library/view/business-ethics-and/9789332511255/xhtml/c14s10.xhtml*, accessed on 8 December 2022.

CHAPTERS IN BOOKS

Cassim FHI 'Introduction to the new Companies Act: General overview of the Act' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) Juta: Cape Town.

Cassim FHI 'The duties and liabilities of directors' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) Juta: Cape Town.

Sneirson JF, 'The history of shareholder primacy from Adam Smith through the rise of financialism' in Sjåfjell B & Bruner CM (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2019), Cambridge University Press.

Millon D 'Enlightened shareholder value, social responsibility, and the redefinition of corporate purpose without law' in Vasudev PM & Watson S (eds) *Corporate Governance after the Financial Crisis* (2012) Edward Elgar Publishing.

Andreadakis S 'Enlightened shareholder value: Is it the new modus operandi for modern companies?' in Boubaker S, Nguyen BD & Nguyen DK (eds) *Corporate Governance Recent Developments and New Trends* (2012) Springer.

CASE LAW

Dodge v Ford Motor Co. 170 NW 668 (Mich. 1919).

Hutton v West Cork Railway 23 Ch D 654.

INTERNET SOURCES

'Business Roundtable' available at *https://www.businessroundtable.org/about-us*, accessed on 18 August 2022.

Bieck RB Jr. & Najder KJ 'A short primer on the heated debate over corporate governance' (2022) X *The National Law Review* available at *https://www.natlawreview.com/article/short-primer-heated-debate-over-corporate-governance*, accessed on 22 September 2022.

JOURNAL ARTICLES

Berle, AA Jr. 'Corporate powers as powers in trust' (1931) 44 *Harvard Law Review*.

Bebchuk LA, Kastiel K & Tallarita R 'Does enlightened shareholder value add value?' (2022) 77 *Forthcoming, The Business Lawyer* (Discussion Paper No. 1077).

Bodie MT 'The next iteration of progressive corporate law' (2017) 74 *Washington and Lee Law Review.*

Clarke T 'The contest on corporate purpose: Why Lynn Stout was right and Milton Friedman was wrong' (2020) 10 *Accounting, Economics, and Law: A Convivium.*

Dr. Mudawi OM & Dr. Timan E 'Does the concept of enlightened shareholder value succeed in bridging the gap between the shareholders and stakeholders value theories?' (2018) 8 *Business and Economic Research.*

Esser I 'The enlightened-shareholder-value approach versus plurism in the management of companies' (2005) 26 *Obiter.*

Freeman RE, Wicks AC, Parmar B 'Stakeholder theory and "The Corporate Objective Revisited"' (2004) 15 *Organization Science.*

Keay A & Iqbal T ‘The impact of enlightened shareholder value’ (2019) 4 *Journal of Business Law*.

Lipton AM ‘What we talk about when we talk about shareholder primacy’ (2019) 4 *Case Western Reserve Law Review*.

Marin M ‘Disembedding corporate governance: The crisis of shareholder primacy in the UK and Canada’ (2013) 39 *Queen's Law Journal*.

Mayer C ‘What is wrong with corporate law? The purpose of law and the law of purpose’ (2022) *European Corporate Governance Institute*-Law Working Paper No.649/2022.

Muswaka L ‘A critical analysis of the protection of stakeholders’ interests under the South African Companies Act: (Part 1)’ (2014) 5 *Mediterranean Journal of Social Sciences.*

Özyürek M 'A critique of the corporate governance approaches from a deontological perspective: Can the corporate objective embrace the interests of employees?’ (2018) 9 *International Journal of Society Researches.*

Raynor ME ‘End shareholder value tyranny: put the corporation first’ (2009) 37 *Strategy & Leadership.*

Skilton PF & Purdy JM ‘Authenticity, power, and pluralism: A framework for understanding stakeholder evaluations of corporate social responsibility activities’ (2017) 27 *Business Ethics Quarterly*.

Smith NC & Rönnegard D ‘Shareholder primacy, corporate social responsibility, and the role of business schools’ (2016) 134 *Journal of Business Ethics.*

Stout L ‘The troubling question of corporate purpose’ (2013) 3 *Accounting Economics and Law: A Convivium.*

Velasco J ‘Shareholder ownership and primacy’ (2010) 2010 *University of Illinois Law Review.*

Williams R ‘Enlightened shareholder value in UK company law’ (2012) 35 *UNSW Law Journal.*

LEGISLATION

Companies Act No 71 of 2008

UK Companies Act of 2006

NEWSPAPERS

Friedman M ‘The social responsibility of business is to increase its profits’ *The New York Times* 13 September 1970.

POLICY AND OTHER PAPERS

DTI ‘South African Company Law for the 21st Century: Guidelines for Corporate Law Reform’ (GN 1183 in GG 26493 of 23 June 2004).

Institute of Directors Southern Africa ‘King IV Report on Corporate Governance for South Africa, 2016’.

The British Academy ‘Policy & practice for purposeful business’ *The final report of the Future of the Corporation Programme* 2021.

THESIS

Cheers Z *The Corporate Social Responsibility Debate* (unpublished Honors Program thesis, Liberty University, 2011).

Mongalo TH *Corporate actions and the empowerment of non-shareholder constituencies* (unpublished PhD thesis, University of Cape Town, 2015).