Introduction

This essay will critically examine components structures of corporate legal system in three separate jurisdictions, the United States (US), United Kingdom (UK), and Germany, whether convergence can be found either by adoption formally, or through a common functional approach. To do this, the essay will examine the following highlights of corporate legal system in these jurisdictions; Share holders/stakeholders oriented model, in light of the UK Companies Act 2006; Ownership and control, and the problems arising from shareholders/ directors relationship; Corporate Personality and lifting the veil of incorporation in the separate jurisdictions. This essay will further consider arguments on whether convergence of these corporate legal systems are desirable, through the possible effects convergence might have on economic, social, and political set of a jurisdiction, and finally conclusion will be drawn by the author.

The corporate legal system of a country is no doubt important to its economical prosperity. The approach taken by a country will determine the level of investment and performance in other to achieve such national economic prosperity. Two main theoretical approaches adopted by corporate legal systems have been identified by corporate laws scholars; the shareholders value theory, and the stakeholder theory. Whether these two approaches are converging is the debate stirred up by Hansmann and kraakman, who argued that convergence are assured towards the shareholders theory. This has become the subject of several debates. The stakeholders’ theory found mostly in continental Europe, with leading models in Germany and also countries such as Japan, is based on the inclusion of stakeholders, such as creditors, and employees in the decision making of the company. The concept of the stakeholder theory is reasoned on the idea that stakeholders are as important as shareholders, as they also contribute to the company’s capital. Perhaps the adoption of the stakeholders’ model by Germany was part of the process of reconstruction of its economy after the World War II to gain back legitimacy. This arguably, seems to have worked, as the German economy has become the envy of the world economies today. The Japanese adoption of the stakeholders’ model has also been argued, was not to encourage investment, but was a post World War II political policy, intended to rationalise the workforce and restore management control of production.

The shareholders theory on the other hand has as its main objectives, the interest and the maximisation of shareholders wealth, which are placed above all other parties. This theory is

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1 Lecturer, Faculty of Law Nasarawa State University Keffi.
4 Ibid
5 Ibid (n 1) 2
7 Andrew Keay (n 1)
formed mostly in the Anglo-Saxon jurisdictions, found in countries like the US, UK, and Australia. Under this theory companies are to maximise market value through the allocation of productive and dynamic efficiency.\(^8\)

There are major structural differences between the two theories in the ownership pattern, organisational structuring, and managerial policies. Germany provides for a two board system, which provides for supervisory board (Aufsichtsrat) and the management board (vorstand).\(^9\) Stakeholders representation on these boards would depend largely on the business of the company. Example, a mining company would have miners and a company dealing in construction would have labourer or manual employees as stakeholders.

Countries like Australia and China provides for a two third board system as well. In China, a minimum of one third of staff representation is provided for on the supervisory board. In France, employees with minimum of three percent of shares in the company are entitled to vote for directors.\(^10\) The purpose of these representations would mainly be to resolve conflicts that are bound to arise from companies operations.

In the US, the shareholder system can be found in the Model Act and also under the laws of the State of Delaware, which most major US corporations are incorporated under.\(^11\) The Delaware General Corporation Law (DGCL) generally provides for a director to run the company in the interest of shareholders.

The Companies Act (CA) 2006 of the UK provides for the shareholder system under section 172. This is referred to as the enlightened shareholder value principle. This provision, which is seen as a major reform to consider other interest other than shareholders, is argued to be no different than the shareholders system,\(^12\) whether the provision of section 172 CA 2006 leans towards the stakeholder system, is an ongoing debate. The Company Law Review Steering Group (CLRSG) made it clear that section 172 enhances the basics of corporate law, which is shareholder value principle.\(^13\) Some commentators have based their argument on this, stating that section 172 is solely based on the shareholders system.\(^14\) Agreeably only the court’s interpretation of this section will show whether the UK is leading towards “stakeholderism”\(^15\) or not.

Similarly the US is not isolated on the stakeholder system. Studies show that interest other than that of the shareholders are taken into consideration in one way or the other by some states through the enactment of the constituency statutes.\(^16\) Broadly, the constituency statutes allow for

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\(^8\) Ibid


\(^11\) Cahn & Donald (n 8) 17

\(^12\) Andrew Keay (n 1) 579

\(^13\) Ibid

\(^14\) Ibid


\(^16\) Ibid 8
a director of public company to consider, when making a decision a wider interest other than that of shareholders alone.  

The argument by Professor Ronald Gilson, that corporate laws only distinctive feature is a means to increase shareholders value can be debated on. Opponent of the shareholder theory argued that it has out run its course in business. While others argue that shareholders theory is focus on short term earning for shareholders, and as a result fail to maximise social wealth. Professor Larry Mitchel argued that the shareholder model is detrimental to not only the company, but also to employees and consumers. Agreeing with Professor Larry, the fall of major US corporations like Enron and WorldCom, perhaps proves this point. Employees and shareholders lost billion in pensions and stock prices.

**Ownership and Control**

One of the main differences found in the corporate legal system of the two separate jurisdictions is the composition of ownership structure. The modern day corporation has brought about investors surrendering their wealth to the control of the corporation (directors), who are given a level of autonomy to produce ‘wages’ for such investors. This is seen as separation in ownership and control, which consequently has resulted in the separation of risk bearers from the decision process in an organisation.

The US ownership structure is based on the ‘outsider oriented’ corporate system. This system is characterised by a high level of fragmentation of share ownership. An outsider oriented is based on a dispersed ownership in the shares of the company, characterised also by a clear separation of ownerships and control. This system is also found in the UK.

An important character of the outsider oriented system is that a single shareholder can hardly affect the management of the corporation on their own. Commentators like Michael Porter argued that the outsider oriented system adopted by the US managers is a myopic investment policy. On the other hand, some argued that the outsider oriented system allows for an open market through the stock market, which allows for a quick response in the event of change in the economy. However the stock market bubble makes this argument hard to swallow.

Opposite of the ‘outsider oriented’ system is the ‘insider oriented’ system, which is one that presupposes that public listed companies of a country have a small number of majority shareholders. This system of concentrated ownership is found in continental Europe and Japan.

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17 Ibid
18 Andrew Keay (n 1) 585
19 Ibid 586
20 Ibid
23 Ibid
24 Ibid
25 Ronald J. Gilson (n5) 12
26 Ibid
27 Ibid
In Germany and Japan large corporations have as shareholders financial institution, such as banks, also large block holders consisting of wealthy individuals, family and non financial firms are found in the case of Germany shareholdings as well.

It has been argued that the insider oriented system as in Japan and Germany, is undiversified, and brings about under performance of the economy. The superiority of one system over the other is still an ongoing debate, the author will agree with Brett, that labelling a single corporate system as superior over another is overly complex and make little sense.

**The Agency Problem**

Conflicts of interest can be found within several constituencies of a corporation, which could include conflicts of insiders; the shareholder and the management, and the outsiders; creditors, minorities and employees. These have being referred to as the agency problems. The director/shareholders relationship is a stereotype of an agency problem. One way of solving these directors/ shareholders problem is by derivative action.

The directors of companies have statutory duties owe to the company provided for by law. Under the Companies Act 2006, the scope and nature and general duties of a director is provided for. These duties are owned to the company and can only be enforced by the company. Part 10 of the CA 2006 provides for duty loyalty, good faith and care. Also sections 8.30, 8.60, and 8.63 DGCL and section 144. Under the AktG sections 82, 88, 93, 112, 116 provides for the duties of directors responsibility.

Analytically, these provisions cannot encapsulate every situation as directors carry out their duties to the companies. Conflict cannot be avoided but can be managed accordingly.

Under the UK Companies Act 2006, derivation claim is provided for under section 206(3) specifies for the types of breach of duty a derivative claim may be brought. Analysts of sections 206 states that a derivative claim under the UK jurisdiction is no longer bound by the requirement of common law as provided for under the rules in Foss v Harbottle, at least not at the preliminary stage of the proceedings.

Commentators have pointed out several distinctions of the new derivative claims in the UK Companies Act and that found in Common Law countries like the US. In a remark presented by Werner R. Kranenburg at the New York State Bar Association International Section Seminar on Transatlantic legislation in London, the Attorney and counsellor- at-law stated that the English courts unlike that of America, in considering whether to continue with a derivative claim takes into

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29 Ibid
32 Supra (n 8)
33 [1842] 67 ER 189
34 Arad Reisberg (n 30) 13
account if the claim can be brought by a member in his own right rather than on behalf of the company itself.\textsuperscript{35}

He also pointed out the differences in scope of limitation which a derivative claim can be brought between the two jurisdictions, arguing that there are more limitations in the UK. He further stated that under the new law, claims are to be brought by the shareholders to ‘\textit{promote the success of the company and act in good faith}’ which is not necessary so in the US.\textsuperscript{36}

In the US both federal and States laws provides for derivative action. Rule 23.1 of Federal Rules of Civil Procedure applies to derivatives action, and each state has its own court rules.\textsuperscript{37} In the US, derivative action is seen as one of the effective way of regulating corporate management provided for by the law.\textsuperscript{38} Corporate lawyers have debate whether the UK government objective to ‘enhance shareholders engagement and long time investment culture’ is a step towards a US-style approach of private enforcement of securities laws by the UK.\textsuperscript{39} The author will answer on the negative, as it has being argued that, the aim of the UK Company Law Reform Bill, as it then was, was to clarify and simplify certain areas of existing company law.\textsuperscript{40}

In Germany, there has been a recent enactment of the \textit{Gesetz zur Unternehmensintegrit und Modernisierung des Anfechtungsrechts} (UMAG) which altered the relevant provisions of German Act on public companies to allow shareholders initiate actions.\textsuperscript{41} Countries like New Zealand and Singapore introduced the statutory derivative action in the 90s. Australia, Canada and South Africa all have a statutory provision for derivative action. While it is said that the same theme runs through all these statute, there are a number of differences in procedures and application.\textsuperscript{42}

It has being argued that the new regime of derivative action in the UK will allow for a wider range of claims to be brought by shareholders than under the Common Law regime. Example is that employees or relevant groups holding shares could potentially bring a derivative claims against the directors for breach of their duties by not taking into account their interest as provided for by section 172 Company Act.\textsuperscript{43}

On the other hand critics of the new derivative law, argue that it will only increase to the already existing fears of directors in carrying out their duties. Critics further argued that the provision of section 260 CA will have little positive benefits in respect of effectiveness and would only increase shareholders litigation. In effect, making directorship non attractive.\textsuperscript{44}

The then Attorney General, Lord Goldsmith, in an attempt to respond to these criticism stated that, the derivative claims is a well established medium for shareholders to bring a claim in the name f a company in certain circumstances. His second point was that, the derivative claims under

\textsuperscript{36} Ibid
\textsuperscript{37} Ibid 2
\textsuperscript{38} Arad Reisberg (n 30) 9
\textsuperscript{39} Werner R. Kranenburg (n 34) 3
\textsuperscript{40} Werner R. Kranenburg (n 34) 2
\textsuperscript{41} Arad Reisberg (n 30) 9
\textsuperscript{42} Ibid
\textsuperscript{43} Ibid 14
\textsuperscript{44} Ibid 15
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the new regime is a 'failsafe mechanism rather than a weapon of first resort'\textsuperscript{45} Thirdly, he pointed that the new derivative claims will be under strict judicial control, and in no way be the same as the American style shareholders class action, stating that no increase in derivative action was expected as a result of the new law.\textsuperscript{46}

By way of analysis, the author will agree that much is expected of the new derivative claim law much reliance is however, place on the courts for it to be effective. For a case on derivative claims to succeed, it will depend on the circumstances and the discretion of the courts to interpret such circumstances.\textsuperscript{47} And perhaps, the greatest hindrance for shareholders would be the cost of litigation, leaving them with the one choice of selling out.\textsuperscript{48}

Other means by which the shareholders/directors relationship is regulated on in US is found in s.141 DGCL, which gives shareholders the rights to eliminate centralize management by way of transfer of executive authority to other bodies other than the board of directors.\textsuperscript{49}

Corporate Personality and Lifting the Veil of Incorporation

Corporate personality of a company is provided for under the corporate legal system of each jurisdiction. In Germany, the Aktiengesetz section 1 provides for the legal personality of corporation. Section 106 DGCL provides for the creation of an entity visited with legal personality while section 16 CA 2006 provides for a corporate entity.\textsuperscript{50} The concept of a corporate legal personality is that, a corporation is seen as a legal entity just like a natural person. However this is possible only theoretically, as we will come to see that the courts in some instances are forced to lift the veil of incorporation. Considerable differences can be found in the judicial approaches of each jurisdiction when lifting the veil of incorporation, even within Common Law countries like the UK and US. This has being argued to be, perhaps due to lack of systemic approach by the courts. The courts are said to experiment with common law concept such as agency relationship, and tort liability in deciding with cases of corporate personality\textsuperscript{51}.

The English approach towards lifting the veil of incorporation has had a history of mixed reception. In the eighteen century, limited liability, corporate personality, and the concept of separate ownership, was received with outright hostility and condemnation,\textsuperscript{52} with decided cases like Salomon v Salomon,\textsuperscript{53} Further ahead was the 70's, which saw a change of attitude towards the doctrine of veil perching by the English courts, with enthusiastic of the doctrine like Lord Denning. The courts at this time, showed a degree of willingness to lift the veil of incorporation.\textsuperscript{54} Cases such as Gilford Motor v Horn\textsuperscript{55}, Trebanog Working Men’s Club and Institute Ltd v Macdonald\textsuperscript{56}, and

\textsuperscript{45} Ibid
\textsuperscript{46} Ibid
\textsuperscript{47} Ibid 52
\textsuperscript{48} Ibid
\textsuperscript{49} Cahn & Donald (n 8) 18
\textsuperscript{50} Ibid 17-20
\textsuperscript{52} Ibid 6
\textsuperscript{53} [1897] AC 22
\textsuperscript{54} Thomas K. Cheng (n 50) 7
\textsuperscript{55} [1933] Ch. at 943
\textsuperscript{56} [1940] 1 K.B. 576 at 582 (Eng.)
Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co\textsuperscript{57} had success on lifting or setting aside separate legal personality of the company. Subsequent years however, saw fallout in the doctrine with English judicial system. Leading to the general perception, that English courts execrate the doctrine of veil piercing.\textsuperscript{58}

On the other hand the doctrine of veil piercing is argued to have being famously accepted by the US judiciary system. Very often, academics and commentators are left to write on the share volume and sometimes contradictory case law of the doctrine in the US jurisdiction.\textsuperscript{59}

Commentators have argued that distinctions between these two jurisdiction goes beyond divergence in judicial attitude, to include fundamental differences in conception of deciding judicial cases, and approach of judicial prerogative to legal doctrine.\textsuperscript{60} Distinctions such as jurisprudential approach, have being pointed out by writers, highlighting augments that while the US corporate veil piercing is done base on shareholders liability, that of the UK is more on the identification mode of parent companies.\textsuperscript{61} They argued that, the williness of the US court to embrace concept outside the common law and the reluctances of the English court to do so is also another difference. Furthermore, the presence of analytical framework in US corporate veil case and the lack of it there of in the English system also distinguishes the two separate approaches of the jurisdictions.\textsuperscript{62}

Commentators have argued that it is unsurprising on the lack of analytical framework in the English system of corporate veil piercing, with cases like \textit{Polly Peck}\textsuperscript{63}, \textit{Gramophone and Typewriter v. Stanley}\textsuperscript{64} which constitutes a wide range of issues, it would be unlikely that a common approach to corporate veils piecing applies to all the circumstances of each case.\textsuperscript{65}

Other differences in approach of the doctrine are that while the US leans towards justice, doing away with much technically of law, the English system is said to be ambivalent about justice and strict on technicalities in deciding corporate veil cases. However, judicial pronouncement show that some judges take into consideration justice over legal efficacy.\textsuperscript{66} One distinguishing approach by the English courts which is seen as a shift from it conservatism on the doctrine of corporate veil is the single economic unit theory. This theory allows the courts to hold corporate groups liable in a single case. The US courts have showed reluctance on the application of this theory. This perhaps, is a result of the shareholders liability approach the US courts follows,\textsuperscript{67} and perhaps because the theory has been labelled with flaws and criticism, even by English judges.\textsuperscript{68}

Recent cases have however, shown that the English courts are now willing to lift the veil incorporation, as was the case in \textit{Beckett Investment Management Group v Hall}\textsuperscript{59} and \textit{Stone and

\textsuperscript{57} [1921] 2 A.C. 465 (H.L.) at 466–67
\textsuperscript{58} Thomas K. Cheng (n 50) 2
\textsuperscript{59} Ibid 2
\textsuperscript{60} Ibid 14
\textsuperscript{61} Ibid 15
\textsuperscript{62} Ibid 19
\textsuperscript{63} [1996] 2 All E.R. at 433
\textsuperscript{64} [1908] 2 K.B. at 95–96.
\textsuperscript{65} Thomas K. Cheng (n 50) 21
\textsuperscript{66} Ibid 25
\textsuperscript{67} Ibid 59
\textsuperscript{68} Ibid 61
\textsuperscript{69} [2007] EWCA (Civ) 613, [2007] I.C.R. 1539 (A.C.) 1545
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*Rolls Ltd v Moore Stephens.*\(^{70}\) This however, may not necessarily be that the UK courts are adopting or leaning towards US approach to the doctrine, as distinction highlight above still exist.

The German corporate law has a distinct approach to the concepts of disregarding corporate personality ‘durchgriffshatung’. This is because most shareholders of companies (*Aktiengesellschaft* (AG) and *Gesellschaft mit beschränkter Haftung* (GmbH)) are also other companies, which distinguishes them from the US pattern, of which individuals are shareholders.\(^{71}\) Unlike the US, the German corporate law provides for standards for liability of company/shareholders.\(^{72}\) Laws governing entities that are shareholders in Germany are found in the German corporate law code AktG section 15-19 and 29, 328 respectfully.\(^{73}\) Analytically, German system has both equitable rule and statutory provisions, what has being described as a dualistic approach.\(^{74}\)

Studies have shown that further differences between the US and German system can be found. Under the German law, cases of lifting the veil of incorporation are decided based on the circumstances of each case. This is in contrast to the US system, where due to series of litigation, a pattern has evolved.\(^{75}\) Historically, the dualistic fabric of the German system was as a result of courts intervention on AG limited liability Companies, who were not regulated by the German stock corporate laws.\(^{76}\) This arguably, has the same theme of consideration of justices by courts under American system.

The similarity of the American and German system end with the liability of individual/shareholders, and a distinct difference is found when dealing with parent- subsidiary corporations.\(^{77}\) Commentators have pointed out that where in US entity law is applicable in Germany, enterprise law is adopted.\(^{78}\) Both systems have being criticised as a result of producing random and unpredictable decisions.\(^{79}\) The shift of the US system towards enterprise liability has been argued by scholars such as Professor Blumberg and Professor Thompson.\(^{80}\) If the US does decide to have a general shareholder liability laws, the German *Konzenracht* can be a model.

**Theory of Convergence and Conclusion**

The US and the UK system even though share the same lineage (common law), have several differences in the corporate system, as was examined above, but to a certain extent these two system are similar compared to the German legal system. The debates on convergence have witnessed different waves. In the early 1990’s the debates was how US will improve its economy.

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\(^{71}\) Carsten Alting, ‘Piercing The Corporate Veil In American And German Law - Liability Of Individuals And Entities: A Comparative View’ (1995) 187, 197 Tulsa Journal of Comparative & International Law

\(^{72}\) Rene Reich-Graefe, ‘Changing Paradigms; The liability of Corporate Groups in Germany’(2004) Vol 37;785 Connecticut Law Review

\(^{73}\) Ibid 797

\(^{74}\) Ibid

\(^{75}\) Ibid 794

\(^{76}\) Ibid

\(^{77}\) Carsten Alting (n 70) 249

\(^{78}\) Ibid 250

\(^{79}\) Ibid

\(^{80}\) Ibid
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through the adaptation of the German and Japanese system. These changed in the mid 1990’s and convergence was debated in favour of the US corporate legal system.81

Hansmann and Kraakman claim that US corporate system triumph over others is like claiming to have found the holy grail of corporate legal system. Several commentators and critics do not share with them this view.82 The debate whether one corporate legal system could qualify as superior and effect convergence is arguably not viable. Structural differences in German and UK are likely to persist. Perhaps the author might look at functional convergence between the UK and Germany system, and argue that the supervisory board and the Non executive Directors (NED) have similar functions of supervising the management of the company. But even so, this comparison cannot be perfect because the members of the NED and member of supervisory board are drawn from different class of people.

The desirability of different corporate legal system converging has being criticised by authors. Lucian Bebchuk and Mark Roe, argued that corporate legal system of various jurisdiction will continued to be resilience on the aspect of convergence.83 Schmidt and Gerald Spindler warned against the transplantation of ‘piece meal’ as convergence which they argue will lead to inefficiency, inconsistency and a dysfunctional system.84 Agreeing with Schmidt and Gerald, an example of transplantation is found in most corporate system of developing countries. Nigeria has a replica of the UK company law. Considering the differences in political, social, and economic background, the author will argue that the ‘copy and paste’ mechanism has produce dysfunctionality in the corporate system of Nigeria.

The Author will agree with Ronald Gilson who argued that the concept of ‘convergence’ is ambiguous, as there is a distinction between convergence in form and function, which makes it generally impossible to predict if a corporate legal system of a jurisdiction will converge towards another, and at what point such convergence will take place.85

Consequently the author will argue that corporate legal system adopted by a jurisdiction is linked to its political, cultural, and social aspect. Culture and politics most especially, cannot be underestimated. A system transcend beyond its legal concept to include cultural, social and even religious background, examples can be found in some Middle East countries with sharia (Islamic law) influence on corporate legal system.

The debate about convergence of corporate legal systems is likely to persist. These debates and divergence of views will enrich the discourse on the theory of convergence, but is most likely not to resolve divergences in various systems, and like Albert Hirschman stated “convergence in one area will be paralleled by renewed divergence in another”86

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