

## Combating Environmental Degradation through Diplomacy and Corporate Governance (Part 1)

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### Abstract

*Environmental degradation witnessed by communities and regions in most African countries is attributed to failure of governance in the sense of inadequately regulated corporate operations which has given room to the pursuit of profits maximization by corporations in disregard of the interests of the host communities and regions. The results are often manifested in communal expression of anger leading to the destruction of lives and property, endangering the security and unity of the affected nation in extreme cases. The paper seeks to proffer solutions to these national maladies and argues that soft power diplomacy reinforced by exemplary leadership could act as soothing balm to the pains of the aggrieved communities. It emphasizes that mandatory corporate social responsibility approach to the operations of companies would provide solutions to these intractable social and environmental challenges.*

**Keywords:** Environment, Diplomacy, Corporate governance.

### 1. Introduction

The process of industrialization which galvanizes development in every nation is usually accompanied by myriad of problems among which is environmental degradation. Poorly regulated mining activities, industrial pollution and disposal of waste are known to constitute threats to the environment and the inhabitants. In the less developed economy, the quest for industrialization and the maintenance of clean and healthy environment are projected on parallel lines. The inordinate desire by the operators of the emerging industries to maximize profits which is often achieved with the connivance, advertently or inadvertently, of governmental agencies and officials are impediments to the maintenance of clean and healthy environment.

The impact of the operations of the unregulated, or inefficiently regulated industries, and the activities of the agencies of government are usually felt massively within the operational zones of such industries and beyond. The foundation for an implosion is led and could well go beyond the imaginations of the operators of such industries and regulating agencies. The people whose means of livelihood are curtailed and animals whose sublime habitats are disturbed are bound to react, sometimes, in such a violent manner as would be well beyond the control of the creators of such discomfort.

The implosion could lead to, not just the disruptions of the operations of the industries, but also abject criminality, with devastating impact on the security of the citizens and the economy of the nation. Such is the case as being witnessed in Nigeria and some other developing nations where there is failure of governance and where the governing rule of the industrialists remains the maximization of profits. This trend must not be allowed to continue as neither the industries, the government, the proximate communities, nor the nation, stands to benefit from these turn of events.

The paper explores the possible solutions to the environmental hazards created by industrial activities and the failure of governance. It comes to the conclusion that a diplomatic approach complemented by well regulated socially responsible corporate governance could redress the inequities that often lead to frictions endangering lives and property, and constituting threats to the unity of the affected nations.

### 2. Diplomacy

The growing wind of globalization, which Joyner (2005:288) referred to as the ongoing worldwide integration of capital, currency, goods, people, advanced technologies, and ideas that are moving across national borders at an accelerating pace, is increasingly demanding from nation states enhanced cooperation and integration in political and economic

activities. Every nation is obliged, by the very desire to control its own destiny, to take account of the neighbours whose conducts affect the citizens of that nation. 'The body politic', as the State was referred to by the French philosopher, Jean-Jacques Rousseau, 'is forced to look outside itself in order to know itself; it depends on its whole environment and has to take an interest in everything that happens' (Watson 1982: 14). The demand on a nation to take into cognizance the interests of those outside itself requires extensive dialogue among nations. It is the dialogue among independent states, the machinery by which the respective governments conduct such dialogues, and the network of promises, contracts, institutions and codes of conduct that develop out of it, that are referred to as diplomacy. Diplomacy, from the state perspective, is concerned with the process of advising, shaping and implementing foreign policy through formal representatives who articulate, coordinate and secure particular or wider interests, using correspondence, private talks, exchanges of views, lobbying, visits, and even threats, to achieve a set objective (Barston 1997: 1).

This perception of diplomacy is aligned to the conduct of international relations through the intercession of professional diplomats with regard to the issues of peace-keeping, trade, war, economics, culture, environment and human rights (Diplomacy 2013). But modern diplomatic practices are not so circumscribed as it could and does extend to internal national and even communal issues that could arise from the activities of government agencies, corporations and organisations. Thus, diplomacy is seen in some quarters as the employment of tact to gain strategic advantage or to find mutually acceptable solutions to a common challenge. The common challenge faced by most African nations, especially Nigeria, at present relating to the environment is how to manage the issues of environmental hazards created by the mining industries and other corporate operations which have given rise to communal restiveness and other criminal activities leaving on their trail inestimable loss of lives and property impacting grievously on the nation's security and economy. The employment of the right diplomatic approach is what is needed in seeking solution to the common national malady.

### **3. Types of Diplomacy**

Diplomacy is often associated with peaceful solution to an existing problem, but it could also be used to orchestrate violence (Barston 1997:1). The preferred approach is to view diplomacy from different classifications such as appeasement diplomacy, soft power diplomacy, monetary diplomacy, gunboat/hard power diplomacy, and public diplomacy (Wikipedia 2013). What each of these classifications entails cannot fully be explore here, but the choice of one or the other or the combination of them, is usually informed by the prevailing conditions and the objective of the diplomatic solution. What is needed in most African nations at present is the most peaceful diplomatic solution that would lead to the reversal of the environmental problems and appeasement of the communities whose interests are not adequately factored in, if not out rightly disregarded, in the course of the corporate operations over the years. The most appropriate diplomatic choice in the existing context is the soft power diplomacy.

### **4. Soft Power Diplomacy**

Power is the ability to influence the behavior of others to achieve the desired result (Nye 1990: 18). There are several ways of using power to achieve a desired result; you can coerce people with threats, or attract and co-opt them to want what you want (Funeka April 2009:123). The later approach is what Nye described as soft power which he sees as the ability to attract and co-opt rather than coerce, use force or give money as a means of persuasion (Nya Jr 1990). This concept is presently widely employed in international affairs. For instance, in 2007 the Chinese Communist Party Congress General Secretary Hu Jintao told the 17th Communist Party Congress that China needed to increase its soft power, the US Secretary of Defense Robert Gates spoke of the need to enhance American soft power by 'a dramatic increase in spending on the civilian instruments of national security – diplomacy, strategic communications, foreign assistance, civic action and economic reconstruction and development.' According to the IfG-Monocle Soft Power Index (2013), the United Kingdom currently holds the top spot in soft power thanks to a combination of international perception, global reach of British media, inventions like the world wide web, architecture, international diplomacy, students seeking to study in the UK, cultural missions and the number of highly publicized international events held there. In 2010 Annette Lu, former vice-president of the Republic of China (Taiwan), visited South Korea and advocated the republic's use of soft power as a model for the resolution of international conflicts (Taiwan News 2010). General Wesley Clark (2003), when discussing soft power, commented that 'it gave us an influence far beyond the hard edge of traditional balance-of-power politics'.

The resources of soft power are found in the assets that produce attraction, and attraction on its part leads to acquiescence (Nye 2004). Nye (2004) emphasised that 'seduction is always more effective than coercion, and many

values like democracy, human rights and individual opportunities are deeply seductive. A country's main sources of soft power are embedded in its culture (the extent that it is attractive to others), its political values (when it lives up to them at home and abroad), and its foreign policies (when others see them as legitimate and having moral authority) (Nye 2011).

A good number of corporations in Africa whose operations have inflicted the greatest environmental hazards on the continent are mostly multinational corporations with significant governmental interests both from their countries of origin and their countries of operations. The operations of such corporations contribute significantly to the economic developments in their countries of origin and the host countries. Shutting down the operations of such companies to cushion environmental hazards is certainly not a viable solution as the adverse economic and political implications could be unbearable especially on the part of the host nations. The way out is soft power diplomacy at the international level, founded on negotiated settlement, and in such manner as would optimize the operations of the corporations for the mutual benefits of the nations with interests in their operations, while preserving the environmental integrity of the host nations and the communities that bear the burden of such operations.

Such diplomatic endeavour should not pose so much difficulty in the modern globalised political and economic world. It is axiomatic that no nation in the modern world can thrive in isolation. Nations are known to succumb to pressure especially from global, regional and sub-regional bodies. Those multinational organisations are invaluable tools at the disposal of host nations in piling diplomatic pressure on the governments of countries of origin of such multinational corporations to address the environmental issues arising from their operations.

But the success of the diplomatic endeavour also depends on the current political actors in the host nations who often have significant economic interests in the *modus operandi* of the corporations. The individual interests of such government officials are unfortunately often placed above that of the nation and the communities that bear the environmental brunt of the companies operations. The consensus required by the national government to model its international diplomacy in such a manner as would achieve the desired goal may not be attained as a result of such deeply embedded individual economic interests.

A soft power approach in seeking solutions to national problems at the domestic level would require synergy between the government, corporations, non-governmental organisations (NGOs) and the civil society (Funeka April 2009:127). Although government is primarily responsible for the security of its citizens and environmental integrity, the expansive reach of human security as an essential link to political development, good governance, access to education and health care, and ensuring that each individual has opportunities and choices to fulfill his/her potentials are simply too demanding and are of such importance that they should not be left solely for the government (Annan 2013). The civil societies and NGOs in Africa are known to have made positive impacts in the areas of capacity building such as developmental peace building, conflict resolution and public service delivery for which reasons they are seen as engines of growth in the continent (Funeka April 2009:127). But the government and the corporate organisations do not seem to be fulfilling their parts in these presumably joint undertaking.

Soft power demands leadership by example, a leader who is able to blend with his/her people, mourn with them when they are in sorrow and dance along with them in times of joy. Soft power abhors a leader who on the face of abject poverty, buttressed by deficiency or nonexistence of essential social amenities, and environmental degradation perpetuated by years of neglect and failure of governance, continues to wallow in opulence galvanised by illicit wealth, sourced by umbrage massive looting of the commonwealth. It is no longer fashionable, except in this clime, to find a leader being conveyed and escorted by a retinue of state of the art cars with ready-to-kill escorts while on a visit to the zones where his/her people are in pains and demanding attention. Some nations in Africa have regrettably degenerated to the abysmal level where known criminal elements and others with questionable means of livelihood could muster the temerity to stand boldly at public places pretending to be dictating, and sometimes actually dictating, the course of public affairs. The solution cannot be found on appeasement diplomacy alone such as the granting of amnesty as witnessed in Nigeria, but in the total transformation of social and political establishments. A sustainable peace and development of the troubled zones in the respective countries require holistic approach encompassing all plans to rebuild a society politically, socially, militarily and economically, a concerted effort at addressing the root causes of the problems (Broodryk & Solomon 2010:6). These are essentially the demands of good governance which as stated in the World Bank report (Ferreira-Snyman & Ferreira 2006:57), "is epitomized by predictable, open, and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law".

Good governance will eradicate corruption, eliminate unnecessary controls, ensures transparency, and free and vigilant press which promotes the democratic governance. The failure of good governance in Africa is attributed to lack of the observance of the rule of law. The rule of law guarantees respect for human rights and rights of minority groups to live in secured and descent environment, it ensures accountability on the part of the government and government agencies

and officials in the discharge of their responsibilities. Where rule of law prevails, governance is seen as a position of service and not an opportunity for the looting of the commonwealth. The leader in such situation enjoys voluntary followership which is the essential quality of soft power. The post imprisonment soft power diplomatic disposition of the late President Nelson Mandela has engendered sustainable peace and growth in the once apartheid ravaged Republic of South Africa. The rare attributes of this late icon is reflected in the tribute by the Nigerian President Goodluck Jonathan (2013) where he acknowledged that there is no Nigerian politician past or present (himself inclusive) that shares the leadership qualities of Mandela. This is a clarion call, not just to Nigerian leaders, but to all those in political leadership in the continent, to adopt the Mandela disposition which is the gospel of soft power diplomacy, in seeking solutions to their respective country's problems.

## 5. Corporate Responsibility

The corporate bodies whose operations are the direct causes of the most visible environmental degradation in the affected nations have continued with their abysmal failure to plough back significant part of their enormous profits for the development of the communities in which their operations are centered. Part of the reasons for this corporate attitude is founded on the old fashioned theory that the primary purpose of the corporation is to maximise profits. The profit maximization objective is seen as the traditional role of the company and its managers (Dodd Jr 1932: 1145). The strengthening of emphasis on this traditional role of corporation is justified by its proponents as the only way of confining the directors within their duties to the company and minimizing the abuse of corporate powers (Berle 1931: 1049). It is argued by those proponents that the responsibility for providing the legal framework that would regulate company's behavior in relation to the rest of the community is that of the state and must be outside the scope of companies' legislation (Tricker 2009:350).

This view of the traditional role of the company is in modern times increasingly coming under a barrage of attack from those who believe that the impacts of the company's operation on the people and the environment are of such significant proportion that it should be accountable, if not responsible, to the societal interests over and above those of the owners and beyond the limits of the law. Motlanthe (2014) recently emphasized that the high prevalence rate of tuberculosis in South Africa is attributed to the mining industries whose mining operations expose the mineworkers to silica dust contained in mine shafts which gives rise to silicosis. This condition is exacerbated by poor accommodation in overcrowded hostels, circular migration between home communities and mine locations, mining-related occupational hazards, high levels of HIV infection and poor access to or usage of routine health services.

Any argument that emphasizes a preference for profit maximization against the genuine societal concerns on corporate operations is rather myopic. It overlooks the long-term benefit which the recognition of other stakeholders interests would confer on the company. Caring for the stakeholders would in the long run build goodwill and create more conducive environment for the company's operations which would translate into greater profits for the company. Such long-term benefit informed the approval by a United States court of corporate donation to a University in *AP Smith Manufacturing Company v Ruth F Barlow* (1993) where Stein JSC said: "Nothing that aids or promotes the growth and service of the...university or college...can possibly be anything short of direct benefit to every corporation in the land. The college-trained men and women are a ready reservoir from which industry may draw to satisfy its need for scientific or executive talent. It is no answer to say that a company is not so benefited unless such need is immediate. A long-range view must be taken of the matter. A small company today might be under no imperative requirement to engage the services of a research chemist or other scientist, but its growth in a few years may be such that it must have available an ample pool from which it may obtain the needed service. It must also be remembered that industry cannot function efficiently or enjoy development and expansion unless it have at all times the advantage of enlightened leadership and direction. The value of that kind of service depends in great measure upon the training, ideologies and character of the personnel available".

This judicial recognition of stakeholders interests as having long-term positive impact on the company and the shareholders invariably throws up the question as to whether the director's traditional duty to the company should now be statutorily extended to the stakeholders.

## 6. Shareholder Value Approach to Director's Duty

Shareholder value (2013) is a business term, sometimes referred to as shareholder value maximization or as the shareholder value model, which implies that the ultimate measure of a company's success is the extent to which it enriches shareholders. It is the value delivered to shareholders as a result of management's ability to grow earnings,

dividends and share price. In other words, shareholder value is the sum of all strategic decisions that affect the company's ability to efficiently increase the amount of free cash flow over time to the benefit of the shareholders. The concept of shareholder value in corporate law stems from the traditional view of the company as an association of shareholders formed for their private gain and to be managed by its board of directors solely with that end in view. The function of the company is thus seen as being to make profit for the benefit of the shareholders, and which must be the goal of the directors. As the directors are appointed by the shareholders who are the owners of the company, the function of the directors as agents of the owners, is faithfully to advance the financial interests of the owners (Rutkuow 2013). Davies (2005:2) lent credence to this perception of role of directors where he stated that the underlying theory of English and Australian company law is that directors' managerial powers are the result of a delegation from the shareholders, even if such delegation now is regarded as having a constitutional and not just an agency character to it. Consequently, the role of directors' duties is naturally seen as being focused on the promotion of the interests of the shareholders who are their principals.

There is no distinction in that context between the interests of the company and those of the shareholders as the company, being a statutory creation, cannot have any interests outside those of its shareholders. This approach was preferred by some of the initial judicial pronouncements on the duties of directors where the interests of the company are portrayed as inseparable from those of the shareholders. In *Re Smith and Fawcett Ltd* (1942), for instance, Lord Greene MR stated the fiduciary duty of the company directors as being to act 'bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose.' [Emphasis added]. In *Greenhalgh v Arderne Cinemas Ltd* (1951) Evershed MR stated that the phrase 'the company as a whole' does not mean the company as a commercial entity as distinct from the corporators, it means the corporators as a general body. Similarly, in *Gaiman v National Association for Mental Health* (1971) Megarry J observed that the company being an artificial entity, it is not easy to determine what is in its best interests without paying due regard to its present and future members as a whole. Davies, Worthington & Micheler (2008: 507) observed that the interests of the company would be meaningless unless it is aligned with the interests of some identifiable individuals. The word 'company' in this context is synonymous with the shareholders of the company (Cassim in Cassim et al 2011: 468). This should only be seen as a justification for sustaining the shareholder value as the company is in law a different person from the shareholders (French, Mayson, & Ryan 2011:489), and exists independently of the individual shareholders..

The promotion of shareholder value is seen as a way of keeping in check the excesses of the directors who could have inherent incentives to optimize activities and resources for themselves rather than for the shareholders. Dodd (1932) in his criticism of Berle (1931) articulated the background to this narrowly conceived role of the directors as being that the directors and managers of modern large corporations are granted all sorts of novel powers by present day corporation statutes and charters, and are free from any supervision by stockholders by reason of the difficulty which the modern stockholder has in discovering what is going on and taking effective measures even if he has discovered it. The fact that managers so empowered not infrequently act as though maximum stockholder profit was not the sole object of managerial activities has led to the emphasis on the doctrine that managerial powers are held in trust for stockholders as sole beneficiaries of the corporate enterprise. Dodd (1932) believes that though the position adopted by Berle (1931) which emphasizes the pursuit of shareholder value in corporate management could have given the stockholders the much needed protection against self-seeking managers, that reason is simply inadequate in modern times to justify the concept that corporations exist for the sole purpose of making profits for the stockholders.

There are however, some judicial decisions that have given impetus to this misconceived role of directors as being to maximize shareholder value. This features prominently in those cases where the courts sought to ascertain the purpose for which the directors have exercised their powers. In some of those cases, the courts held the view that the directors' powers must be exercised for the purpose of promoting the interests of the company and not for any collateral purpose. In *Re Lee Behrens & Co Ltd* (1932) the directors had voted an annuity to the widow of the company's former managing director in the exercise of power provided in the company's constitution. Eve J struck down the payment as being not reasonably incidental to the carrying on of the company's business, and not for the benefit of, or to promote the prosperity of the company. Similarly, in *Re W & M Roith Ltd* (1967) the director wished to make provision for his widow for which he procured the alteration of the company's constitution and entered into a service contract with the company to the effect that on his death his widow would be entitled to pension for life. Plowman J, following *Lee Behrens' case*, held that the transaction, though made in good faith, was not for the benefit of the company and as such not binding on the company. In *Re Cameron's Coalbrook Steam Coal and Swansea and Laughor Railway Co, Bennett's case* (1854) Turner LJ said: "In the exercise of the powers given to them...[directors] must, as I conceive them, keep within the proper limits. Powers given to them for one purpose cannot, in my opinion, be used by them for another and different purpose. To permit such proceedings on the part of directors of companies would be to sanction not the use but the abuse of their

powers. It would be to give effect to an illegal exercise of legal power".

In some of the more recent cases the courts have struck down transactions in which the directors conferred benefits on themselves or other persons other than the shareholders as a whole as not being in the interests of the company. One of such is *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)* (1995) where the court held that a sole director was not acting in the interests of the company, but in his personal interests, when he procured an *ex gratia* payment to himself by the company of the sum of £100,000 on termination of his service contract with the company. Similarly, in *Simtel Communications Ltd v Rebak* (2006) Forbes J held that a director who released a significant quantity of stock to a customer (who already owes the company money in circumstances where there is no real prospect of recouping it) without prepayment was not acting in the best interests of the company. The purpose of the director's action was found by the court to be 'to maintain good relations with Kenny [the debtor] so as to pave the way for securing investment in the company that was to be set up on the ashes of Simtel.' In *JJ Harrison (Properties) Ltd v Harrison* (2001) Chadwick LJ stated that the powers to dispose of company's property conferred upon the directors by the articles of association, must be exercised by the directors for the purposes, and in the interests, of the company.

The courts emphasis in all the above cases is that the exercise of the directors powers and the performance of their duties must be geared at the promotion of the interests of the company, a synonym for shareholder value, any exercise of power outside the pursuit of this goal is seen as a breach of duty (Hannigan 2009:205).

Companies' legislation in some jurisdictions has codified this primary duty of directors as expounded by the common law courts. In Nigeria, for instance, section 279(1) of the Companies and Allied Matters Act of 1990 declares the relationship between the company and the director as fiduciary, and as such the director shall observe utmost good faith towards the company in any transactions with the company or on its behalf. Subsection 3 of section 279 expresses the duty of the director as being to act at all times in what he believes to be in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purpose for which the company is formed.

The South African Companies Act of 2008 embodies a modified version of the common law expression of the director's fiduciary duty. Section 76(2) of the Act provides that a director of a company must not use the position of a director, or any information obtained while acting in that capacity; to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company. As though this were not sufficient to guide the director in the right direction in the exercise of his duty, section 76(3) of the Act stretched this common law principle beyond equivocation by providing that the director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in good faith and for a proper purpose, and in the best interests of the company.

In Lesotho the Companies Act of 2011 introduced some level of objectivity in the pursuit of shareholder value by the director. Section 63(1) of the Act provides that a director shall, when exercising powers or performing duties, act in good faith and on 'reasonable grounds' in the interests of the company. The phrase 'reasonable grounds' introduced an objective standard to the subjective duty of a director. It creates room for the court not to rely solely on the opinion of the director but to objectively assess the entire transaction to ascertain whether it indeed satisfies the requirement of the promotion of the interests of the company. This accords with the statement of Pennycuik J in *Charterbridge Corporations Ltd v Lloyds Bank Ltd* (1970:70) that "the proper test, I think, in the absence of any separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company". But Jonathan Parker J had maintained a strictly subjective standard in another English case (*Regentcrest plc v Cohen* 2001) where he held that the question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind.

The latter position will not apply under the present provision of the Lesotho Companies Act which will be revisited later to discover the extent to which it permits a director to consider other interests in the performance of his duty to the company.

The United Kingdom (UK) Companies Act of 2006 follows a similar pattern in section 172(1) which provides that a director of a company must act in the way he considers in good faith would be most likely to promote the success of the company for the 'benefit of its members as a whole'. The phrase 'benefit of its members as a whole' is a vindication of the common law courts decisions that the phrase 'interests of the company' is an expression of the interests of the shareholders as a whole, as the company, being a juristic person, cannot have any interests outside those of its shareholders (*Greenhalgh v Arderne Cinemas Ltd* 1951, *Brady v Brady* 1988)). It is evident from this analysis that the primary duty of the director as reflected in the provision is the pursuit of the shareholder value as the mandate which a

director has is to promote the success of the company for the interests of the members as a whole and not for the interests of any individual shareholder or indeed the majority shareholder or shareholders (Arnold and Haywood in Mortimor QC 2009:254).

The pursuit of shareholder value by the company has been criticized by writers. Martin quoted Jack Welch as referring to the concept as the 'dumbest idea in the world' stating that shareholder value should be seen as a result, not a strategy, as the company's main constituencies are the employees, the customers and its products (Martin 2011). The concept has also been described as a short-term approach to company's business, which lays emphasis on immediate profits in preference to long-term growth, and which is bad for the economy (French, Mayson, & Ryan 2011:490). Short-term business maximization, it is observed, does not necessarily increase shareholder value. If a business sells sub-standard products to reduce cost and make a quick profit, it damages its reputation and therefore destroys competitive advantage in the future. While a focus on shareholder value can benefit the owners of a corporation financially, it does not provide a clear measure of social issues like employment, environmental issues or ethical business practices. A management decision can maximize shareholder value while lowering the welfare of third parties. It can also disadvantage other stakeholders such as customers, for a company could in the pursuit of shareholder value cease to provide support for old, or even relatively new products. Dodd (1932) contends that the role of business in the community is not limited to profit-making, it also has social function which is why it is permitted by law. 'Accordingly, where it appears that unlimited private profit is incompatible with adequate service, the claim of those engaged therein that the business belongs to them in an unqualified sense and can be pursued in such manner as they choose need not be accepted by the legislation.' Booth (2013) observed, from an economic perspective, that there is no theoretical justification in economics to support creating shareholder value, when it is simply a transfer of wealth from other claimants on the firm to the shareholders.

Some judicial pronouncements have significantly articulated the dynamics of corporate practices and societal change which justify a shift from the rigid and primordial concept of shareholder value as the only corporate purpose. In *Steinway v Steinway & Sons* (1896) the New York Supreme Court observed that 'as industrial conditions change, business methods must change with them, and acts become permissible which at an earlier period would not have been considered to be within corporate power'. In *AP Smith Manufacturing Co. v Ruth F. Barlow* (1953) Stein JSC stated that the 'emancipation from earlier constricting attitudes and holdings is part of the judicial growth and public service'. This buttresses the court's positive disposition to imbibing new approach in defining corporate purpose. In *Hutton v West Cork Rly Co* (1883) Bowen LJ expressed the judicial willingness to accommodate other stakeholders interests in the exercise of the directors duties so long, but only so long, as it promotes the interests of the company. His Lordship conveyed this message in captivating words which have continued to serve as reference points in discussions on this concept. He stated that; "The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.... It is not charity sitting at the board of directors, because as it seems to me charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb (I admit not a philanthropic garb) charity may sit at the board, but for no other purpose". In *Hampson v Price's Patent Candle Co* (1876) it was held that the company might lawfully expend a week's wages as gratuities for its servants because that sort of liberal dealings with servants eases friction between masters and servants, and is, in the end, a benefit to the company.

The Canadian Supreme Court in *Peoples Department Stores Inc. (Trustee of) v Wise* (2004) was more direct in expressing its willingness to accommodate stakeholders interests in the exercise of directors duty. Section 122(1) of the Canadian Business Corporations Act of 1985, which is reminiscent of the promotion of shareholders value in the strict sense, provides that "Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation". Major and Deschamp JJ held, while interpreting that provision, that they 'accept as an accurate statement of the law that in determining whether they (directors) are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment'.

This minimal concession by the courts to the consideration of stakeholders interests by the directors in the discharge of their responsibilities to the company is now encapsulated by writers as the concept of enlightened shareholder value approach to corporate responsibility. **(Continued in Part 2).**

## References

- Joyner, C.C. (2005), *International Law in the 21st Century: Rules for Global Governance*. Maryland: Rowman & Littlefield Publishers.
- Watson, A. (1982), *Diplomacy The Dialogue Between States*. London: Methau & Co Ltd.
- Barston, R.P. (1997), *Modern Diplomacy*. (2<sup>nd</sup> ed). New York: Addison Wesley Longman Inc.
- Diplomacy. [Online]. Available <http://en.wikipedia.org/wiki/Diplomacy> (January 23, 2014).
- Nye, J. (1990), *Bound to Lead: The Changing Nature of American Power*. New York: Basic Books.
- April, F.Y. (2009), *Assessing South Africa's strategic options of soft power application through civic interest groups*. *African Journal on Conflict Resolution* Vol 6 No.1. 123, 128.
- Nye Jr. J.S. (2013), *The Declining of America's Soft Power* [Online]. Available <http://www.foreignaffairs.com/articles/59888/joseph-s-nye-jr/the-decline-of-americas-soft-power>. (February 26, 2014).
- Nye Jr. J.S. (2013), *Soft Power, Hard Power and Leadership*. [Online]. Available [http://www.hks.harvard.edu/netgov/files/talks/docs/11\\_06\\_06\\_seminar\\_Nye\\_HP\\_SP\\_Leadership.pdf](http://www.hks.harvard.edu/netgov/files/talks/docs/11_06_06_seminar_Nye_HP_SP_Leadership.pdf) (February 26, 2014).
- IfG-Monocle *Soft Power Index* (2013). [Online]. Available <http://www.independent.co.uk/news/uk/home-news/britain-is-now-most-powerful-nation-on-earth-8326452.html> (February 26, 2014)
- Soft power lets Taiwan overcome poverty, survive despotism (2010), Lu, Taiwan News, February 18.
- Clark, W.K. (2003), *Winning Modern Wars: Iraq, Terrorism, and the American Empire*. New York: Public Affairs.
- Nye, J. (2004), *Soft Power: The Means to Success in World Politics*. New York: Public Affairs.
- Nye, J. (2011), *The Future of Power*. New York: Public Affairs.
- Annan, K. (2000), *Security General salutes international workshop on human security in Mongolia. 8-10 May 2000*. [Online]. Available [www.un.org/news/press/docs/2000](http://www.un.org/news/press/docs/2000) (February 26, 2014).
- Broodryk, A. & Solomon, H. (2010), *From War Economics to Peace Economics in Africa*. *Scientia Militaria: South Africa Journal of Military Studies* Vol 38 No 1, 1, 6.
- Governance: The World Bank 's experience (1990) vii.
- Ferreira-Snyman, M.P. & Ferreira, G.M. (2006), *Global good governance and good global governance*. *South African Yearbook of International Law* Vol 31, 52, 57.
- Jonathan, G (2013), *Nigerian politicians lack virtues of great men – President*. [Online]. Available <http://www.punchng.com/news/nigerian-politicians-lack-virtues-of-great-men-jonathan/> (December 9, 2013.).
- Dodd Jr. E.M. (1932), *For Whom are Corporate Managers Trustees*. *Harvard Law Review*. Vol. 45, 1145, 1146-1147.
- Berle, A.A. (1931), *Corporate Powers as Powers in Trust*. *Harvard Law Review* Vol. 44, 1049.
- Tricker, B. (2009), *Corporate Governance Principles, Policies and Practices*. New York: Oxford University Press Inc..
- Mollanthe, K. (2014), *TB deaths down: Motlanthe*. [Online]. Available <http://www.timeslive.co.za/politics/2014/03/24/tb-deaths-down-motlanthe> (March 25, 2014).
- Shareholder Value (2013), [Online]. Available [http://en.wikipedia.org/wiki/Shareholder\\_value](http://en.wikipedia.org/wiki/Shareholder_value) (February 10, 2013).
- Definition of 'Shareholder Value' (2013), [Online]. Available <http://www.investopedia.com/terms/s/shareholder-value.asp#ixzz1nlsJg7qR> (February 26, 2014).
- Rutkuow, L. (2013), *Should Corporations Serve Shareholders or Society?: The Origins of the Debate*. [Online]. Available <http://www.corporationsandhealth.org/news/140/15/Should-Corporations-Serve-Shareholders-or-Society-The-Origins-of-the-Debate> (February 10, 2014).
- Davies, P.L. (2005), *Enlightened Shareholder Value and the New Responsibilities of Directors' (Lecture delivered at the University of Melbourne Law School 4 October 2005)* 2 [Online]. Available [http://cclsr.law.unimelb.edu.au/files/Enlightened\\_Shareholder\\_Value\\_and\\_the\\_New\\_Responsibilities\\_of\\_Directors.pdf](http://cclsr.law.unimelb.edu.au/files/Enlightened_Shareholder_Value_and_the_New_Responsibilities_of_Directors.pdf) (January 10, 2014).
- Lazonick, W. & O'Sullivan, M. (2013), *Maximizing Shareholder Value: a New Ideology for Corporate Governance*. [Online]. Available [http://www.uml.edu/centers/cic/Research/Lazonick\\_Research/Older\\_Research/Business\\_Institutions/maximizing%20shareholder%20value.pdf](http://www.uml.edu/centers/cic/Research/Lazonick_Research/Older_Research/Business_Institutions/maximizing%20shareholder%20value.pdf) (January 10, 2014).
- French, D., Mayson, S. & Ryan, C. (2011)., *Mayson, French & Ryan on Company Law*. (28th ed). New York: Oxford University Press Inc.
- Re Smith and Fawcett Ltd* [1942] Ch 304 p.306 (CA).
- JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162 para. 25
- Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291, [1950] 2 All ER 1120 p. 1126 (CA).
- Gaiman v National Association for Mental Health* [1971] Ch 317 p. 330, [1970] 2 All ER 362 (ChD).
- Brady v Brady* [1988] BCLC 20 p. 40 (CA).
- Davies QC, P.L., Worthington, S. & Micheler, E. (2008), *Gower and Davies Principles of Modern Company Law*. (8<sup>th</sup> ed). London: Sweet and Maxwell.
- Cassim, F.H.I. (2011)., *The Duties and the Liability of Directors*. In F.H.I. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev & J. Yeats (Eds), *Contemporary Company Law*. Cape Town, JUTA & Co Ltd.
- Re Lee Behrens & Co Ltd* [1932] 2 Ch 46 (ChD).
- Re W & M Roith Ltd* [1967] 1 WLR 432, [1967] 1 All ER 427 (ChD).
- Re Cameron's Coalbrook Steam Coal and Swansea and Laughher Railway Co, Bennett's case* (1854) 5 De GM&G 284 p. 298 (Ch).
- Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)* [1995] BCC 1000, [1995] 3 All ER 811, [1995] 1 BCLC 352 (ChD).
- Simtel Communications Ltd v Rebak* [2006] 2 BCLC 571, [2006] EWHC 527 (QB).



- Hannigan, B. (2009), *Company Law* (2<sup>nd</sup> ed.), New York: Oxford University Press Inc. South African Companies Act 71 of 2008.  
*Charterbridge Corporations Ltd v Lloyds Bank Ltd* [1970] Ch 62 p. 70.  
*Regentcrest plc v Cohen* [2001] 2 BCLC 80 p. 105 (ChD).
- Arnold, M. & Haywood, M. (2009), *Duty to Promote the Success of the Company*. In S.Mortimore QC, (Ed).. *Company Directors Duties, Liabilities, and Remedies*. New York: Oxford University Press Inc.
- Martin, R.L. (2011), *Fixing the Game: Bubbles, Crashes, and What Capitalism Can Learn from the NFL* [Online]. Harvard Business Review Press. Available <http://www.forbes.com/sites/stevedenning/2011/11/28/maximizing-shareholder-value-the-dumbest-idea-in-the-world/4/> (December 13, 2013).
- Booth, L. (1998), *What Drives Shareholder Value?* (A paper presented at the Federated Press 'Creating Shareholder Value' conference, October 28, 1998) [Online]. Available <http://www.exinfm.com/pdf/files/value.pdf> (January 13, 2014).
- Steinway v Steinway & Sons* 17 Misc. 43, 40 NYS 718, 720 (1896).
- A P Smith Manufacturing Co. v Ruth F. Barlow* 26 NJ Super 106 (1953) 97 A 2d 186 (Superior Court of New Jersey, Chancery Division).
- Hutton v West Cork Rly Co* (1883) 23 Ch D 654 p. 673 (CA).
- Hampson v Price's Patent Candle Co* (1876) 45 LJ Ch 437 (CA).
- Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 S.C.R. 461, 2004 SCC (Canlii) para 42.