How Can UK Corporate Governance Law Enhance LGBT Dignity Protection?

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Declaration of Authenticity and Author's Rights

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.'

Signed: 王岩

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Abstract

LGBT people are equally entitled to human dignity as others are entitled to in human community/society. To respect LGBT people's dignity, the law plays a role in substantiating and protecting LGBT people's interests in all aspects of life: LGBT people's 'full membership'. LGBT dignity protection has been developed, *inter alia*, in human rights law, the law of employment and service provision, family law, immigration law and equality law in the UK jurisdiction. This thesis aims at introducing corporate governance to contribute to LGBT dignity protection in the UK. It will answer the question how UK Corporate Governance law can be changed to enhance LGBT dignity protection.

The focused problem in this thesis is that LGBT people can experience expressive harm in corporate activities, including service provision and employment areas. UK Equality law provides 'extra protection' on freely expressing/manifesting beliefs or opinions, which involve objection to LGBT identities and interests, such as objection to same-sex life in Christianity beliefs. Individuals can be allowed by the law to go beyond 'mere disapproval' and (intentionally or unintentionally) to deliver heterosexual and cisgender superiority implications through service provision and employment areas. The expressions/manifestations can 'pull' LGBT people from the 'equal high rank' among human community, but those speakers are not legally required with any responsibility for this LGBT expressive harm.

I contend that corporate directors and managers are not mandated with duties to address this expressive harm to LGBT people in the UK jurisdiction. In Equality law, the UK proportionate approach is focused on merely dealing with material harm (e.g. discrimination) and does not provide much legal guidance on tackling expressive harm. More importantly, UK Corporate Governance law does not impose legal obligations for directors to tackle expressive harm to LGBT people in corporate activities. S.172 (1) of the Companies Act 2006, as a key source of UK Corporate Governance law, mandates directors to promote the success of the company for the ultimate purpose of shareholders' interests. The statutory principle imposes little obligation on directors to seriously protect stakeholders' interests, including but not limited to employees, customers and people in the local society in the UK. From the perspective of

directors' duties, UK Corporate Governance law allows directors to disappoint LGBT stakeholders/people, leaving them in the expressive harm sufferings through companies.

In order to enhance LGBT dignity protection in corporate world, this thesis adopts the transformative corporate social responsibility (CSR) theoretical approach and promotes changes in UK Corporate Governance law. Corporate purpose is about more than mere profit-making and shareholders' wealth objectives. Protecting stakeholders' interests should be a substantive objective. The transformative CSR approach intends to widen directors' duties and presents that directors should sacrifice profit-making and shareholder wealth creation for the purpose of stakeholder protection. It will embody substantive stakeholder protection in corporate purpose. The transformative CSR approach marks a shift from profit-maximisation to profit-sacrificing social responsibilities in corporate governance.

To bridge corporate responsibility and LGBT dignity protection, this thesis adopts the radical feminist 'care and compassion' principle to strengthen the role of transformative CSR in challenging corporate heterosexual (and cisgender) superiority culture. The radical feminist perspectives demonstrate that the 'care and compassion' to LGBT stakeholders/people means protecting LGBT stakeholders' human rights and interests in corporate life. It also demonstrates that directors should exercise power to overturn LGBT subordination, encouraging to integrate LGBT dignity protection 'lessons' (UK Equality law) into UK Corporate Governance law.

Following from the theoretical discussions, this thesis proposes an independent LGBT due diligence process in the UK Corporate Governance law in order to address the LGBT expressive harm. In this process, there would be a central mandatory duty – LGBT due diligence duty – for directors to identify, prevent and mitigate expressions and manifestations which involve objections to LGBT interests in corporate activities, for the purpose of respecting LGBT dignity. This duty echoes the transformative CSR approach, widening directors' duties; also, this duty echoes the radical feminist 'care and compassion' principle, intending to overturn LGBT subordination. To strengthen the central duty, this thesis proposes to create two supportive CSR-related mechanisms, including the mandatory LGBT due diligence reporting and the LGBT stakeholder engagement (soft-law), to enhance scrutinisation.

The main findings are that the proposed LGBT due diligence process can weaken shareholder primacy but also strengthen UK Corporate Governance law to enhance LGBT tolerance through companies. Furthermore, the proposed governance change in corporate entities can set an example for the law of other organisations or entities, such as partnerships, financial sectors, charities and public authorities, to learn how to enhance LGBT dignity protection in the relevant service and provision areas. Nevertheless, the LGBT due diligence process, as an initial proposal, may not completely overturn shareholder primacy in UK Corporate Governance law; it can encounter other challenges and limitations. To strengthen this proposal as a more LGBT-affirmative mechanism, this research implies more radical changes on corporate purpose and responsibility in the UK corporate legal framework and more changes in UK Equality law that can provide direct 'legal guidance' on corporate governance.

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INTRODUCTION

A. Research question

This thesis investigates how UK Corporate Governance law can be changed to enhance LGBT dignity protection. It aims to introduce corporate governance to participate in addressing LGBT intolerance (i.e. expressive harm) and achieving to respect LGBT people's human dignity in corporate life and society.

In response to LGBT expressive harm in corporate life, this thesis devises an independent LGBT due diligence process in the UK Corporate Governance legal system, including the mandatory LGBT due diligence duty, the mandatory LGBT due diligence reporting regulation and the LGBT stakeholder engagement soft-law. This proposed due diligence process is guided and developed by the transformative Corporate Social Responsibility (CSR) theoretical approach combined with the radical feminist 'care and compassion' principle in corporate literature.

This thesis will challenge corporate heterosexual (and cisgender) superiority culture and provide a dignified environment for LGBT people/stakeholders who participate in corporate activities as well as who are affected by corporate activities in the UK society.

B. Explanation of key terms

1) LGBT definition

In this thesis, I adopt the term 'LGBT'. LGBT is the acronym for Lesbian, Gay, Bisexual and Transgender. I interpret LGBT as broadly referring to people with marginalised sexual and non-binary gender identities compared to heterosexual and cisgender people. The term LGBT encapsulates LGBT living styles, including same-sex/homosexual life, bisexual life, and non-binary gender (including transgender) life in different aspects of society, such as employment and service provisions. In this thesis, LGBT is mainly emphasised on LGBT people's living identities and core living interests in society.

The term LGBT is drawn from non-discrimination rulings from European Court of Human Rights (ECtHR) and Court of Justice of European Union (CJEU). In *Karner v Austria*[1] the ECtHR relied on Article 8 (Right to respect for private life and family life), read with 14 (Protection from Discrimination), found that same sex couples have a right to respect for their home. Following this, the ECtHR, in *Schalk and Kopf v Austria,*[2] found that 'same sex couples (including bisexual relationships) are just as capable as different sex couples of entering into stable committed relationships'.[3] From the examples of family life, this line of cases show that LGBT people should be legally entitled to equal private life as heterosexual and cisgender families in law.[4] In *P v S and Cornwall County Council*[5] where the applicant was fired because she decided to undertake a process of medical transition. According to the CJEU, the notion of sex discrimination 'cannot be confined simply to discrimination based on the fact that a person is of one or other sex'; by firing the applicant grounded on the intended gender transition, the employer was acting less favourably because of the 'sex of the person'.[6] The judgement indicates that non-binary gender people, including transgender, are equally entitled to non-discriminatory rulings as cisgender people (Male/Female). Learning from these cases, the term LGBT can play a role in navigating and progressing legal measures to ensure that *non-heterosexual and non-binary gender people* have the enjoyment of the 'equal high-ranking status' (human dignity, discussed in Chapter 1) as heterosexual and cisgender people in society. In other words, the term LGBT can make a direct contribution to pushing back the normativity/superiority created by the heterosexuality and cisgender in law.

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[1] (2004) 38 EHRR 24
[2] (2011) 53 EHRR 20
[3] Ibid [94].
[4] For instance, in *Parry & Parry v. United Kingdom (*Application no. 42971/05*)*, one partner underwent a gender reassignment surgery and claimed to remain with their spouse in a married relationship. The Court stated that 'the applicants [under the Article 8] may continue their relationship in all its current essentials and may also give it a legal status akin, if not identical to marriage, through a civil partnership which carries with it almost all the same legal rights and obligations'.[at page 10] The Court indicated that non-binary gender people's family life is equally entitled to legal protection as cisgender people's life.
[5] [1996] 2 CMLR 247
[6] Ibid at [20] – [22]

In a legal thesis, I would argue that 'LGBT' is a more fundamental term than other terms, such as LGBT+, LGBTQIA+, and Queer. In sociological studies, the latter ever-evolving ones show as a group of umbrella terms to cover various identities and thus create the rich diversity.[7] While those terms can introduce more diverse living interests for legal developments, those terms never depart from the central 'non-heterosexual and non-binary gender' concept under the term LGBT, as adopted in this thesis. According to Stephens, the progress of legal protection on LGBT rights can bring up more hope and force to improve legal protection for LGBT+ rights.[8] For instance, in 2018, the EU Commission produced a report for transgender and intersex equality protection, proposing to offer better opportunities to deal with intersectional forms of discrimination on these particular grounds.[9] The advocate for non-discrimination protection on intersectional forms followed from transgender protection in *P v S*. Furthermore, as Ricciardo and Elphick argued, LGBTQIA+ experiences are varied, with individuals experiencing differing levels of marginalisation and discrimination based on factors including social acceptance of their identities.[10] As argued above, non-heterosexual and transgender protection has been justified in legal developments; grounding on LGBT legal developments, law can be reformed to offer further specific protection for other marginalised people under LGBTQIA+. Therefore, 'LGBT', which is emphasised on non-heterosexual and non-binary gender beings, is an entirely concise and classic term to navigate legal changes for not only lesbian, gay, bisexual and transgender people but also other living interests under those terms like LGBTIQA+.

2) Tolerance

In this thesis, tolerance looks at addressing unfettered freedom by individuals. Tolerance is emphasised on the principles of 'co-existence and pluralism' and accommodating differences

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[7] Aidan Ricciardo and Liam Elphick, 'Under my umbrella: LGBTQIA+ rights, LGBTQIA+ researchers and 'internal allyship' [2024] Alternative Law Journal 1 at 3.
[8] Mark Stephens CBE, 'Brunei, Britain & protecting LGBT rights in the Commonwealth' [2019] European and Human Rights Law Review 235 at 237.
[9] Marjolein van den Brink, Peter Dunne, 'Trans and intersex equality rights in Europe – a comparative analysis' [2018] Directorate-General for Justice and Consumers (EU Commission) 1 at 108 < https://op.europa.eu/en/publication-detail/-/publication/f63460ca-ebac-11e8-b690-01aa75ed71a1/language-en> (Accessed 26 April, 2024)
[10] See (n 7) at 3.

among people.[11] Tolerance conveys reasonable limits on individuals' freedom; promoting tolerance is a means of preventing discrimination and human rights violations.[12] Also, tolerance is different from respect or acceptance in this thesis. According to Carter, tolerance entails 'objection component', including to a person, a belief, or a practice.[13] Under tolerance, individuals are allowed to disagree. I share with Carters' viewpoint, this thesis looks at the incompatibilities between respect/acceptance and tolerance – tolerance involves 'evaluating negatively' whereas respect involves upholding, supporting and accepting.[14] Furthermore, while tolerance allows disagreement or opposition, it remains as a mutual concept – practices shared by 'opposed but equally powerful agents'.[15] In the US case *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*[16] the cakeshop company owner held the religious belief which disagrees with LGBT people's interests and rejected to sell a cake for a same-sex couple. In the US Supreme Court, Justice Kennedy stated that there should be a 'neutral and respectful consideration' towards religious beliefs and the disputes 'must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.'[17] This case judgment can be an example of unpacking the mutual meaning of tolerance in this thesis. The religious believers are allowed to hold the belief that disagrees with LGBT interests; but they should not be allowed to manifest their beliefs by refusing to provide service to LGBT people and to cause harm on LGBT people's living interests. LGBT people ought to be equally entitled to the commercial service as other heterosexual and cisgender people in society. By achieving this, the law should limit the religious believers' manifestation but should not completely prohibit the believers' rights to freely express and manifest religious beliefs or force the believers to

[11] Zehra F. Kabasakal Arat and Caryl Nuňez, 'Advancing LGBT Rights in Turkey: Tolerance or Protection?' [2017] Hum Rights Rev 1 at 5.
[12] Ibid at 3.
[13] Ian Carter, 'Are Toleration and Respect Compatible?' [2013] Journal of Applied Philosophy 195 at 196.
[14] Ibid at 196.
[15] Ibid at 196.
[16] 584 U. S. ____ (2018)
[17] Ibid 12 and 18.

positively accept or respect LGBT interests. Justice Kennedy's judgment reinforced the co-existence – tolerance – of religious interests and LGBT interests in legal protection.

C. Why does the research question matter?

C.1. LGBT legal protection perspective

LGBT people are protected in different areas of law in the UK. Decriminalisation of same-sex intercourse occurred at different points of time throughout the UK. For England and Wales, s.1 of Sexual Offences Act 1967 provided that a private homosexual act (male-male) 'shall not be an offence provided that the two parties consent thereto and have attained the age of 21 years', and similar legislation was passed in 1980 for Scotland and 1982 for Northern Ireland.[18] In 1994 the Criminal Justice and Public Order Act lowered the age of consent for gay men from 21 to 18, and in 2001 it was further lowered to 16.[19] Sexual orientation neutrality in criminal law was achieved in England and Wales by the Sexual Offences Act 2003 and in Scotland by the Sexual Offences (Scotland) Act 2009.[20] In the law of family and private life, Adoption and Children Act 2002 brought rights for same-sex couples adopting in England and Wales; the same occurred in Scotland in 2007.[21] Civil partnership for same-sex couples throughout the UK was recognised through the Civil Partnership Act 2004 (coming into force in 2005). Same-sex marriage was introduced in England and Wales by the Marriage (Same Sex Couples) Act 2013 in England and Wales, and the Marriage and Civil Partnership (Scotland) Act 2014. In employment law, Employment Equality (Sexual Orientation) Regulations 2003 implemented protection on LGBT people from direct and indirect discrimination, and also harassment and victimisation in the workplace, which have now been superseded by the Equality Act 2010.[22] Therefore, LGBT legal protection plays a role in providing a dignified environment for LGBT people: LGBT people are progressively becoming 'full' and 'equal' beings in all aspects of life.

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[18] Sexual Offences Act 1997, s1(England and Wales); Criminal Justice (Scotland) Act 1980, s. 80; Homosexual Offences (Northern Ireland) Order 1982

[19] The Sexual Offences (Amendment) Act 2000, s1.

[20] For instance, s1 of Sexual Offences Act 2003 provided the description of 'rape', without being limited to only heterosexual intercourse.

[21] Adoption and Children Act 2002, s.68.

[22] Equality Act 2010, s.7 and s.12.

However, as Peter Dunne argued, it would be misleading to argue that 'expanding LGBTQI rights has been without any disagreement or legal controversy' in the UK.[23] One example is service objection to LGBT people's interests in business. According to Anthony Gray, many people objected to provide service to LGBT people in business/commercial activities because those held the views/beliefs that they object LGBT identities and living interests, such as objecting same-sex relationships and homosexual orientation in some religious beliefs.[24] This expressive objection to serve LGBT people in commercial activities can happen in not only UK jurisdiction, but also Canadian and US jurisdictions.[25]

Another example is the expressive objection to LGBT people in workplace. A report, which was conducted by Brad Sears and others in 2021, suggested that many people verbally expressed objection to LGBT on the basis of Christianity. In the report, many LGBT respondents said that they heard many comments which object homosexual orientation and gender identity on the basis of 'God' from the colleagues or supervisors.[26] People can deliver the expressions, such as 'LGBT people were against God's plan', 'God didn't love LGBT people', and 'God only made two genders', to oppose LGBT identities and LGBT interests.[27] Those employees also expressed the Christianity belief to demand that gay people change their sexual orientation.

Allowance of the expressive objection at work and service provision by Equality law would cause harm to LGBT people. Allowing the expressive objection to LGBT people/interests is equivalent with the allowance of manifesting the beliefs/opinions in heterosexual superiority in society.[28] I argue that the allowance of objection can cause the consequence that LGBT

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[23] Peter R. Dunne, 'Brexit: The Likely Impact on Sexual Orientation and Gender Identity in the United Kingdom' in Moirs Dustin et al (eds), *Gender and Queer Perspective on Brexit* (Palgrave Macmillan, 2019) at 287.

[24]Anthony Davidson Gray, 'Religious-based discrimination in the commercial context on the basis of sexual orientation: A comparative perspective' [2022] Common Law World Review 198 at 198 to 199.

[25] Ibid. Gray presented cases in relation to service objection to LGBT people, such as *Lee v Ashers Baking Co. Ltd* [2018] UKSC 49, *Masterpiece Bakery v Colorado Civil Rights Commission* [2018] 128 S. Ct. 1719 (US), and Smith and *Chymshyn v Knights of Columbus* [2005] BCHRT 544.

[26] Brad Sears, Christy Mallory, Andrew R. Flores, and Kerith J. Conron, 'Lgbt People's Experiences Of Workplace Discrimination And Harassment'[2021] UCLA School of Law William Institute 1 at 18.

[27] Ibid at 18.

[28] Kenneth M. Norrie, 'What Level Of Respect Do The Beliefs Of The Ashers Baking Company Limited Deserve In A Democratic Society' [2023] Northern Ireland Legal Quarterly 417 at 437 and 438; Heterosexual superiority, in my thesis, is explained that LGBT people are less worth of human

people are treated as 'second-class citizens'.[29] The real danger is that it is acceptable to hold heterosexual superiority 'in the way that it is no longer acceptable to profess that the white race is superior to all others, or that men are inherently superior to women'.[30]

C.2. Corporate governance perspective

As a radical feminist author, I am aiming to tackle this expressive harm to LGBT people in corporate governance, intending to challenge the culture that actualises LGBT subordination.[31] Learning from those examples above, corporate activities, including service provision and employment, can be where people deliver expressive harm and cause intolerance to LGBT people in society. However, the existing UK Corporate Governance law is not helpful to tackle LGBT expressive harm in corporate activities. From the corporate literature, the existing UK Corporate Governance legal system is dominated by shareholder primacy. According to Orts, one study in 2011 found that the top ten law schools as well the top ten business schools in the US taught a view focused on shareholder primacy as the normative objective of business firms: the first mission of the firm is to maximise profits; to claim any other broader (social) conception of business purposes is to risk betraying directors' fiduciary duties, which echoes shifting primacy back to shareholders in UK Corporate Governance law.[32] According to MacNeil and Esser, with shareholder primacy confirmed in UK Corporate Governance law, directors are not imposed with mandatory obligations to protect other stakeholders' interests (i.e. human rights and environmental interests) and can be

dignity/status as heterosexual and cisgender people. This will be discussed in radical feminist critiques in Chapter 5.

[29] Ira Lupu and Robert Tuttle, 'Same-Sex Equality and Religious Freedom', [2010] NorthWestern Journal of Law & Social Policy 274 at 294; Paul Johnson, 'The love of law, and the law of love: Jonathan Cooper and LGBT human rights advocacy' [2022] European Human Rights Law Review 33 at 45 to 46

[30] See (n 28) Norrie at 438.

[31] E.g. Catharine A. MacKinnon, 'Substantive equality revisited: A rejoinder to Sandra Fredman' [2017] International Journal of Constitutional Law 1174 at 1176; Catharine A. MacKinnon, 'Weaponizing The First Amendment: An Equality Reading' [2020] Virginia Law Review 1223 at 1225; Catharine A. MacKinnon, 'Equality'[2020] Creative Commons Attribution-Non-commercial No Derivatives International 213 at 214 and 215. Professor MacKinnon's works are influential to me and this thesis. Her radical feminist critiques are helpful to challenge heterosexual superiority culture and address LGBT expressive harm in corporate life. The radical feminist critiques will be discussed more in Chapter 5.

[32] Eric W. Orts, 'Toward a theory of plural business purposes' [2024] Journal of Corporate Law Studies 1 at 8 and 18.

trapped to add value to society beyond shareholders collectively.[33] Likewise, both Choudhury[34] and Galanis[35] argued that the confirmed shareholder primacy contributes to watering down directors' obligations to address other stakeholders' interests and concerns under the UK model. Following this, corporate governance engagements for LGBT protection are more likely to be driven by commercialisation. As Conway argued, LGBT Pride activities by companies are usually critiqued as instruments for making 'pink cash'.[36] With shareholder primacy in law, the involvement of corporate sponsors in LGBT Pride activities is difficult to be considered as true care to LGBT peoples' rights in society. Also, as argued above, expressive harm to LGBT people is not well addressed in UK Equality law, which creates a lack of legal guidance for directors to go beyond shareholder primacy and exercise power to address LGBT expressive harm. As a result, directors bear little responsibility with the circumstances in which LGBT people encounter expressive harm and experience status sufferings developed by heterosexual superiority through corporate activities.[37]

D. Focus on UK Corporate Governance law

To tackle LGBT expressive harm, this thesis is focused on proposing changes on UK Corporate Governance law. First, this thesis takes directors' power and duties as the central focus in UK Corporate Governance law. In the UK, the most commonly cited definition of 'corporate

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[33] Iain MacNeil and Irene-marié Esser, 'The Elusive Purpose Of Corporate Purpose' [2023] (Forthcoming: 'Private Law and Sustainability', Routledge) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4523037#:~:text=Ultimately%20corporate%20purpose%20defines%20who,and%20embedded%20in%20corporate%20culture.> (Accessed on the 3rd May) 1 at 8.

[34] Barnali Choudhury, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough' [2023] Business and Human Rights Journal 180 at 187.

[35] Michael Galanis, 'Corporate law coasting in neutral: from egalitarianism, to sustainability, to extinction?' in Christopher Bruner and Marc Moore (eds), *A Research Agenda for Corporate Law* (Edward Elgar 2023) 1 at 37.

[36] Daniel Conway, 'Conceptualising queer activist critiques of Pride in the Two-Thirds World: Queer activism and alternative Pride organising in South Africa, Mumbai, Hong Kong and Shanghai' [2024] Sexualities 1 at 3 and 4.

[37] E.g. Charlotte Villiers, 'A game of cat and mouse: human rights protection and the problem of corporate law and power' [2023] Leiden Journal of International Law 415 at 426 ('The consequence is to shut out other stakeholders (despite claims to recognize them) from important decision-making processes')

governance' is provided by the influential Cadbury Report in 1992.[38] According to the Cadbury Report, corporate governance is 'the system by which companies are directors and controlled', for which board of directors bear principal responsibility.[39] Corporate governance is concerned – first and foremost – with the problem of power: 'corporate governance is essentially an enquiry in to the causes and consequences of the allocation of decision-making power'.[40] Nowadays, directors power and duties focus on 'the benefit of its members as a whole' vested in s.172 of the Companies Act 2006: shareholders are affirmed as occupying prime position in corporate governance.[41] As argued above, this shareholder-centric model allows directors to neglect adverse corporate impacts on LGBT people in decision-making. Therefore, this thesis will widen directors' duties and propose the LGBT due diligence duty.

Secondly, this thesis is focused on LGBT people/stakeholders in UK Corporate Governance law. Learning from the pre-existing law, directors' duties and power are owed to the 'interests of the company',[42] including the corporate entity,[43] shareholders[44] and non-shareholding stakeholders (or stakeholders).[45] There are two scopes of stakeholders in this thesis. First, stakeholders are people who contribute to corporate development, including (but not limited to) employees, customers and creditors.[46] Secondly, stakeholders include those who can be affected by corporate activities, including people in the local society.[47] The 'stakeholders in a wider society' is learned from adverse impacts of the company on wider society. As Watson argued, the company operates in the world and has therefore an impact on the world, creating

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[38] The Cadbury Report was put forward by the Cadbury Committee on the Financial Aspects of Corporate Governance in 1992. This will be discussed in detail in Chapter 3, Section 3.
[39] The Cadbury Committee, Report of the Committee on the Financial Aspects of Corporate Governance (1992), para. 2.5.
[40] Marc T Moore, Martin Petrin, *Corporate Governance: Law Regulation and Theory* (Palgrave, 2017).
[41] *BTI 2014 LLC v Sequana SA* [2022] 3 W.L.R. 709 at [332] and [386]
[42] E.g. *Re Smith & Fawcett Ltd* [1942] Ch. 304
[43] E.g. *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392.
[44] E.g. *Brady v Brady* [1998] BCLC 20.
[45] E.g. *Fulham Football Club v Cabra Estates* [1994] 1 BCLC 363.
[46] E.g. *Fulham Football Club v Cabra Estates* [1994] 1 BCLC 363: The duties owed by the directors are to the company and the company is more than just the sum total of its members, including creditors and employees at 373
[47] *Teck Corporation v. Millar* [1972] 33 D.L.R. (3d). 288: directors are allowed to protect the interests of people from the local community, whose interests can be affected by the corporate activity at 314; (the theoretical definition of stakeholders will be discussed in Chapter 4 in detail)

negative externalities on people in society.[48] According to Sjåfjell and Bruner, corporate governance should recognise 'the importance of protecting human rights and securing the fulfilment of fundamental social needs, acknowledging the economic and societal risks that pervasive inequality, globally and within countries'.[49] It means that corporate activities should be managed in 'social foundation', ensuring the realisation of a number of basic human rights and needs for people who can be affected by the company. Following the corporate discussion, LGBT people are stakeholders who are identified as LGBT, particularly focusing on LGBT employees, customers and LGBT people who can be affected in the UK society. In UK Corporate Governance law, the proposed due diligence duty would require directors to mitigate and prevent expressive harm from being delivered to LGBT stakeholders in the company and society.

Thirdly, this thesis will propose two supportive mechanisms in the proposed LGBT due diligence process in UK Corporate Governance law, including LGBT reporting regulation and LGBT stakeholder soft-law. This thesis is focused on the two sources of the UK Corporate Governance law, including UK Company law and UK Corporate Governance Codes. UK Company law, including company legislations and case law, provides mandatory directors' duties and accountabilities[50] and various non-financial reporting and disclosure obligations.[51] Learning from the non-financial reporting obligations, this thesis will propose the LGBT reporting regulation in the LGBT due diligence process. Another source refers to the non-binding[52] UK Corporate Governance Codes. The UK Corporate Governance Code 2024 placed much emphasis on stakeholder protection and directors' wider responsibilities, including

[48] Susan Watson, 'Can the modern corporation operate sustainably?' in Beate Sjåfjell, Carol Liao and others (eds), *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene* (EE, 2022) at 206.
[49] Beate Sjåfjell and Christopher M. Bruner, 'Corporations and Sustainability' in Beate Sjåfjell and Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019) at 4.
[50] E.g., Companies Act 2006 Sections 171-177.
[51] E.g., Companies Act 2006 Sections 414CA and 414CB.
[52] UK Corporate Governance Codes adopted 'comply or explain' principle, which is understood as soft-law. This nature will be discussed in detail in Chapter 3 Section 3 and Chapter 6 Section 4.

stakeholder engagement recommendations.[53] Modelling on the stakeholder engagement recommendation, this thesis will propose the LGBT stakeholder engagement soft-law in the LGBT due diligence process, integrating with the LGBT reporting regulation to strengthen effectiveness of the due diligence duty.

Fourthly, this thesis will apply the proposed LGBT due diligence process in all companies (regardless of public or private and large or small aspects) within the UK. Traditionally, under the influence of corporate governance codes, only public companies, in particular large and socially significant ones, involve corporate governance.[54] Nevertheless, all companies should involve corporate governance nowadays. S.172 of the Companies Act 2006 is a general statutory director duty applied to all companies, regulating all directors' decision-making power. Also, Financial Reporting Council introduced the Wates Corporate Governance Principles for *Large Private Companies* in 2018, similarly intending to enhance directors' accountability to stakeholder protection as UK Corporate Governance Code 2024.[55] As Bakan argued, companies distribute services and resource, driving themselves and their values into every corner of society.[56] All companies can have interactions with LGBT people in society, such as employment or service provision; all companies have a chance of delivering expressive harm to LGBT people in society. Thus, this corporate governance change – LGBT due diligence process – must be applied to all companies in the UK.

E. Research methodology

This research is completed by doctrinal analysis. According to Hutchinson and Duncan, doctrinal analysis normally contains two parts – 'locating the sources of the law' and

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[53] FRC, The UK Corporate Governance Code (January, 2024), Principles A (long-term sustainable success); Principles D (stakeholder/workforce engagement mechanisms)

[54] See (n 40) Moore at 4 to7; The UK Corporate Governance Code 2024 is applied to only to all companies with a premium listing (public-traded companies).

[55] Financial Reporting Council, The Wates Corporate Governance Principles for Large Private Companies, (December 2018) < https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf > (Accessed on 20th September 2023)

[56] Joel Bakan, *The New Corporation: How "Good" Corporations Are Bad for Democracy* (Knopf Doubleday Publishing Group, 2020) at 111.

'interpreting and analysing the text'.[57] The first part of the doctrinal method requires this thesis to access, collect and analyse a wealth of primary and secondary sources of the relevant legislation in UK Corporate Governance law, including legislations, case law and corporate governance codes; LGBT protection case law in UK courts, the ECtHR, the CJEU, US jurisdiction, South African Jurisdiction and Canadian Jurisdiction.

The second part of the doctrinal method is referred as 'identifying, analysing and synthesising the content of the law'.[58] This thesis intends to adopt a wealth of theoretical frameworks to guide the analysis and synthesis of law. This thesis adopts the transformative corporate social responsibility (CSR) theoretical approach, aiming to widen directors' responsibilities and include LGBT protection in corporate governance. Through analysing LGBT legal protection, LGBT human dignity respect is identified as the focus of transformative CSR: UK Corporate Governance law should tackle LGBT expressive harm and enhance LGBT tolerance in corporate life. In order to bridge corporate governance and LGBT dignity respect, this thesis integrates feminism with the transformative CSR approach: the radical feminist 'care and compassion' principle. Built on corporate and feminist theoretical discussions, the transformative CSR approach (combined with the radical feminist 'care and compassion' principle) plays a role in challenging heterosexual superiority culture in corporate aspects. This transformative CSR approach brings about the proposed change – LGBT due diligence process – in UK Corporate Governance law.

F. Originality

My original contribution to knowledge is to connect LGBT protection and corporate governance in a way that has not been done before. The primary aim of the thesis is to tackle the LGBT expressive harm which has not been well addressed in the UK jurisdiction and thus to enhance LGBT tolerance in corporate life and society. As will be discussed in Chapter 2, UK courts have placed much emphasis on the proportionate approach in relation to striking a fair

[57] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] Deakin L. Rev. 83 at 110.
[58] T Hutchinson, 'Doctrinal Research' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge 2013) at 9.

balance between LGBT interests and competing interests (e.g. the rights to freely expressing and manifesting disapproval of LGBT interests) in corporate life. If courts favour or protect the expressions of beliefs and views in workplace, individuals can endorse these views to LGBT people in corporate activities, such as workplace and service provision.[59]

This thesis, built on the transformative corporate social responsibility direction in the UK,[60] proposes the new LGBT due diligence process in the corporate governance system. Rather than follow the fair balance in the UK courts, the proposed due diligence process would require directors to limit or restrict the expression and manifestation *content*, which involves passing disapproval to LGBT, in corporate activities. This process can directly address LGBT expressive harm in the company and the impacts on the wider society, making a contribution to LGBT people' full and equal membership in human society. Also, this corporate governance-based due diligence process provides a dynamic mechanism which requires directors to proactively identify, prevent and mitigate LGBT expressive harm issues. The significance of the 'due diligence' mechanism is that directors are required to adopt comprehensive internal corporate compliance policies and programs as well as scrutiny of corporate activities.[61] It enhances corporate accountability to internally challenge corporate heterosexual superiority culture, which delivers a positive external impact – increase LGBT tolerance – in society.

G. Thesis structure

[59] Sharon Cowan and Sean Morris, 'Should "gender critical" views about trans people be protected as philosophical beliefs in the workplace? Lessons for the future from *Forstater*, *Mackereth* and *Higgs*' [2022] Industrial Law Journal 1 at 32 to 33

[60] British Academy, Principles of purposeful Business: How to deliver the framework for the Future of the Corporation (2019) < https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf > (Accessed on 1st April 2023) at 16 and 17 (A corporate purpose is the expression of the means by which a business can contribute solutions to societal and environmental problems.)

[61] Christine Parker and Leon Wolff, 'Sexual Harassment and The Corporation In Australia And Japan: The Potential For Corporate Governance Of Human Rights' [2000] Federal Law Review 509 at 513 to 514.

In this Section, I will demonstrate a brief description of each chapter, including summary, focused literature, and how to approach the research question chapter by chapter (sub-questions).

Chapter 1 aims to provide the theoretical foundations for human dignity and expressive harm. In Section 1, I unpack human dignity from Waldron's works, identifying human dignity as an 'equal high-ranking status'. Following this, LGBT dignity protection is interpreted as LGBT people possessing the high-ranking status equally as heterosexual and cisgender people in law. Also, I distinguish Waldron's dignity from Kantian dignity (i.e. intrinsic worth): Waldron's dignity is adopted because it can show that LGBT people's human status can be 'pulled down from' the equal high rank in legal protection. In Section 2, I interpret expressive harm by engaging the expressive function of law and Waldron's dignity literature. I would argue that law can allow individuals to deliver expressions that cause harm to others, including LGBT people. Similar to material behaviours, expressions can take away people's dignity from the equal high rank. Thus, LGBT expressive harm is a dignitary harm to LGBT people. In Chapter 1, I answer the questions about the meanings of LGBT dignity and expressive harm.

Following the theoretical discussions in Chapter 1, Chapter 2 aims to examine LGBT dignity protection in UK Equality law, including the Equality Act 2010, European Convention of Human Rights (ECHR), and EU law. In Section 1, I adopt the legal concept tolerance from the ECtHR, arguing that UK Equality law has embodied the tolerance concept to accommodate LGBT people's rights and other interests which may not agree with LGBT dignity protection (competing interests). The key example is non-discrimination rulings on the ground of sexual orientation and gender identities in the Equality Act 2010. Thus, UK Equality law has availabilities to LGBT dignity protection. However, expressive harm is not being protected under the existing UK Equality law. In Section 2, I examine the case *Lee v Ashers Baking Co Ltd* in the UK Supreme Court, arguing that the 'extra protection' in this case judgment allows expressive harm to happen to LGBT people. LGBT people can suffer 'invisible' dignitary harms in corporate activities; the UK law conveys LGBT intolerance in society. In Section 3, I engage with LGBT protection cases under UK Equality law and examine the LGBT intolerance and limitations of the law, including the flaws of the existing UK court proportionate approach and

the lack of employers' liabilities on addressing LGBT expressive harm. Following the limitations in Section 3, I synthesise the limitations of Equality law as LGBT protection 'lessons' and suggest internalising those 'lessons' into directors' duties in UK Corporate Governance law in Section 4: directors need to be obliged to limit or restrict the LGBT-critical content in expressions and manifestations to enhance LGBT tolerance. Chapter 2 answers the questions about why UK Equality law is insufficient to LGBT dignity protection and address LGBT expressive harm, and what 'lessons' need to be internalised in UK Corporate Governance law to propose changes.

In Chapter 3, I answer the question why directors' duties under UK Corporate Governance law are inadequate to participate in LGBT protection. This chapter interrogates whether or not shareholder primacy is entailed in UK Corporate Governance law, in particular s.172 of the Companies Act 2006. Section 1 adopts shareholder primacy theories in corporate literature and focus on directors' power and duties to exclusively aggregate corporate profits for shareholder wealth creation. Section 2 and 3 engage with UK company legislations, case law and parliamentary debate, arguing that while s.172 is not aimed to be a shareholder primacy model, it does create a shareholder primacy effect and does not embody stakeholder protection in corporate governance law. Section 4 engages with corporate and feminist literature and corporate case studies. It provides the evidence, including corporate scandals, case law and corporate environmental protection, that directors are allowed to disappoint stakeholders' interests in s.172. Learning from these evidence, s.172 does not impose obligations on directors to protect LGBT people and even does allow LGBT intolerance issues to perpetuate in corporate activities. This chapter delivers that directors' power and duties, as the core of corporate governance, ought to be modified to enhance LGBT protection. Combined with Chapter 2, directors' duties ought to be widened and added with the LGBT protection 'lessons'.

In Chapter 4, I intend to investigate how to widen directors' duties under UK Corporate Governance law. To answer this question, I present a theoretical model transformative Corporate Social Responsibility (CSR) approach. In Section 1, I engage with corporate sustainability literature, and present the new corporate purpose/objective, including long

term corporate wealth maximisation, shareholder wealth and substantive stakeholder protection. The significance of this new corporate purpose is to highlight stakeholder protection as a substantive goal. Building on the new corporate purpose, Section 2 engages with CSR literature and creates the transformative CSR theoretical approach. The core of this approach is to impose obligations on directors to sacrifice profit-generation for the purpose of safeguarding stakeholders' interests, including LGBT protection. This approach shifts the role of corporate governance from profit-maximisation to profit-sacrificing for social responsibilities, as evidenced in European Corporate Governance changes. Section 3 provides the foundation for the transformative CSR approach in corporate legal and theoretical developments. Section 3 identifies a company as an independent social entity in society. This creates the foundation for transformative corporate social responsibility developments, including neutral technocracy and the corporate citizenship theory, in corporate governance. Combined with Chapter 3, transformative CSR can contribute to going beyond shareholder primacy under UK Corporate Governance law and shifting directors' duties towards LGBT dignity protection.

The transformative CSR approach in Chapter 4 looks at widening directors' duties to general substantive stakeholder protection. In Chapter 5, I will investigate how to reinforce transformative CSR specifically widening and guiding directors' duties to LGBT dignity protection. In response to the question, I argue that the radical feminist 'care and compassion' principle is a key interpretative theory in this chapter. Section 1 engages corporate and feminist 'care and compassion' management literature. I attempt to weave a 'care and compassion' principle in social and relational feminism with the transformative CSR approach. This 'care and compassion' principle regards LGBT stakeholders' interests as LGBT people's human needs and interests, which echoes social imperatives protection in the transformative CSR approach. Also, the feminist 'care and compassion' principle suggests internalisation of other areas of law to enhance LGBT protection in corporate governance. Section 2 engages with radical feminist literature. I argue that radical feminism deepens the 'care and compassion' principle, highlighting protecting LGBT dignity as a substantive goal in transformative CSR. Radical feminist critiques, which intend to overturn male superiority, play a crucial role in challenging corporate heterosexual superiority and enhancing LGBT life

tolerance. One example is LGBT board diversity. Section 3 engages with the radical feminist 'difference' method literature. I argue that the 'difference(inequality)' method in radical feminism can empower transformative CSR to achieve LGBT dignity protection. The 'difference' method suggests key theoretical guidance in transformative CSR, including protecting LGBT people's unique needs, going beyond equal treatment, and specifying a LGBT protection-based duty. Combined with Chapter 2 and Chapter 4, the radical feminist 'care and compassion' principle reinforces transformative CSR approach embodying the LGBT protection 'lessons' in directors' obligations to tackle LGBT expressive harm in UK Corporate Governance law.

Combined with Chapter 4 and 5, Chapter 6 proposes the new LGBT due diligence process in UK corporate governance law, as the manifestation of the transformative CSR combined with radical feminist 'care and compassion' principle. Modelling on the form of human rights due diligence law, this proposed due diligence process would be an independent but specific new model to address LGBT expressive harm in the UK corporate governance legal framework. Section 1 presents LGBT due diligence duty as the central duty, emphasised on 'identifying, preventing and mitigating' LGBT-critical content in expressions and manifestations in corporate activities. This duty internalises LGBT protection 'lessons' to address LGBT expressive harm (in Chapter 2) and intends to respect LGBT people's human dignity (in Chapter 1). The proposed duty also reflects the substantive stakeholder protection goal in transformative CSR (in Chapter 4) and challenges corporate heterosexual superiority culture (in Chapter 5). To reinforce this due diligence duty, I propose two supportive scrutinisation mechanisms, including LGBT due diligence reporting regulation and LGBT stakeholder engagement. This proposed LGBT due diligence process can successfully introduce UK Corporate Governance law to participate in enhancing LGBT tolerance and protecting LGBT human dignity in corporate life and society.

Chapter 1: Theoretical foundations for human dignity and expressive harm

Introduction

In this Chapter, I will interpret key terms: human dignity and expressive harm. According to Finck, human dignity has emerged as a justificatory tool for bringing about LGBT rights through adjudication or legislation.[1] She further said that dignity fulfils the role in allowing for re-interpretations of law to give rise LGBT rights.[2] She concluded that dignity makes the significant improvement that non-heterosexual or non-cisgender people should no longer be deprived of the benefits of citizenship that are entitled to heterosexuals or cisgender people.[3] From Finck's argument, dignity can be considered as the underpinning approach for LGBT protection in law. For instance, the US Supreme Court, in *United States v. Windsor,*[4] delivered that further protection needs to be implemented on same-sex marriages because same-sex marriages are 'worthy of dignity in the community equal with all other marriages';[5] the Canadian Supreme Court, in *Vriend v. Alberta,*[6] found that gay and lesbian people must be protected from discrimination on the basis of sexual orientation because 'all persons are equal in dignity and rights';[7] in the UK same-sex marriage parliamentary debate, it was emphasised by Lord Anderson of Swansea that same-sex marriage law can 'protect and to give dignity and equal rights to a minority (homosexual people) in our country'.[8] Learning from same-sex partnership legal developments, I think that human dignity is linked with equal status among humans/individuals in society.

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[1] Michele Finck, 'The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective', [2016] 14 INT'l J. Const. L. 26 at 27.
[2] Ibid at 27.
[3] Ibid at 28
[4] 570 U. S. 744 (2013)
[5] ibid 19 to 20; another example is *Obergefell v. Hodges* 576 U.S 644 (2015).
[6] [1998] 1 SCR 493
[7] Ibid 497.
[8] Lord Anderson of Swansea, House of Lords, Daily Hansard, 17th June 2013<https://hansard.parliament.uk/Lords/2013-06-17/debates/13061712000472/Marriage(SameSexCouples)Bill#contribution-13061733000033 > (Accessed at 27th March 2022)

This chapter will be divided into two sections. In Section 1, I will provide the definition of human dignity by borrowing Waldron's dignity discourse, deconstructing the 'equal high-ranking status'. With Waldron's dignity, I will provide a theoretical foundation for understanding LGBT dignity: LGBT people possess the equal standing as heterosexual and cisgender people within this high rank. Also, I will distinguish Waldron's dignity from other dignity frameworks (e.g. Kantian dignity) which regards human dignity as intrinsic worth. Unlike other dignity frameworks, Waldron's dignity demonstrates that LGBT people can be 'pulled down' from the high rank and suffer from dignitary harms.

In Section 2, I will go on discussing dignitary harms, emphasising on expressive harm in this thesis. I will start from discussing expressive function of law, arguing that law can play a role in causing dignitary harms to LGBT people, including material harm and expressive harm. Furthermore, I will adopt Anderson and Pildes' approach and provide theoretical understanding about expressive harm. With this theoretical foundation, I will build up the connection between expressive harm and Waldron's dignity, arguing that expressions *per se* can cause exclusion of LGBT people from the equal high rank. I will provide evidence through *Bull v Hall* (material harm) and the 'separate but equal' legal system (expressive harm). I will also reflect on Waldron's dignity and answer what dignity suggests on resolving expressive harm. Finally, I will demonstrate the limited scope of expressive harm in this thesis.

Section 1 Definition of human dignity (1.1)

1.1. A. Waldron's dignity

Following Jeremy Waldron's discourse, I would argue that human dignity is understood as 'equal high-ranking status'.[9] First, I deconstruct this concept by explaining 'high-rank'. Waldron argued, in *the Dignity of Groups*, that:

[9] The 'equal high-ranking status' concept has been embodied in a number of Waldron's works: e.g., Jeremy Waldron, 'Dignity and Rank' in Jeremy Waldron and Meir Dan-Cohen (ed), Dignity, *Rank, and Rights* (Oxford University Press, 2012); Jeremy Waldron, *On Another's' Equals: The Basis of Human Equality* (Harvard University Press, 2017); Jeremy Waldron, 'Dignity, Rights, and Responsibilities' [2011] Arizona State Law Journal 1107; Jeremy Waldron, 'The Dignity of Groups' [2008] Acta Juridica 66; Jeremy Waldron, 'How Law Protects Dignity' [2012] Cambridge Law Journal 200.

> As a foundational idea, human dignity might ascribe to each person a **very high rank**, associated with the sanctity of her body, her control of herself and her determination of her own destiny, values and capacities that are so important that they must not be traded off for anything.[10]

On this basis, human beings are called to a 'special vocation' in the world, meaning that each of us was to be regarded with certain nobility or royalty and each of us was to be regarded as a creature of high(er) rank.[11]

Secondly, 'equal high rank' embodied in Waldron's dignity indicates that the idea of this special/high rank brings 'all humans in the great chain of beings'.[12] Waldron's dignity is emphasised on 'an upwards equalisation of rank': everyone's nobility or royalty is equal as others are entitled to *within* this rank.[13] While human beings stay at a higher rank than other creatures, within in this rank, there are no certain privileged groups whose ranks are over others. As Waldron illustrated in the example:

> Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone's person and body sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege[14]

The idea of 'equal high rank' articulates a significantly egalitarian position: humans are basically one another's equals.

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[10] Jeremy Waldron, 'The Dignity of Groups' [2008] Acta Juridica 66 at 73.
[11] Jeremy Waldron, 'Dignity, Rights, and Responsibilities' [2011] Arizona State Law Journal 1107 at 1119; also, Waldron unpacked the meaning of 'high rank' through an example – 'presumably in this ranking, plants are in turn inferior in dignity to beasts, and beasts are inferior to humans, and humans are inferior to angels, and all of them of course are inferior in dignity to God', meaning that humans rank higher than other creatures. See Jeremy Waldron, 'Dignity and Rank' in Jeremy Waldron and Meir Dan-Cohen (ed), Dignity, *Rank, and Rights* (Oxford University Press, 2012) at 33.
[12] Jeremy Waldron, 'Dignity and Rank' in Jeremy Waldron and Meir Dan-Cohen (ed), Dignity, *Rank, and Rights* (Oxford University Press, 2012) at 33.
[13] Jeremy Waldron, 'Dignity, Rights, and Responsibilities' [2011] Arizona State Law Journal 1107 at 1120.
[14] Ibid 1120.

Thirdly, following Waldron's discourse, status is associated with individuals essentially living as who they are and with their life interests. According to Waldron, status[15] can be divided into sortal status and condition status. Sortal status is emphasised on what sort of person an individual is.[16] I share with Waldron's idea that there is only one sortal status – the status of being a human; only one kind of human being.[17] Nonetheless, this status idea does not preclude human life differences. As Waldron argued, there is only one kind of human status but are 'different kinds of person', including women and men; black and white.[18] Regardless of different living identities, including LGBT, every individual is entitled to this human status, which is the baseline created by sortal status. Shukla, similarly, said that dignity is attached with all individuals/humans at birth (and till the end of life) regardless of race, citizenship, good/bad persons.[19] Furthermore, this sortal status affects condition status: under one kind of human, many conditional situations are potentially arrayed.[20] The condition status is emphasised on certain conditions that individuals are in.[21] As Kateb reinforced, human life can be marked by 'tendencies and potentials that could unfold in many more ways than actually occur'.[22] Condition status represents a variety of life interests based on who they are (arising from sortal status), such as same-sex marriage.

In the LGBT protection context, Waldron's dignity discourse delivers such as a significance – LGBT people ought to be seen with equal high-ranking status as other people (i.e. heterosexuals and cisgendered people) are entitled to in law. Following the sortal status, there is the single-status society where the equal high rank is attributed to every human being.[23] As Waldron argued:

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[15] According to Waldron, dignity is a matter of status; status, in this sense, is deemed as a legal concept or legal status rather than moral status. See (n 12) Waldron, *Dignity and Rank* (2012) at 19.
[16] See (n 12) at 59.
[17] Jeremy Waldron, *On Another's' Equals: The Basis of Human Equality* (Harvard University Press, 2017) at 8.
[18] See (n 12) at 59.
[19] Surabhi Shukla, 'The Many Faces of Dignity in Navtej Johar' [2019] EHRIL 195 at 201.
[20] See (n 12) at 8.
[21] Ibid at 59.
[22] George Kateb, *Human Dignity* (HUP, 2011) at 159.
[23] See (n 12) Waldron, *Dignity and Rank* (2012) at 56 to 57; The 'equal high rank' sheds lights on other commentator's dignity discussion about equal human status respect. For instance, Daly and May

> To be sincere, reliable, fair, kind, tolerant, unintrusive, modest in my relations with my fellows is not due them because they have made brilliant or even passing moral grades, but simply because they happen to be fellow members of the moral community.[24]

On this basis, we become equal members of the community/society and we hold ourselves to be one another's' equals, guaranteeing ourselves and each other mutual equal rights.[25] Similarly, as Franke argued, all humans enjoy an upwards equalisation of rank akin to the human status, which creates a society for all of us.[26] Each individual holds the 'membership' of our human society; each individual's life ought to be accommodated in society even though the living way is different from others. As Waldron argued for disabled people, there is no other community/society except the human society to which they [disabled people] belong.[27] Likewise, there should be no other society except the human society to which LGBT people belong: LGBT people should never be subordinated to any other individuals; LGBT people's living interests should never be excluded from our human society. Accordingly, LGBT dignity protection signifies substantiating legal protection to LGBT people as *equal humans* as others in life.

1.1.B Distinguish Waldron's dignity from Kantian dignity

I would argue that Waldron's dignity framework is more specific than Kantian dignity discourse[28] in terms of observing LGBT people's harm or suffering experiences. Waldron's dignity indicates that individuals can be 'pulled down' from the equal high rank, which is helpful to facilitates how the law should prevent and mitigate harm to LGBT people. I share

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reinforced this and argued that Human dignity conveys the notion that everyone has equal worth, meaning that each person's worth of the human status is equal as every other person's. See E. Daly and J. May, 'A Premier for Dignity Rights'[2018] Juriste Internationale at 1; James R. May, Erin Daly, 'Why Dignity Rights Matter?'[2019] EHRLR 129 at 132.

[24] Ibid 169.

[25] Ibid 58.

[26] Katherine Franke, 'Dignifying Rights: A Comment on Jeremy Waldon's Dignity, Rights, and Responsibilities' [2011] ARIZ. St. L.J. 1177 at 1179; Also, in radical feminism, Catharine MacKinnon put forward the 'difference' method, reinforcing the adoption of legal methods to protect women's different needs (e.g. anti sexual harassment at work) and to limit men's behaviours (e.g. bring about sexual harassment to women at work). This aims to respect dignity between men and women, which is reflected in later philosophical discussion in this Chapter; this also is detailed in Chapter 5, Section 3.

[27] See (n 17) Waldron, *On Another's' Equals* (2017) at 246.

[28] Kantian dignity discourse is discussed as a *classic example* of regarding dignity as an intrinsic worth.

with Michael Rosen's comments: Kantian dignity is emphasised on 'respecting something within in a person', whereas Waldron's dignity is about respecting a person himself or herself.[29]

I argue that Immanuel Kant regards dignity as an intrinsic worth. In the seminal work *the Groundwork to the Metaphysics of Morals*, Kant explained dignity:

> In the kingdom of ends everything has either *a price* or a *dignity.* What has a price can be replaced by something else as its *equivalent,* what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.[30]

Following this quotation, we can understand that Kantian dignity is referred as value beyond all price. For Kant, dignity is such a value or worth that is inherent in every human. This is supported by *Fundamental Principles of the Metaphysic of Morals*. In this work, Kant regarded dignity as an 'unconditional incomparable worth'.[31] Thus, dignity respect for Kant means respecting the intrinsic worth or value of an individual.

For Kant, dignity seems too fundamental for every human to lose. As Michael Rosen argued, Kantian dignity in relation to the intrinsic worth is like a 'prize-worthy' work: it only means a good work but never says what it is good about, which leads the intrinsic worth to a complex and obscure idea.[32] The intrinsic worth can bring up many key questions, such as what the worth means, where the limitation of the worth is, and how the worth is identified as 'being lost/harmed'. This exceptionally vague dignity does not convey any substantive values that can play a role in shaping the law to protect a dignified life.[33]

Unlike Kantian dignity, Waldron's dignity involves more details about potentials of people losing their dignity. Sortal status and condition status can suggest how individuals and their life are excluded from the 'equal high rank'. In the discussion of sortal status, Waldron

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[29] See (n 12) Jeremy Waldron, 'Dignity and Rank' (2012) at 25.
[30] Immanuel Kant, *Groundwork of the Metaphysic of Morals* (CUP, 1997) 4:435
[31] Immanuel Kant, *Fundamental Principles Of The Metaphysic Of Morals* (1785) at 28.
[32] Michael Rosen, *Dignity Its History and Meaning* (HUP, 2012) at 22.
[33] Ibid 22; Mary Neal, '"Not Gods But Animals": Human Dignity and Vulnerable Subjecthood' [2012] Liverpool Law Rev 177 at 184.

demonstrated the historical legal systems, such as the racist system of apartheid in South Africa from 1948 to 1994 and the slavery system in the United States from 1776 until 1865.[34] The sortal status can play a key role in critiquing the legal systems in terms of recognising different hierarchical sorts of human beings and providing different/unequal treatments on the basis of the race people belong to. The sortal and condition status in Waldron's dignity can make a significant contribution to LGBT legal protection, such as addressing discrimination to LGBT people in different aspects of life. Therefore, Waldron's dignity delivers substantive values to the role of law in protecting LGBT people from being 'pulled down from' the equal high rank in our life.

1.1.C Provisional conclusion

Waldron's dignity – equal high-ranking status – is the focus throughout the thesis. Following Waldron's discourse, LGBT dignity legal protection looks at protecting LGBT people and their life interests from being excluded from society; nor are LGBT people subject to heterosexual and cisgender people in society.

Waldron's dignity is of accuracy. Rather than focus on intrinsic worth, Waldron's dignity makes the law more clearly point out dignitary harms. Waldron's dignity can play a pivotal role in identifying the harms arising from the failure of recognising the status of human beings, including physical harms and other 'invisible' but also fundamental harm (e.g. expressive harm). Waldron's dignity will make a contribution to observing expressive harm to LGBT people in this thesis, which will be discussed later in this chapter.

Section 2 Definition of expressive harm (1.2)

1.2.A. Expressive function of law

Law has expressive function. According to Pildes and Anderson, expression is referred to 'the ways that an action or a statement (or any other vehicle of expression) manifests a state of

[34] See (n 17) Waldron, *On Another's' Equals* (2017) at 7.

mind'.[35] Following Sunstein's approach, law makes and delivers 'statement', shaping social norms and pushing them in the right direction.[36] In order to change social norms, the law's 'statement' is designated ultimately to affect both judgments and behaviours of individuals.[37]

Following expressive function, I would argue that law can play a role in protecting human dignity. Adler combined with expressive function of law with Equality law, arguing that the law contributes to addressing a racial second-class status where black people are believed to be inferior to white people.[38] Likewise, Pildes and Anderson argued that Equality law maintains equal protection, resolving 'issues of stigma and [racial] second-class citizenship'.[39] The racial second-class status is associated with the sortal status in Waldron's dignity. The two examples indicate that every individual is entitled to the single human status (sortal status) and none of us should be excluded from the 'equal high rank' due to different racial characteristics. Thus, law's 'statement' should play a role in influencing people's behaviours and judgements in order to protect every human as another's equals in society.[40]

Nevertheless, expressive function of law does not always work beautifully as we expect. Sometimes law could have little or no effect on influencing individual's behaviours and judgement.[41] For instance, Dubow investigated the historical racist legal system in South Africa:

> …institutional racial segregation had been government policy since the creation of the Union of South Africa in 1910. The landmark segregationist package of 1936 ended any hopes that blacks in South Africa might gain franchise rights and removed the vote from those Africans in the Cape…

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[35] Elizabeth S. Anderson and Richard H. Pildes, 'Expressive Theories of Law: A General Restatement' [2000] University of Pennsylvania Law Review 1503 at 1506
[36] Cass R. Sunstein, On the Expressive Function of Law [1996] U. Pa. L.Rev 2021 at 2026
[37] Ibid at 2025.
[38] Matthew D. Adler, 'Expressive Theories of Law/ A Skeptical Overview' [2000] University of Pennsylvania Law Review 1363 at 1432.
[39] See (n 35) at 1537
[40] Richard Mullender, 'Racial Harassment, Sexual Harassment, and the Expressive Function of Law' [1998] The Modern Law Review 236 at 240: according to Mullender, Equality Law delivers the message that 'all persons possess the same moral worth', echoing Waldron's dignity.
[41] See (n 36) Sunstein at 2026

> Prior to 1948, Africans were subject to many laws restricting their occupational rights in an effort to ensure that skilled work was restricted to whites….[42]

On this basis, expressive function of law can be distorted. Oppositely, law can prevail unhealthy social norms and push them in the wrong direction.[43] Law's 'statement' can express hostile and divisive attitude and can give rise to disturbance on human dignity. Following the historical evidence, if law can pull black people down from the equal high rank, it can cause same dignitary problems to LGBT people in society. Therefore, law can deliver statement to protect human dignity as well as to cause dignitary harms to people.

1.2.B. Material Harm

Dignitary harms include material harm and expressive harm. *Material harm* is associated with material burdens or matters on others by deterring or obstructing access to opportunities, such as goods, services and abilities.[44] There are some examples for material harm, such as causing financial loss, loss of employment or social position, disappointment of contractual expectations.[45] Moreover, material harm is associated with many forms of matters, such as pain/injury, criminal offence, hate speech, violence, discrimination in legal protection. It was argued by Raz that the forms of harm, such as discrimination or hate speech, can reduce someone's ability or opportunities to act in the ways which he may desire.[46] Combined with Waldron's dignity, material harm can cause disturbance by taking away people's condition status. For instance, a homosexual candidate encounters a lack of access/chance to employment or service because of their sexual orientation. It is apparent in this scenario that the homosexual candidate suffers the unlawful discrimination which causes material harm for him to fail to exercise the equal right to work. Material harm is focused on the violation of people's interests or interference with their rights, such as degrading treatment or torture to

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[42] Saul Dubow, *Apartheid, 1948-1994* (OUP, 2014) at 11 and 12.
[43] Cass R. Sunstein, 'Incommensurability and Valuation in Law' [1994] Michigan Law Review 779 at 820
[44] Douglas Nejaime & Reva B. Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics' [2015] YALE L. J. 124 at 2566 to 2567.
[45] John Stuart, *On Liberty, Utilitarianism and Other Essays* (Oxford World's Classics, 2015) at 22.
[46] Joseph Raz, 'Autonomy, toleration, and the harm principle' in Susan Mendus (ed.), *Justifying Toleration: Conceptual and Historical Perspectives* (CUP, 1988) Raz at 169

LGBT people (Article 3 of ECHR) and the ban on same-sex intercourse and partnership (Article 8 of ECHR).[47] Material harm is strongly associated with material issues about the respect of LGBT people's human dignity.

1.2.C. Expressive harm

1.2.C.1. Understanding expressive harm

Expressive harm is the central focus in dignitary harms in this thesis. For defining expressive harm, I adopt the theoretical approach from Anderson and Pildes. Expressive harm is described as 'acting an unjustified expressive principle' which was interpreted as 'a principle to express negative or inappropriate attitude'.[48] In this approach, expressive harm can be caused intentionally or unintentionally[49] through communicative and non-communicative pathways. In a communicative pathway, a person can suffer an expressive harm when she or he is treated with negative or inappropriate attitudes through 'sending a message'; [50] communication can be also grounded on sharing an understanding of inappropriate attitudes or bringing the attitudes out in public space for acknowledgement by the addressees.[51] Apart from communicative pathways, negative or inappropriate attitudes can be delivered to people through non-communicative behaviours, such as negligence, inconsideration, and reckless actions.[52] Expressive harm can be understood as a content-based harm.

Expressive harm cannot be disassociated with expressive function of law. Expressive harm or inappropriate attitude expressions can be understood as law perpetuating negative or inappropriate norms in society. In fact, expressive harm reflects law failing to push social norms towards a right direction. According to Anderson and Pildes, policies and law can cause expressive concerns, delivering inappropriate messages or reinforcing delivering of

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[47] For instance, *Tyrer v United Kingdom* [1979-80] 2 E.H.R.R. 1; *Schalk v Austria* [2011] 53 E.H.R.R.
[48] See (n 35)'Expressive Theories of Law: A General Restatement' at 1527.
[49] Ibid 1528, 1551, and 1568.
[50] Ibid 1528
[51] Ibid 1528; 1530
[52] Ibid at 1529; Anderson and Pildes provided the example that a person grounded on some inappropriate attitudes initiated deliberate wrongdoings.

inappropriate messages; law has the focus on the interpretive dimension of public action. [53] As discussed above, the historical racists legal system in South Africa delivered the message that it was OK to deprive black people of certain constitutional rights that white people were entitled to. This law played a role in reinforcing racist norms, including expressing or manifesting racially stigmatised ideas or words to black people in society. Law constructs social norms, which in return burdens or benefits individuals.[54] Law can certainly reinforce social norms containing messages of racial, gender and LGBT inferiority in society and exacerbate internalisation of those norms in life.[55] Therefore, in LGBT protection, law can play a role in allowing expressive harm and inflicting LGBT people.

1.2.C.2. Expressive harm and human dignity

- Why is expressive harm associated with human dignity?

It is noteworthy that expressive harm can cause disturbance people's dignity, including LGBT people. According to Anderson and Pildes, the reason why expressive harm is detrimental is that individuals can deliver/express a message of inferiority and cause an 'out' for a person – some of her or his rights or interests fail to be recognised through a legal system.[56] This resonates with Waldron's dignity discussion – expressive harm will cause exclusion of an individual's human status from the equal high rank. Waldron had reflections on expressions:

> …the word highlights the subjective attitudes of the person expressing the views… What we call a thing tells us something about our attitude to- ward it, why we see it as a problem, what our response to it might be, what difficulties our response might cause, and so on….[57]

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[53] Ibid at 1531; Likewise, Hugo argued that law has the expressive function, delivering public messages by approving or disapproving of inappropriate attitudes. See Victor Hugo, 'Innocents lost: proportional sentencing and the paradox of collateral damage' [2009] Legal Theory 67 at 90 to 91.
[54] Ron Levy, 'Expressive Harms and the Strands of Charter Equality: Drawing out Parallel Coherent Approaches to Discrimination' [2002] 393 at 395
[55] Harvard Law Review, Expressive Harms and Standing [1999] Harvard Law Review Association 1313 at 1314
[56] Richard H. Pildes, 'Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' [1998] The Journal of Legal Studies 725 at 754 and 755; See (n 35) Expressive Theories of Law: A General Restatement at 1542.
[57] Jeremy Waldron, *The Harm in Hate Speech* (HUP, 2012) at 34

If law grants protection on expressions, Waldron indicated that we shall consider the questions:

> Does that apply to vulnerable minorities? Is their status as equal citizens in the society now so well assured that they have no need of the law's protection against the vicious slur of racist denunciation?[58]

Following these two quotations, it can be safely said that, similar to Anderson and Pildes, Waldron showed the worry that expressions can lead to undignified life to individuals.

According to Pildes, dignitary harms could be attributed to hurtful healings, such as 'their material and liberty interests, their psyches, and their social reputation'.[59] Following Pildes' approach, Blackburn argued that expressive harm can be attributed to 'a self-standing, determinable matter'.[60] Likewise, Levy argued that expressive harm can disturb human dignity in terms of 'effects on self-esteem and feelings of inferiority, and characteristics of hitting and slapping'.[61] Initially, expressive harm seems to be mainly formed as consequential humiliation or emotional harms.

In fact, expressive harm is well beyond emotional harms. As I argued before, when law allows individuals to express negative attitudes to others, such as LGBT people, it can be argued that law is pushing social norms towards the direction that it is OK to stigmatise or treat LGBT identities inferior to heterosexual and cisgender identities. As Pildes argued, expressive harm is social rather than individual.[62] When the social norms about LGBT people go to the wrong direction, expressive harm will be burdensome to not just one or two LGBT people but all LGBT people in society. I share with Waldron's analysis – 'it [human dignity] is a matter of status,

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[58] Ibid at 30
[59] See (n 35) at 1530.
[60] Simon Blackburn, *Practical Tortoise Raising: and other philosophical essays* (OUP, 2010) at 87.
[61] See (n 54) at 400 to 401.
[62] Richard H. Pildes and Richard G. Niemi, '"Bizarre Districts," and Voting Rights: Evaluating Election-District
Appearances after Shaw v. Reno' [1993] Michigan Law Review 483 at 507; Likewise, Blackburn (n 60) said that expressive harm 'is not the derogatory or stigmatizing actions of individuals, but those expressed by public bodies', at 70.

and as such it is in large part normative'. [63] If we only deem expressive harm as humiliation or emotionally hurtful feelings, it would water down the importance of human dignity. When we investigate expressive harm, it is the 'hurt' on our human status[64] – expressive disregard excludes us from the 'one kind of human' (sortal status) on the basis of living identities, such as LGBT, gender and race; also, expressive disregard excludes us from the relevant living interests (condition status), such as same-sex marriage. Indeed, law indirectly can play a role in pushing back our certain group's rights in society. In the LGBT protection context, this 'hurt' on human status is inherent to every LGBT person, whether or not they feel humiliated or emotionally hurt. As consequence, law would recognise all LGBT people as subordinated to others in society by allowing expressive disregard to LGBT identities or living interests.

- How does Waldron's dignity suggest expressive harm being resolved?

Expressive harm can be understood as law allowing some people to harm others. To my mind, successfully addressing expressive harm is not a task for one individual or one group of individuals. According to Waldron, we hold ourselves to be one another's' equals, and we should have the mutual guarantee that one individual's behaviours will not hurt others' equal high-ranking status.[65] This is reinforced by other commentators. For instance, as noted by Becchi, dignity cannot be reduced or enhanced for any human beings.[66] Sulmasy also argued that no human beings, including being white or black, male or female, able-bodied or disabled, homosexual or heterosexual, should be euthanized because 'this would be justified only by a denial of the intrinsic dignity that grounds all our moral obligations towards each other'.[67] In LGBT context, LGBT dignity respect requires everyone's involvement in society. Thus, to

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[63] See (n 57) Waldron at 85.
[64] Ibid at 112
[65] See (n 17) Waldron: On Another's' Equals at 58.
[66] Paolo Becchi, 'Human Dignity in Europe: Introduction' in Paolo Becchi, Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (2019 Springer) at 15; also see Mary Neal, 'Respect for human dignity as 'substantive basic norm'[2014] International Journal of Law Context 1 at 15 (Human status justifies dignity between each individual)
[67]Daniel P. Sulmasy, O.F.M., 'Dignity and Bioethics: History, Theory, and Selected Applications', in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (2008) at 197.

address expressive harm, law should play a role in limiting individuals' behaviours from delivering inappropriate expressions to LGBT people.

As evidenced in Waldron's discourse, within the equal high rank, every human bears responsibilities to maintain our dignity and another's dignity in society. Waldron described the sense of responsibilities as:

> We are responsible for standing up indomitably for our own rights, without fuss or moral embarrassment, and equally we are capable of standing up for the rights of others, taking joint responsibility with all others for the whole regime of rights which has been entrusted to us, jointly and severally. [68]

Foster, who argued for a 'joint account', perceived dignity for one individual but also other human beings in the human community,[69] which echoes Waldron's quotation. When an individual pursues their dignified life, it may be affected or affect a multitude of other human beings (organisms).[70] Waldron also borrowed the 'well-ordered society' from John Rawls and argued that:

> if those in power treat people in the unequal and degrading ways that the racist leaflets call for—*that* would show that the society was not well-ordered… expressive function to be at the fore in a well-ordered society, particularly in connection with the public and visible assurance of just treatment that a society is supposed to provide to all of its members…[71]

Every human holds the rights to deliver expressions, such as freedom of expression and manifesting beliefs/views. In a moral community/society, we also bear responsibilities of our expressions for not disturbing other people's human dignity. I share with Waldron's statement: 'the rights that are recognised in society must be compossible'.[72] To fulfil our responsibilities for not delivering expressive harm, we need to be capable of self-mastery and self-control,

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[68] See (n 13) Waldron, Dignity, Rights, and Responsibilities at 1127.
[69] Charles Foster, *Human Dignity in Bioethics and Law,* (Oxford: Hart Publishing, 2011) at 14.
[70] Ibid 14.
[71] See (n 57)*The Harm in Hate Speech* at 68 and 81.
[72] Ibid at 135

indicating that law should play a role in limiting freedom from being some wilfulness that the society has to put up with.[73]

Reasonably limiting individuals' free behaviours for addressing expressive harm needs a fine balance. On the one hand, owing to mutual respect (to dignity) in our moral society, a slight loss of freedom is justified by the prospect of preventing real harm to other people.[74] Thus, dignity protection does require some legitimate qualification/restriction imposed on such freedom.[75]

This emphasises that dignity is not solely derived from the freedom of the atomistic individual but also includes consideration of other people in the human community.[76] Similar to Waldron, Schachter argued that dignity is understood as 'embracing a recognition that the individual self is a part of larger collectivities and that they, too, must be considered in the meaning of the inherent dignity of the person.'[77] Kelman also agreed that dignity is focused on the interconnected network (as the human society) of individuals who care about each other, recognise each other's individual freedom but also respect each other's human status.[78] Thus, qualification of freedom can be considered as the price that we pay as humans for living in a socially cohesive community.[79] For Waldron's dignity, an individual is able to freely unfold their living interests (condition status) but also has the responsibility of respecting other people's dignity in the human community/society. A truly dignified life means that an individual is 'fully' but also 'equally' human: diversified life interests are included but also prevented from disturbance by others in society.

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[73] See (n 13) Waldron, Dignity, Rights, and Responsibilities at 1136: It is a way of thinking about freedom as authority, not just freedom as some wilfulness that the society has to put up with.
[74] See (n 57)*The Harm in Hate Speech* at 160
[75] Luis Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse', [2012] INT'l & COMP. L. REV. 331 at 360.
[76] Val Corbett, 'The Promotion of Human Dignity: a Theory of Tort Law' [2017] Irish Jurist 121 at 127
[77] Oscar Schachter, 'Human Dignity as a Normative Concept' [1983] 77 American Journal of International Law 848 at 851.
[78] Herbert C.Kelman, 'Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers' [1973] Journal of Social Issues 25 at 48 to 49.
[79] Ibid at 130 to 131.

On the other hand, Waldron's dignity does not intend to sacrifice the individual's dignity for other people. In the human community/society, there is no superior group to distinguish people according to their human status. Goodin argued that 'the demands of dignity impose a minimum standard of decent treatment for every individual not to be sacrificed for any less weighty considerations.'[80] Also, Corbet's quotation can be referred as summarising dignity:

> ..human dignity is a question of **striking the appropriate balance** between recognition of the fact that individuals cannot operate in isolation without regard for others while at the same time providing those individuals with the space in which their capacity for free choice is allowed to thrive…[81]

An individual's freedom to deliver expressions is only qualified when he or she is possible to cause disturbance on other people's dignity. The qualification of individual's freedom has no intention of expressing the favour on whose living identities and interests are more worth of human status within the high rank. The qualification plays a safeguarding role: in order to achieve equal high-ranking status, every individual's interests should be merely protected to the level on which their interests would not pass disturbance to other people's life and identities. In other words, law should only address the expressions which can potentially cause dignitary harm to others in society, which will be reflected in tolerance discussion next chapter.

1.2.C.3. how shall we identify expressive harm?

If law intends to limit expressive harm but not to violate people's rights, such as freedom of expression and manifestation, I would argue that law needs to distinguish or locate the content in expressions that can deliver dignitary harms. This is reinforced by Waldron's content-based approach: in the example of hate speech, he argued that 'we want to catch only hate speech that is expressed in an abusive, insulting, or threatening way'.[82] In the LGBT protection context, law needs to identify and address the content that excludes LGBT people from the equal high rank in expressions. For instance, an individual delivers expressions

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[80] Robert E. Goodin, 'The Political Theories of Choice and Dignity' [1981] American Philosophical Quarterly 91 at 96.
[81] See (n 76) Corbett, 'The Promotion of Human Dignity at 130.
[82] See (n 57) *The Harm in Hate Speech* at 151

involving content, such as ‘same-sex relationships should not exist’ or ‘X is a bad person because X is transgender’. Once the expressions occur, expressive harm to LGBT people occurs.

As argued before, the negative content could be involved in verbal expressions or behaviours based on principles. Thus, expressive harm can exist in two ways: 1) expressive harm is inherent in material harm 2) expressive harm *per se* occurs. *Bull v Hall*[83]is an example of expressive harm entangled with material harm. In this case, Mr and Mrs Bull, who were the owners of a small private hotel, refused to accommodate a same-sex couple (civil partners) in a double bedroom because they were not married. The owners are devout Christians who believe that sexual intercourse outside traditional marriage—construed as a union between one man and one woman—is sinful. The civil partners brought proceedings against the hotel owners claiming that the refusal to accommodate them in a double bedroom amounted to unlawful discrimination on grounds of sexual orientation. In the UK Supreme Court, it was held by the majority that the owners had discriminated against the guests ('the Respondents'), civil partners, when they refused them a double room in their hotel.

I agree with the Supreme Court – the refusal to provide service to the same-sex couple put them at the disadvantaged/unfair position compared with heterosexual couples, constituting material dignitary harm to LGBT people. Going beyond this, I argue that expressive harm to the same-sex couple is entangled in this discriminatory behaviour. The hotel policy said that ‘we prefer to let the double accommodation to heterosexual married couples only’. Following this policy, the hotel owners refused the service and suggested that marriage is only between men and women on the basis of their Christianity belief. The Civil Partnership Act 2004, albeit without same-sex marriage law yet in 2008, intended to ensure that ‘same sex partners can enjoy the same legal rights as partners of the opposite sex’.[84] While the same-sex couple were not *married*, their civil partnership regarded them with equal rights as an actual married couple in this case scenario.[85] Accordingly, the refusal and the hotel policy, which delivered

[83] [2013] UKSC 73
[84] [36]
[85] same sex couples can enter into a mutual commitment which is the equivalent of marriage, the suppliers of goods, facilities and services should treat them in the same way. [36]

denial of same-sex life and marriage, are interpreted as the hotel owners expressing and manifesting negative attitudes (based on orthodox Christianity beliefs) to LGBT people in this service provision. Combined with Waldron's dignity, this expressed denial of same-sex life and marriage can cause disturbance on LGBT people's condition status and sortal status, excluding LGBT living identities and interests from society. Therefore, apart from material harm, law should sanction an individual for expressing negative attitudes and causing dignitary harm to others in life, such as employment and service provisions.

Reflected on this case, a further question can be asked: whether or not expressive harm, without evidence of material harm, can stand alone. I would argue that identifying expressive harm is not necessarily based on identifying material harm. An expressive harm in LGBT legal protection, without material harm basis, is mirrored in the discussion about same-sex marriage and civil partnership. The allowance of civil partnership while withholding marriage to same-sex couples can cause expressive harm. For instance, In *Minister of Home Affairs v Fourie and Bonthuys*, Sachs J stated that:

> Historically the concept of '**separate but equal**' served as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation. The very notion that integration would lead to miscegenation, mongrelisation or contamination, was offensive in concept and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalised forms, proponents of segregation would vehemently deny any intention to cause insult. ... The above approach is unthinkable in our constitutional democracy today...Ignoring the context, once convenient, is no longer permissible in our current constitutional democracy which deals with the real lives as lived by real people today. Our equality jurisprudence accordingly emphasises the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected.[86]

The allowance of civil partnership but limiting same-sex marriage constitutes a 'separate but equal' system for same-sex couples. While this system does not cause material harm, such as intentional insult or offence, this system still conveys exclusion of same-sex couples (LGBT people) from the marriage institution. The US Supreme Court recognised that 'the

[86] [2005] ZACC 19 at [150] to [151].

transcendent importance of marriage' is the 'nobility and dignity' it offers to couples and that same-sex couples seeking access to marriage are asking 'for equal dignity in the eyes of the law'.[87] The Supreme Court continued to state that 'laws excluding same-sex couples from the marriage right impose stigma and injury'.[88] Likewise, the Inter-American Court handed down Advisory Opinion OC-24/17:

> there would be no point in creating an institution that produces equal effects and gives rise to the same rights as marriage, but is not called marriage, except to draw attention to same-sex couples by the use of a label that indicates a stigmatising difference or that, at the very least, belittles them[89]

The limiting of same-sex marriage does not deal with 'the real lives as lived by real people' and eschews 'equal high rank' for people in society. The limiting of marriage means that marriage is only allowed to opposite-sex couples or heterosexual people. This fails to build up a 'one kind of human status' society in which marriage is applied to everyone, regardless of sexual orientation. Therefore, the exclusion of marriage to same-sex couples can make LGBT people possess a 'second-class citizenship'[90] and disturb LGBT people's dignity. Certainly, this 'separate but equal' legal system caused expressive harm to LGBT dignity, regardless of material consequences. An expressive harm can occur alone with polite but dignitary harmful content. To identify and address expressive harm, law should regulate the content of expressions, which will be discussed in Chapter 2 in UK Equality law.

1.2.C.4. Limits of expressive harm

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[87] *Obergefell v Hodges* 576 U.S. (2015) at 3 and 28.
[88] Ibid 18
[89] Inter-American Court of Human Rights (court opinions) < https://www.corteidh.or.cr/cf/Jurisprudencia2/overview.cfm?doc=1884&lang=en> (Accessed on 1st April); For another example of an authority, while the ECtHR developed legal protection on LGBT dignity, it rather continues to endorse the 'separate but equal' system for LGBT people. The examples can be found in *Schalk v Austria* [2011] 53 E.H.R.R. 20 at [108] and *Oliari v Italy* [2017] 65 E.H.R.R. 26 at [185] that same-sex marriage were permitted access to an institution, but still may be excluded from the cornerstone institution of marriage. As Laverack concluded, the lack of same-sex marriage recognition in the ECtHR has not yet 'levelled up' LGBT people. See Peter J. Laverack, 'The Indignity of Exclusion: LGBT Rights, Human Dignity and the Living Tree of Human Rights' [2019] E.H.R.L.R. 172 at 184.
[90] Michael C. Dorf, 'Same-sex Marriage, Second-class Citizenship, and Law's Social Meanings' [2011] Virginia Law Review 1267 at 1279 to 1281.

With the strong link between expressive harm and human dignity, I would argue that the scope of expressive harm is limited to disturbance on an individual's core identities or life aspects. According to Waldron, respect for human dignity is understood as a 'crucial foundation of basic human rights and equality'.[91] He continued to argue that dignity is associated with a member of society in good standing, validating the role of law to ensure an individual as an equal and as the possessor of a high-ranking status.[92] Learning from Waldron's discourse, expressive harm should be limited to violating an individual's basic rights arising from the equal high-ranking status. Expressive disregard on sortal status should fall into the scope of causing expressive harm, such as racial characteristics, gender, LGBT identities. Following sortal status, expressive disregard on condition status also should fall into the scope of causing expressive harm, such as marriage, the suppliers of goods, facilities and services. As Waldron argued, no law or social practice can take the equal high-ranking status away.[93] Thus, expressions, which can deliver the message of damaging an individual's human status, are scoped as causing expressive harm.

Expressive harm can cause hurtful feelings. Nevertheless, expressive harm is distinguished from expressions that cause hurtful feelings. Beliefs, such as veganism and religions, are protected under s.10 of the Equality Act 2010. Adopting veganism or a religion can show a 'high level of cogency, cohesion and importance',[94] constituting a human life choice. When a vegan person or a religious believer encounters disagreement on their life choice, it is likely that hurtful feelings happen to them. Likewise, people who hold gender-critical beliefs can encounter criticisms on themselves or their belief. While those expressions cause emotional harm or reputational harm, they are not categorised as causing expressive harm. Those expressions, I argue, have no little impact on subordinating people's sortal status. As argued in Waldron's dignity discourse, sortal status is the foundation for condition status: fundamentally, we are humans with our own living identities, we further claim our corresponding basic rights from law. Anderson and Pildes' expressive harm approach

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[91] Jeremy Waldron, 'Dignity and Defamation: The Visibility Of Hate' [2010] Harvard Law Review 1597 at 1610
[92] Ibid 1611 and 1612
[93] Ibid 1612
[94] E.g., *Casamitjana Costa v The League Against Cruel Sports* ET Case No.3331129/18

reinforced the importance of sortal status in Waldron's dignity. When they discussed expressive harm in Equality law as an example, they emphasised on inappropriate messages toward living identities/characteristics and stigmatising people as inferior human class (e.g. 'racial division'), including racial, ethnic, and gender groups.[95] The verbal criticisms over vegan life styles or religion beliefs cannot lead to disturbance on those people's sortal status: it should never cause the denial that vegan people or religious believers are not equal humans.[96] In contrast, expressions against people's core living interests and identities, such as LGBT, gender, race, will fundamentally exceed the status baseline. The concept 'expressive harm' should be only limited as safeguarding everyone on the equal high rank, rather than watered down for all potential harms associated with expressions or language.

1.2.D. Provisional conclusion

First, expressive harm is a product of law when its expressive function does not work well. It shows that law plays a role in pushing social norms toward a wrong direction where negative attitudes or messages are allowed to express to other people and cause harm. Secondly, expressive harm is a dignitary harm that can exist alone. Following from Waldron's dignity discourse, expressive disregard can lead to taking an individual's sortal status away from the equal high rank, regardless of the individual feeling hurt or material harm existing. It is a 'hurt' on human status. Thirdly, expressive harm is limited to 'hurt' on human dignity; it should not open the floodgate for all hurtful feelings from expressions or languages. Expressive harm is limited as a matter to an individual's core identities and life. In a moral society, law should be facilitated to limit individual's freedom and to involve everyone in addressing expressive harm.

Conclusion

There are various dignity frameworks. However, with Waldron's discourse, the meaning of 'LGBT dignity' can be easily comprehended in this thesis. Learning from Waldron's philosophy,

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[95] See (n 54)'Expressive Harms and the Strands of Charter Equality' at 408: Likewise, Levy, when discussing expressive harm in Equality Law, emphasised on expressions causing superiority/inferiority.

[96] The verbal disapproval of a philosophical/religious belief can happen but should not cause intolerance of the beliefs or life styles. This will be discussed in Chapter 2.

every of us is entitled to the equal high-ranking status, which constitutes to our human society/community. Except LGBT living identities, how can we say LGBT people are different from other people in terms of human species and dignity? If LGBT people are equal as others within this high rank, why should LGBT people be subordinated to heterosexual and cisgendered people, and why should LGBT interests be excluded from society? Certainly, Waldron's dignity is such as an antidote to heterosexual (and cisgender superiority) culture in society, including corporate life.

Following the expressive function, law can deliver 'statement' to protecting LGBT dignity. However, from the perspective of expressive harm, law plays a role in pulling LGBT people from the equal high rank. The allowance of delivering expressions by law, including through communicative and non-communicative pathways, weakens legal protection and recognition of LGBT dignity in life. Another worry is that expressive harm can exist alone and be 'invisible' compared with material actions – individuals can use polite language but deliver dignitary harmful meaning to LGBT people. Whether or not LGBT individuals feel hurt, their status is taken away by the expressive disregard that can toxically encourage heterosexual superiority culture. Thus, adverse impacts of expressive harm limit this concept to only harm on core identities/interests of a person associated with human dignity.

Echoing Waldron's philosophy, we live in a moral society and law should not perpetuate expressive harm to LGBT people. We are entitled to rights but also bear responsibilities to others in society. Law should play a role in encompassing responsibilities of other individuals to achieve LGBT dignity protection; law should strike a balance and reasonably limit individuals' freedom. Also, LGBT condition status determines LGBT living interests in different aspects of life. To strengthen LGBT dignity protection in the UK, we need all relevant areas of law to participate in addressing expressive harm, including Equality law and corporate governance law. Chapter 2 will examine UK equality law in LGBT dignity protection and addressing expressive harm.

Chapter 2 Evaluation on LGBT dignity protection in UK Equality law

Introduction

In Chapter 1, I provided a comprehensive theoretical foundation about human dignity and expressive harm. Human dignity protection cannot be disassociated with law of equality. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[1] Sachs J stated that '…it is the inequality of treatment that leads to and is proved by the indignity'.[2] Ackermann J, in the same case, also said that 'the rights of equality and dignity are closely related'.[3] In *Law v Canada*[4] Supreme Court of Canada located dignity at the centre of the equality principle:

> Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.[5]

Thus, Equality law should play a pivotal role in improving tolerance of LGBT people and their core living interests, thereby achieving to protect human dignity. For this thesis, UK Equality law is sourced from the Equality Act 2010 (anti-discrimination law) mainly, and relevant principles from European Convention of Human Rights (ECHR), EU human rights law and anti-discrimination law, and case law from European Court of Human Rights (ECtHR) and Court of Justice of European Union (CJEU).[6]

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[1] [1998] ZA CC 15
[2] Ibid [124].
[3] Ibid [30]
[4] [1999] 1 SCR 497
[5] Ibid Para 51.
[6] The EU and ECHR have exerted a key influence on the expansion of protected grounds of discrimination in Equality Act 2010. While Brexit happened in 2016, the UK had followed the EU's lead and implemented Article 13. It subsequently gave effect to the EU's Employment Equality Framework Directive. See Jonathan Cooper, Keina Yoshida, Peter Dunne, Anya Palmer, 'Brexit: The LGBT Impact Assessment' [2018] Gay Star News 1 at 9 to 10; Sandra Fredman, *Discrimination Law* (OUP, 2023), 170.

In this Chapter, I will investigate LGBT dignity protection in UK Equality law. I will lay the argument on why UK Equality law is insufficient to address LGBT expressive harm. In Section 1, I will look into the progress of UK Equality law in LGBT dignity protection. Following from the ECtHR and EU law, UK Equality law has been influenced by the concept of mutual tolerance in society; it should be able to appropriately accommodate LGBT rights protection and other interests which may not agree with LGBT dignity protection (competing interests). To mirror mutual tolerance, UK Equality law plays a pivotal role in addressing discrimination and harassment on the ground of LGBT identities. UK Equality law delivers the sense of LGBT tolerance in society in order to protect LGBT dignity.

In section 2 and 3, I will argue that while UK Equality law has made progress in LGBT dignity protection, the law does deliver insufficient LGBT tolerance. In Section 2, I will examine LGBT expressive harm in UK Equality law, arguing that UK Equality law provides 'extra' protection for competing interests, such as freedom of expressing and manifesting LGBT-critical content, over LGBT dignity when it comes to conflict. The law allows LGBT expressive disregard to exist in many social areas, such as corporate and business practices, causing dignitary harms to LGBT people in society. Furthermore, I will argue that LGBT expressive harm can cause potential material harms on existing LGBT rights, pushing back the progress of LGBT legal protection. LGBT intolerance does exist in UK law.

In section 3, I will examine how LGBT intolerance is manifested as limitations in UK Equality law, particular in LGBT expressive harm. One limitation is focused on the proportionate approach in UK courts, arguing that UK courts only intend to identify material harm. Another limitation is focused on employers' liabilities for unlawful behaviours (e.g. discrimination and harassment) caused by third parties. The key point of examining limitations of UK Equality law is to argue that this law will have a negative impact on UK Corporate Governance law embodying legal instruments to address LGBT expressive harm: directors will neglect LGBT expressive harm in corporate affairs and fail to adopt effective measures to protect LGBT stakeholders, such as employees, customers and people in the wider society.

Learning from the limitations in Section 3, I will present potential changes of UK Equality law in the context of addressing LGBT expressive harm in Section 4: regulating the LGBT-critical

content to widen the proportionate approach; imposing individual speakers' responsibilities; the role of employers' duty. These three potential changes in Equality law will be synthesised as LGBT protection 'lessons' in this thesis to reinforce changes of UK Corporate Governance law participating in addressing LGBT expressive harm. UK Equality law is insufficient, and analysing potential changes is important for academic sustainability lawyers to learn and improve UK Corporate Governance law for LGBT dignity protection.

Section 1 Availabilities of UK Equality law in LGBT protection (2.1)

2.1.A. Tolerance in UK Equality law

2.1.A.1. Tolerance and human dignity in the ECtHR

I would argue that UK Equality law is featured with tolerance sourced from the ECtHR. According to Jeremy Waldron, human society is depicted as a 'pluralist society', where people 'of differing beliefs go proudly about their own business' and 'live their lives in accordance with their own values'.[7] Following this, tolerance is a key concept to secure the room for different kinds of life but also impose limits on individuals' expressions and behaviours from disturbing other people's dignity.[8] As argued in Chapter 1, to protect human dignity needs to involve other people and to reasonably limit their freedom. LGBT dignity protection in law can be understood as the role of law in improving LGBT tolerance: securing the pluralism nature of society and limiting other people from disturbing LGBT dignity.[9]

I would identify human dignity to be considered as the inherent or fundamental value of ECHR. In *Pretty v United Kingdom*[10] the ECtHR described respect for human dignity and human freedom as 'the very essence of the Convention'.[11] In *Bouyid v Belgium*[12] the Court said that although the European Convention itself does not mention the concept of dignity, 'the Court

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[7] Jeremy Waldron and Mellissa S. Williams, *Toleration and its Limits* (New York University, 2008) at 9.
[8] Ibid at 6 and 7.
[9] Aernout Nieuwenhuis, 'A positive obligation under the ECHR to ban hate speech?' [2019] Public Law 326 at 331.
[10] [2002] 35 E.H.R.R. 1
[11] Ibid 37-38.
[12] [2016] 62 E.H.R.R. 32

has emphasised that respect for human dignity forms part of the very essence of the Convention, alongside human freedom'; it followed that 'any interference with human dignity strikes at the very essence of the Convention'.[13] In *Pastörs v Germany*[14] the ECtHR concluded that the applicant's impugned statements were not worthy of respect because they 'affected the dignity of the Jews to the point that they justified a criminal-law response'.[15] The 'respect for human dignity' is the essential purpose or object of the ECHR as a whole.[16] The human rights of the Convention 'form an integrated system for the respect of human dignity', where 'democracy and the rule of law have a key role to play'.[17]

The idea that tolerance is a key concept to protect human dignity is evidenced in ECtHR case law. In *Baczkowski v Poland*[18] the ECtHR suggested that a key principle of a democratic society was 'pluralism', that is to say the 'harmonious interaction of persons and groups with varied identities', the encouragement of which is 'essential for achieving *social cohesion*'.[19] This judgment echoes tolerance in the philosophical discussion: on the one hand, pluralism suggests the diverse interests from persons and groups based on varied identities,[20] including religious, LGBT, and cultural identities; on the other hand, pluralism suggests the 'social cohesion', which means that citizens in the democratic process may integrate with each other and pursue common objectives collectively.[21] 'Social cohesion' maintenance indicates that the practice of human interests should not interfere with other people and their life.

For instance, Article 3 stipulates that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment', which is interpreted as dignity respect in case law. In *Tyrer v United Kingdom*[22] the ECtHR stated that 'one of the main purposes of Article 3 [is] to

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[13] Ibid 1069 – 1070.
[14] Appl. 55225/14, 3 October 2019
[15] Ibid 47.
[16] Sebastian Heselhaus and Ralph Hemsley, 'Human Dignity and the European Convention on Human Rights' in Paolo Becchi, Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (2019 Springer) at 969
[17] *Refah Partisi (The Welfare Party) v Turkey* [2002] 35 E.H.R.R. 3 at 43.
[18] [2009] 48 E.H.R.R. 19
[19] Ibid 488
[20] *S.A.S. v. France*, Application no. 43835/11, July 2014, at 19, 53.
[21] See *Baczkowski v Poland* (n 66) at 488-489
[22] [1979-80] 2 E.H.R.R. 1

protect, namely a person's dignity and physical integrity'.[23] The Court further explained that 'although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity'.[24] There should be 'zero tolerance' to behaviours or interferences which are possible to cause physical harm to any individual, regardless of severity level. From the ECtHR, the fundamental value human dignity echoes Waldron's dignity philosophy, as argued in Chapter 1 – people's behaviours should not render pulling someone from the 'equal high rank' in society by causing material dignitary harms. Also, the ECtHR suggests that human dignity protection relies on legalising shared responsibilities among every individual, calling for participation of mutual tolerance to secure 'social cohesion' of people's interests and life.

2.1.A.2. Limits of tolerance in Article 9 and 10 of ECHR

The ECHR principles emphasise on the limits of tolerance: one individual's behaviours are accommodated unless the individual exceeds the limit and causes disturbance on other people's dignity. The 'limits of tolerance' set by Article 9(2) and Article 10(2) are commonly focused on the principle that permits states to subject these rights to such restrictions and penalties 'as are prescribed by law and are necessary in a democratic society' to achieve legitimate aims including public safety and the protection of the rights of others.[25] This illustrates the meaning of proportionality principle. The principle means that the Court should assess and balance how much the protection is to be granted to the freedom of expression and manifestation when the forms of expression may conflict with other factors, such as LGBT identities.[26] To put it another way, proportionality is focused on how much restriction or

[23] Ibid 11-12.
[24] Ibid 9-10.
[25] Article 9(2) and Article 10 (2) of ECHR
[26] Alan Greene, 'Closing places of worship and COVID-19: towards a culture of justification?' [2021] 393 at 394 to 396; Catriona Cannon, 'Freedom of religious association: towards a purposive interpretation of the employment equality exceptions' [2021] ILJ 1 at 34 to 36. The authors discussed the proportionality on the Article 9 – the court should consider the right to manifest the religious beliefs under Article 9 and the limitation of a protected right.

limitation can be given to the right to freely express and manifest the beliefs. The proportionality concept is helpful to explain tolerance in the context of freedom of expression: on the one hand, it attempts to contribute to a pluralist atmosphere to accommodate different beliefs or views to be expressed and exist in society; on the other hand, proportionality illustrates the observation on whether or not the expression would exceed the limits of tolerance to other people or factors. The proportionality principle, arising from Article 9 and Article 10, intends to ensure that there is a fair balance struck between the two parties' rights, thereby creating a mutual tolerance environment.

The proportionate protection of Article 9 and Article 10 is reflected in the ECtHR decisions to reinforce the 'religious peace atmosphere' in which religious beliefs should be appropriately tolerated without being attacked in the pluralist society. In *Otto Preminger v Austria*[27] the private association posted the statement 'trivial imagery and absurdities of the Christian creed' about a film.[28] It was stated by the Regional Court that 'God the Father, Mary Mother of God and Jesus Christ are the central figures in Roman Catholic religious doctrine and practice'.[29] However, the Regional Court continued that 'God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression..' in the film.[30] As a result, the manager of the private association was charged with the act of 'disparaging religious doctrines'.[31] The expression of the private association can be considered as exceeding the limits of tolerance to be expected by the Roman Catholic belief and the belief holders. It was held by the ECtHR that:

> The respect for the religious feelings of believers as guaranteed in Article 9 (Article 9) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious **violation of the spirit of tolerance**[32]

[27] Application no: 13470/87, September 1994
[28] Ibid 3.
[29] Ibid at 5.
[30] Ibid at 5.
[31] Ibid at 3-4.
[32] Ibid at 13.

To avoid 'inhibit[ing] those who hold such beliefs from exercising their freedom to hold and express them',[33] the ECtHR intended to limit the right of the applicant (private association) to freely express the view that may cause intolerance to the Roman Catholic religious belief holders by sufficiently causing public offence.[34]

Similarly, in *ES v Austria*[35] a woman was convicted of 'disparaging religious doctrines' having suggested that the Prophet Mohammed was a paedophile. The woman E.S. claimed that the view was based on the historical fact and her right to freely express should be entitled to respect. However, the Regional Court concluded that 'the applicant had intended to wrongfully accuse Muhammad of having paedophilic tendencies'[36] and 'her [the applicant's] statements were not statements of fact, but derogatory value judgments which exceeded the permissible limits'.[37] Similar to *Otto*, the ECtHR held that the expression of the view can destroy the 'mutual religious tolerance'. The Court put more weight on protection of the freedom of thought and religion in the proportionate discussion:

> Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious **intolerance**, for example in the event of an improper or even abusive attack on an object of religious veneration, a state may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures….[The Convention guaranteed] the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand.[38]

On the one hand, the two applicants can 'offend' the religious believers by holding and expressing views objecting the religious beliefs; on the other hand, the two applicants cannot go beyond the limits of tolerance and cause intolerance to the religious believers' rights, which illustrates the legal responsibilities on the two applicants for not causing disturbance on other

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[33] Ibid at 13
[34] Ibid at 16
[35] NO. 38450/12, December 2018
[36] Ibid 4.
[37] Ibid at 4.
[38] Ibid at 16.

people's rights. This similar observation on the limits of tolerance happens to LGBT dignity protection under the ECtHR.

2.1.A.3. LGBT tolerance and LGBT dignity protection in ECtHR

In LGBT dignity protection, the equality rulings under the ECtHR play a role in enhancing LGBT tolerance by imposing limits on competing interests. In *Vejdeland v Sweden*[39] various individuals entered a secondary school and distributed leaflets describing homosexuality as a 'deviant sexual proclivity' which had 'a morally destructive effect on the substance of society'. The leaflets also linked homosexuality with HIV and AIDS and stated that homosexual lobby groups were 'trying to play down paedophilia'.[40] For distributing the leaflets, the applicants were charged with agitation against a national or ethnic group. The applicants complained that the conviction was breach of the Article 10 of ECHR, but this was rejected by the ECtHR. Similar to *E.S*. and *Otto*, the ECtHR proportionately restricted the right of the applicant to freely express the disapproval information against LGBT people. It stated that:

> …Although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations…Inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by **insulting**, holding up to ridicule or slandering specific groups of the population can be sufficient…in the face of freedom of expression exercised in an irresponsible manner.[41]

The insulting of LGBT people by exercising the right to freely express can be considered as disregarding or targeting at LGBT people's identities. It seems to allege that LGBT people's living identities, including sexual orientation and gender identities, are problematic. It is apparent that the expression can cause intolerance to LGBT people by taking LGBT people's equal high-ranking status away. The ECtHR referred to 'hateful acts' or 'violence' as the

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[39] [2014] 58 E.H.R.R. 15 479; another similar case is *Lilliendahl v Iceland* where a man expressed very strongly hostile anti-gay information, such as 'homosexuality is disgusting', and he was charged with hate speech. This was held not be inconsistent with article 10 of ECHR. As a consequence, he encountered the proportionate restriction of his freedom of expression right because his expression which contains strongly homophobic content had been considered as causing intolerance to LGBT people (Application no. 29297/18, May 2020)

[40] Ibid 480.

[41] Ibid at 488 to 489.

potential consequences which are likely to arise from the insulting/expression to interfere with LGBT people's rights and interests. To maintain the respect to LGBT people's human dignity, the ECtHR put more weight to protecting LGBT people over the expressive competing interest. In other words, the ECtHR imposed responsibilities that the applicants ought to take for not causing intolerance to LGBT people's living interests through their expression/behaviours.

It is crucially important to note that the ECtHR never conveyed the information that LGBT identities are more important or superior to any beliefs or views. Even though the applicant's right to freely express was proportionately restricted, the Court had no discussion that his views were inferior to LGBT identities. Nor did it say that people who disagree with LGBT identities like *Vejdeland* should be friendly with or hold acceptance to LGBT people. To reverse the scenarios in the cases, if some gay people had posted anything like 'Stop Christianity and Believe in Homosexuality' in the public, those gay people's right to freely express may well have been proportionately limited in the scenario. Under the Article 9 and 10, proportionality in the ECtHR has no intention of affording legal advantages on any beliefs, identities or living ways; all the point of proportionality is to limit individuals from inciting offence to others. The law will protect the rights to freely express and manifest religious beliefs until the level where the beliefs/opinions can deliver disturbance to LGBT dignity.

2.1.B. LGBT dignity protection and tolerance in UK Equality law

The LGBT dignity protection from the ECtHR, where law plays a role in improving LGBT tolerance in society, is embodied in UK Equality law; this is well manifested in LGBT non-discrimination protection.[42] For instance, in *Walker v Innospec*[43], Mr Walker worked for Innospec, and made contributions to its pension scheme, from 1980 until 2003. All of his 23

[42] There are 9 protected characteristics of the Equality Act 2010, including section 7 (gender reassignment) and section 12 (sexual orientation), protecting LGBT people from discrimination on the ground of sexual orientation and gender identities. In the Equality Act 2010, there are more requirements than non-discrimination in relation to prohibited conduct on LGBT intolerance, such as harassment (section 26) and victimisation (section 27). But considering the large amount of literature and case law in LGBT non-discrimination ruling, this chapter takes non-discrimination as a classic example of showing availability of protecting LGBT tolerance in UK Equality law.

[43] [2017] UKSC 47

years of employment and contributions occurred *before* the relevant date of 5 December 2005. He entered into a civil partnership on 23 January 2006. If he dies before his civil partner, the calculation of the amount of the survivor's pension payable to his civil partner, and all payments to his civil partner, will take place *after* the relevant date of 5 December 2005. If Mr Walker was married to a woman, she would be entitled on his death to the pension provided by the scheme to a surviving spouse, and the value of that 'spouse's pension' was about £45,700 per annum. As things stood, Mr Walker's husband would be entitled to a pension of about £1,000 per annum (the statutory guaranteed minimum).[44] There is a noticeable pay difference between heterosexual couples and homosexual couples. Mr Walker lodged a claim against his employers, alleging that they had discriminated against him on the ground of his sexual orientation. The Employment Tribunal (ET) unanimously decided that there had been both direct and indirect discrimination on that ground.[45] But the Employment Appeal Tribunal (EAT) reversed the judgment from the ET and held that 'the Framework Directive did not have retrospective effect to render unlawful inequalities based on sexual orientation that arose before the last date for its transposition.[46] But in the Supreme Court:

> The salary paid to **Mr Walker throughout his working life was precisely the same as that which would have been paid to a heterosexual man.** There was no reason for the company to anticipate that it would not become liable to pay a survivor's pension to his lawful spouse. The date when that pension will come due, provided Mr Walker and his partner remain married and his partner does not predecease Mr Walker, is the time at which denial of a pension would amount to discrimination on the ground of sexual orientation. [47]

Following this, it can be argued that UK Supreme Court intends to secure LGBT people's human dignity; UK Equality law intends to address sexual orientation and non-cisgender gender identities (gender reassignment) discrimination in order to improve LGBT tolerance in life.

This non-discrimination rule in UK Equality law is influenced by EU law and ECHR jurisdictions. It is witnessed by the Article 21 of The Charter of Fundamental Rights of The European Union:

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[44] Ibid [5]
[45] Ibid [6]
[46] Ibid [7]
[47] Ibid [61]

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Another non-discrimination example is the Article 3 of ECHR in relation to prohibition on torture or degrading treatment, which contributes to enhancing LGBT tolerance in society. The Article 3 has been employed in sexual orientation protection against discrimination in the ECtHR case law. In *Idenotoba v Georgia*[48] the applicants (LGBT marchers) the International Day against Homophobia in Tbilisi and encountered aggressive and verbally offensive counter-demonstrators who blocked the way and subjected to threats of physical and homophobic insults. Some applicants suffered from the injuries and needed medical treatment. The Court reiterated that discriminatory treatments as such can amount to degrading treatment in relation to Article 3 in human dignity.[49] These discriminatory treatments that caused the severe harm to applicants significantly disturbed human dignity of the applicants.[50] It was found that 'there had been a violation of Article 3 taken in conjunction with Article 14 with respect to the second to fourteenth applicants'.[51] The Court stressed that the treatment grounded on the bias of heterosexual majority against homosexual minority may fall in within the scope of Article 3.[52] Similar cases, including those in relation to Article 8, illustrate the anti-discrimination of LGBT people is grounded on equal human dignity in the ECtHR.[53] It reiterates human dignity respect between LGBT people and non-heterosexual and cisgender people in legal protection. The non-discrimination concept does make a contribution to prohibiting disturbing behaviours (caused by other people) in relation to subordinating LGBT people's

[48] [2018] 66 E.H.R.R. 17
[49] Ibid at 723 to 724.
[50] Ibid. at 709 to 710.
[51] Ibid. at 708 to 709
[52] Ibid. at 723 to 724
[53] In the ECtHR, there are a number of LGBT non-discrimination case law examples in relation to Article 8, such as *Schalk v Austria* [2011] 53 E.H.R.R. 20, *Oliari v Italy* [2017] 65 E.H.R.R. 26, *Vallianatos v Greece* [2014] 59 E.H.R.R.12, *Beizaras and Levickas v Lithuania* [2020] 71 E.H.R.R. 28 and *Association Accept v Romania* [2022] 75 E.H.R.R. 15. All the cases suggest that LGBT people's private interests should not be violated/discriminated under Article 8 and Article 14 of ECHR.

human status. LGBT non-discrimination protection echoes addressing the limits of tolerance in the ECtHR.

Following non-discrimination rules from EU law and ECHR, UK Equality law delivers 'legal statement' which pushes social forms towards a right direction: [54] imposing limits on individuals' freedom and behaviours, such as less favourable treatments, in order to improve tolerance of LGBT people and their living interests in society. The non-discrimination rulings in UK Equality law echo the tolerance meaning from the ECtHR and make a contribution to addressing 'issues of stigma and second-class citizenship' [55] of LGBT people in life, progressively providing equal protection for LGBT people. Trispiotis reinforced LGBT tolerance protection and argued that UK Equality law allows limited exceptions for competing interests to LGBT people (e.g. conscientious objection) and intend to assure homosexual people and their partnerships are 'worthy of equal respect and esteem'.[56] LGBT tolerance embodied in UK Equality law certainly promotes LGBT dignity protection. As Cannon argued, UK Equality law protects individuals against harms caused to their human dignity; more precisely, the law applies to the community/society to which every individual belongs to.[57] This indicates that LGBT dignity protection, in the sense of non-discrimination in UK law, requires other individuals' participation, taking responsibilities for their intolerant consequences. Grounded on sexual orientation and gender identity (gender reassignment), UK Equality law also requires individuals to be 'duty-bearers', limiting their behaviours and preventing other forms of intolerance to LGBT people, including harassment and victimisation in the Equality Act 2010.[58] UK Equality law reflects the sense of responsibilities to protect human dignity by Jeremy Waldron, as argued in Chapter 1.

Furthermore, learning from *Walker*, I would argue that UK Equality law plays a role in encompassing but also furthering LGBT interests in different aspects of life. When it comes to

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[54] Cass R. Sunstein, 'On the Expressive Function of law' [1996] U. Pa. L. Rev. 2021 at 2021
[55] Expressive Theories of Law: A General Restatement at 1537
[56] Ilias Trispiotis, '"Alternative lifestyles" and unlawful discrimination: the limits of religious freedom in Bull v Hall' [2014] European Human Rights Law Review 39 at 48.
[57] Catriona Cannon, 'Freedom of religious association: towards a purposive interpretation of the employment equality exception' [2021] Industrial Law Journal 1 at 35.
[58] Michael Foran, 'Grounding Unlawful Discrimination' [2022] Legal Theory 33 at 39.

addressing prohibited conducts (i.e. discrimination, harassment and victimisation), the scope of the Equality Act 2010 extends to a wide range of areas, including employment/work, commercial and public service provision, family property, pension. Combined with Waldron's dignity, the significance of UK Equality law is to secure legal status of LGBT people. This wide scope expressed in UK Equality law promotes legal recognition of LGBT people's condition status, encouraging developments of other laws in protecting LGBT people's different living interests in society.[59] Combined with Trispiotis and Cannon above, UK Equality law makes a contribution to safeguarding LGBT people's sortal status, broadcasting the message to the whole society that LGBT people are equal humans as others within the high rank; LGBT tolerance is a key task in UK legal systems.

2.1.C. Provisional conclusion

The main conclusion of this section is that UK Equality law has availability to protect LGBT human dignity. This legal availability is equivalent with LGBT tolerance protection that is sourced from ECHR and EU law. LGBT tolerance is emphasised on mutual tolerance: law should play a role in accommodating LGBT interests and other competing interests in society, ensuring that other competing interests-holders never cause harm to LGBT people and their living interests (competing interests-holders' responsibilities). In other words, law should prevent other competing interests-holders from exceeding limits of mutual tolerance or causing intolerance to LGBT people, thereby achieving LGBT dignity protection. This LGBT tolerance is manifested as addressing the prohibited conducts in the Equality Act 2010 in the UK. Certainly, this LGBT tolerance protection should be furthered into other laws' 'statements' (expressive function) in order to protect LGBT people as equal and full beings in society.

[59] While the Equality Act 2010 deals with LGBT discrimination issues in a wide range of aspects, it does not 'create' LGBT rights protection in other areas of law. For instance, while the Equality Act 2010 can serve as a catalyst for the development of laws pertaining to same-sex marriage, it does not possess the power to directly establish same-sex marriage laws.

Section 2 Identify LGBT expressive harm in UK Equality law (2.2)

While UK Equality law has embodied LGBT tolerance, the law has limitations in fully improving LGBT tolerance and achieving LGBT dignity protection. I would argue that UK Equality law allows expressive harm to LGBT people in life, including employment and service provisions in corporate activities; by focusing on tolerance of LGBT people, the UK law has the tendency of allowing the extra protection (as discussed below) on expression and actions/manifestation objecting LGBT identities in corporate engagements, including employment and service provision activities.

2.2.A. LGBT-critical content

Before understanding the 'extra protection' concept, it is crucial to understand 'LGBT-critical' content. The LGBT-critical content includes, *inter alia*, views, opinions and beliefs, which entails objection on LGBT people's living identities and living modes. The LGBT-critical content is usually underpinned by sexuality-critical and gender-critical beliefs: heterosexuality is privileged and superior over homosexuality, according to heteronormativity;[60] sex/gender is biological and immutable, people cannot change their sex.[61]

The LGBT-critical content is developed from conscientious objections in LGBT protection.[62] Conscientious objection implies that an individual seeks to be exempted from a law that requires him or her to perform an act for others that he or she regards as immoral (based on their beliefs).[63] Conscientious objection to LGBT people's interests happens in aspects of employment and commercial service provision.[64] When a LGBT-related conscientious

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[60] Brian Dempsey, 'Gender neutral laws and heterocentric policies: "domestic abuse as gender-based abuse" and same-sex couples' [2011] Edinburgh Law Review 381 at 402; Lynda J. Ames, 'Homo-Phobia, Homo-Ignorance, Homo-Hate: Heterosexism and AIDS' in Esther D. Rothblum & Lynne A. Bond (eds), *Preventing Heterosexism and Homophobia* (SAGE, 1996) at 2.

[61] E.g. *Forstater v CGD Europe* [2022] WL 02703899

[62] E.g. Bruce MacDougall; Elsje Bonthuy; Kenneth McK Norrie; Marjolein van den Brink, 'Conscientious objection to creating same-sex unions: an international analysis' [2012] Canadian journal of human rights 127.

[63] Richard J Moon, 'Conscientious Objection in Canada: Pragmatic Accommodation and Principled Adjudication' [2018] Oxford Journal of Law and Religion 274 at 274 and 275;

[64] Conscientious objection in LGBT protection happened in other jurisdictions. see for example, *Eadie v Riverbend Bed and Breakfast (no 2)*, [2012] BCHRT 247 and *Brockie v Ontario (Human Rights*

objection happens, an individual usually acts on the LGBT-critical content and objects to perform an act for LGBT people in activities. Conscientious objection discussion in LGBT protection is helpful to raise the alert of the content in views/beliefs: objection to LGBT identities and living interests can be motivated by the relevant LGBT-critical content in life, including expression and manifestation.[65] Therefore, LGBT-critical content refers to the means through which individuals deliver expressive harm to LGBT people.

2.2.B. *Lee v Ashers Baking Company Limited,* 'extra protection' and LGBT expressive harm in UK Courts

2.2.B.1. The source of 'extra protection' in UK Courts

UK Equality law can provide 'extra protection' on the rights to freely express/manifest LGBT-critical content (as competing interests) over LGBT interests when it comes to conflicts between the two parties in corporate life. The classic example is *Lee v Ashers Baking Company Limited*. In the case, the bakery owners Mr and Ms McArthurs, who hold the religious belief which includes LGBT-critical content, objected to decorate the icing message 'support gay marriage' on the cake which was requested by their customer Mr Lee who is a homosexual man. Mr Lee brought a discrimination claim against McArthurs, alleging unlawful discrimination on the grounds of sexual orientation and political opinion. In the UK Supreme Court judgement, it was stated by the Court that:

Commission) [2002] OJ No 2375 (a print shop) in Canada; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ [2018], *Elane Photography LLC v Willock* [2013] 309 P 3d 53 (NM); *Telescope Media Group v Minnesota* [2019] 936 F 3d 740 in the US; *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] ZAGPHC 269] in South Africa. These cases provide the examples that conscientious objection on the basis of LGBT-critical content to LGBT people in the aspects of service provision and employment.

[65] Conscientious objection is associated wider topics, including military service *United States v Seeger* [1985] 380 US 163 and clinical health *The Christian Medical and Dental Society of Canada v CPSO* [2018] ONSC 579 (Canada). Nevertheless, the purpose of introducing conscientious objection is to provide the source for LGBT-critical content in law – LGBT-critical content can be expressed and manifested in corporate engagements and these content needs be emphasised in LGBT protection. The discussion of conscientious objection is merely limited to LGBT topic discussion.

> The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the **message** on the cake. The less favourable treatment was afforded to the message not to the man.[66]

Many commentators, who support the Supreme Court judgment, interpreted that McArthurs' objection is to express the political opinion that opposes same-sex marriage (political agenda) to respond to Mr Lee's political opinion that supports same-sex marriage. Thus, McArthurs' objection should not be considered as expressing disapproval to homosexual orientation.[67]

However, I would argue that the objection is a manifestation of the LGBT-critical religious belief through the professional conduct in the company. In order to count as a 'manifestation' of the Article 9 in the ECHR, 'the act in question must be intimately linked to the religion or belief'.[68] The manifestation of religion or belief is 'the existence of a sufficiently close and direct nexus between the act and the underlying belief'.[69] In *Ashers*, when McArthurs objected the message decoration service on the cake, they delivered the service in a way that they were motivated by the religious belief (LGBT-critical content). This is recognised and supported by some commentators that McArthurs showed the act on the LGBT-critical content through the professional conduct.[70] To look back at the judgment from the Supreme Court, the legally entitled protection to McArthurs' objection and the political opinion expression indicate that people are allowed to act on the LGBT-critical belief through corporate engagements towards others like LGBT employees or customers from the public, without taking responsibility for the consequences on LGBT dignity. This judgments illustrates the 'extra protection' in UK Equality law.

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[66] [2018] UKSC 49, 1, at 9.
[67] Christopher McCrudden, 'The Gay Cake Case: What the Supreme Court Did, and Didn't, Decide in Ashers' [2020] Oxford Journal of Law and Religion 238 at 241; Jeremy D. Tedesco, 'Masterpiece Cakeshop and the Foundations of Free Speech and Toleration' [2020] Oxford Journal of Law and Religion 271 at 285-287.
[68] *R (on the application of Cornerstone (North East) Adoption and Fostering Service Ltd)* [2021] P.T.S.R. 14 at 81.
[69] Ibid at 83.
[70] Sandra Fredman, 'Tolerating the Intolerant: Religious Freedom and Complicity' [2020] Oxford Journal of Law and Religion 305 at 326.

2.2.B.2. The dangers of 'extra protection': LGBT expressive harm and intolerance

Learning from *Ashers*, if McArthur's objection is understood as legally manifesting the religious belief involving LGBT-critical content, I would argue that this 'extra protection' has a negative impact on allowing McArthurs and/or other individuals to deliver expressive disregard on LGBT living identities and interests in corporate engagements. In other words, this 'extra protection' can cause LGBT expressive harm that the UK Supreme Court failed to recognise. As discussed in Chapter 1, following Anderson and Pildes' approach to expressive harm, McArthurs' actions sent the 'LGBT-critical message/attitude' through both communicative and non-communicative pathways.[71] This message/attitude can express disregard to LGBT identities and living interests, which constitutes expressing inappropriate or negative attitude towards LGBT people. Furthermore, Anderson and Pildes would argue that this expressive disregard by McArthurs could cause dignitary harm to LGBT people. This is reinforced by Waldron's discussions. As he argued in the book *The Harm in Hate Speech*, content-based actions, including communicatively and non-communicatively, can be distressing; the content can involve abusive meaning and assault human dignity.[72] Following Anderson, Pildes and Waldron, McArthur's manifestation (and expression) has an effect on taking LGBT people's equal high-ranking status away: it suggests, regardless of intentionally or unintentionally, that LGBT core living interests should not exist in human society. Nehushtan commented that the service was objected because McArthurs believed that gay couples should not have the equal rights (as straight couples) and acted on the belief while denying a service.[73] While McArthurs did not render an abusive and callous hate speech against LGBT people, their 'polite' LGBT-critical expression never changes the meaning that homosexual orientation should not be included as in 'human characteristics/identities'; nor does it change

[71] In *Ashers*, the factual findings suggest that their political opinion against same-sex marriage is based on the Christianity beliefs involving LGBT-critical content. Thus, McArthurs not only manifested but also verbally expressed LGBT-critical content in this case.
[72] Jeremy Waldron, *The Harm in Hate Speech* (HUP, 2012) at 111 and 151.
[73] Yossi Nehushtan, 'Conscientious objection and equality laws: Why the content of the conscience matters' [2019] Law and Philosophy 227 at 232

the fact that all LGBT people suffer from disturbance on human dignity in society, despite many not personally feeling or experiencing the harm.[74]

This existence of LGBT expressive harm shows that UK Equality law fails to preserve mutual tolerance in a pluralist society. As Johnson argued, UK Supreme Court in *Ashers* did not address the core human rights issues compatibly with the tolerance approach in ECtHR.[75] A useful example from the ECtHR in relation to preserving mutual tolerance between LGBT interests and competing interests can be found in *Eweida v United Kingdom.*[76] In this case, Ms Ladele who worked in the local authority as a district registrar refused to officiate civil partnerships on the grounds of her religious belief that homosexuals are sinful, which can be understood as expressing and manifesting LGBT-critical content in professional service provision. This freedom of belief and manifestation is under the Article 9 and the freedom of expression is under the Article 10. Both the English Court of Appeal and the ECtHR had no difficulty in refusing her claim to sharing the belief in heterosexual superiority in the workplace. Ms Ladele had the right to no more than hold her views. In contrast to the English Court, the ECtHR illustrated how the balance between protection for LGBT and other competing interests is struck, and it suggested a greater weight to LGBT interests than to the religious beliefs of opponents. This judgment goes beyond non-discrimination and indicates substantive LGBT tolerance among competing interests. On the one hand, the ECtHR acknowledged the legitimacy of Ms Ladele's religious interests. According to the Court, religious faith constituted a core aspect of an individual's identity,[77] which approves of her rights to freely hold, express and manifest religious beliefs. On the other hand, the ECtHR did not neglect the serious consequences on LGBT people. The ECtHR approved the local authority of aiming to 'secure the rights of others which are also protected under the Convention'.[78] The Court adopted the 'mutual tolerance' attitudes towards Ladele's religious interests.

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[74] As I argued in Chapter 1, dignitary harm on LGBT human dignity is about disturbance on human status; if disturbance on LGBT human dignity happens, it will affect all LGBT people in society.
[75] Paul Johnson, 'The love of law, and the law of love: Jonathan Cooper and LGBT human rights advocacy' [2022] EHRLR 33 at 46.
[76] [2013] 57 E.H.R.R. 8
[77] Ibid at 240.
[78] Ibid at 240

Accommodation of her belief by the local authority does not mean that the local authority approved of her belief, but the accommodation only implies 'a sign of tolerance' in society.[79] The ECtHR in this case showed a mutual tolerance approach where individuals' free expressions/manifestations should be reasonably limited for LGBT human dignity protection, which should have been adopted by UK Supreme Court in *Asher*s.

Without following this ECtHR approach, UK Supreme Court in *Ashers* has expressed a 'legal statement' that encourages LGBT intolerance in society through 'extra' protection. According to the Supreme Court, the objection was to the decorating message, implying that there was no discrimination on the ground of sexual orientation; thus, McArthurs would have refused the order from anyone who sought such a customised cake, regardless of the political (or religious) opinions or sexual characteristics. [80] Following this logic, the allowance of manifestation suggests that there was an exemption from the normal rule against discrimination on the basis of political belief.[81] Even though there was no discrimination, it does not mean that the law has not caused intolerance to LGBT people. Unlike the ECtHR, the UK law did not achieve to ensure that religion and LGBT interests can ultimately co-exist.[82]

Indeed, learning from ECHR, the objection to homosexual orientation and transgender identities may be allowed to exist on the basis of the Article 9. For instance, to hold the LGBT-critical beliefs like gender-critical belief is entitled to legal protection. In the ECtHR, while Ladele was not allowed to manifest her LGBT-critical beliefs in professional service conduct, she was still entitled to expressing and manifesting the beliefs under Article 9 and 10 of ECHR outside the institution, such as in a church. But tolerance of LGBT-critical content should not be allowed to go beyond the mere 'disapproval' level like disagreement or shock in life aspects,

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[79] Ibid at 240.
[80] Rex Ahdar, Jessica Giles, 'The Supreme Courts' Icing on the Trans-Atlantic Cakes' [2020] Oxford Journal of Law and Religion 212 at 215; In UKSC, Lady Hale said that the decorating message/slogan Support Gay Marriage is not a 'proxy' for any sexual orientation. [25]
[81] Kenneth M. Norrie, 'Lee v Ashers Baking Co Ltd' [2019] Juridical Review 88 at 93 to 95; Marie ̈tta D.C. van der Tol, 'Conscience and Cakes: Reaffirming the Distinction Between Institutional Duties and Individual Rights' [2020] Oxford Journal of Law and Religion 372 at 381-382 and 383.
[82] Matthew Gibson, 'The God "dilution" religion, discrimination and the case for reasonable accommodation' [2013] C.L.J 600 at 612.

such as employment and service provision.[83] The UK law failed to observe that McArthurs had gone far beyond the 'mere disapproval' level and expressed the disapproval to LGBT people through corporate activities. The UK Supreme Court ought to have limited McArthur's rights to freely manifest LGBT-critical beliefs like the ECtHR, which reveals the limited function of UK Equality law in encouraging LGBT intolerance.

2.2.C. More LGBT expressive harm and intolerance examples beyond *Ashers*

Ashers Baking Ltd is not the only one example which delivers expressive harm to LGBT people. In a Britain Work Report 2018 (Stonewall), 18% of the LGB (employees) respondents said that they heard negative comments and derogatory remarks expressed against homosexual and bisexual orientation at workplace.[84] In 2017, Mason and Vaughan carried out an empirical study on experiences of LGBT barristers in England and Wales. In the interviews, some participants said somethings like 'have not actively lied, but I have lied by omission, particularly if asked 'do you have a girlfriend?'. The answer 'No' confirms the assumption of heterosexuality inherent in the question'.[85] Responses like these suggest that they feel rather uncomfortable about revealing their sexual orientation at work. This unwillingness can be linked with expressive harm delivered by people. For instance, a participant said that they walked past by some staff and overheard one person express strong disapproval of homosexual orientation and life.[86] In this scenario, the person who said the content opposing LGBT identities did not speak to any homosexual person. In fact, they mainly expressed their opinion/disagreement about homosexual orientation. If opinions like this did not cause any potential discrimination, then their freedom of expression right would be protected and the LGBT-critical expression at employment would be tolerated too. However, this verbal disapproval still causes expressive harm to LGBT people. In a company, the workplace is

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[83] Jeremy Waldron, Melisa S. Williams, 'Introduction' in Jeremy Waldron, Melisa S, Williams, *Toleration and Its Limits* (NYU Press, 2008) at 5. In the same book, Wendy Brown, 'Tolerance as/in Civilizational Discourse' at 421-428.

[84] Stonewall (2018), LGBT in Britain Work Report
< https://www.stonewall.org.uk/system/files/lgbt_in_britain_work_report.pdf >at 7

[85] Marc Mason and Steven Vaughan, 'Sexuality at the Bar: An Empirical Exploration into the Experiences of LGBT+ Barristers in England & Wales' [2017] at 4.

[86] Marc Mason and Steven Vaughan, 'Sexuality at the Bar: An Empirical Exploration into the Experiences of LGBT+ Barristers in England & Wales' [2017] (presentation) at 16.

featured with openness, meaning that there are interrelationships between people and LGBT people can be among the group.[87] If the opinion is allowed to spread through corporate activities, it would certainly encourage an environment where LGBT people lose their human dignity. Potential expressive harm can explain why LGBT people feel less comfortable about 'coming out' at work.[88]

In *303 Creative LLC v. Elenis*[89] the US Supreme Court (Opinion of the Court) revealed LGBT intolerance in law. In this case, Ms Smith, who offers website and graphic design among other services through 303 Creative, wanted to expand her company offerings to include wedding websites. Although she promised to provide customised service regardless of customers' characteristics, such as race and sexual orientation. She disagrees with same-sex marriage and she will not provide the content in service that is contradictory to her biblical truth. Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. In the Supreme Court, she sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs. The Opinion of the Court prohibited Colorado from forcing Ms Smith to create expressive designs speaking messages with which the designer disagrees. In other words, Ms Smith, similarly to McArthurs, was allowed to manifest her LGBT-critical belief through service provision.

Similar to the UK Supreme Court in *Ashers*, the Opinion of the Court laid more protection on freedom of expression and manifestation rights. Under the Colorado Anti-Discrimination Act, the law adopted 'public accommodations', aiming to prevent from almost every public-facing business denying 'the full and equal enjoyment' of its goods and services to any customer based on his race, creed, disability, sexual orientation in the State.[90] This intends to improve LGBT tolerance and protect LGBT people's interests in society. Meanwhile, LGBT interests

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[87] Mary Neal, 'Not Gods but Animals: Human Dignity and Vulnerable Subjecthood' [2012] Liverpool Law Review 177 at 189; Catherine Dupre, 'Unlocking human dignity: towards a theory for the 21st century' [2009] E.H.R.L.R. 190 at 196. (These two works are helpful to look at vulnerability and potential harm humans can receive from the perspective of interrelationships, including companies)
[88] See (n 85) The Sexuality at the Bar Project. For instance, another participant said that 'I don't necessarily wear [my sexuality] on my sleeve. I'm sure people know that I'm gay... It's not something that is really immediately apparent.' at [3].
[89] 600 U.S. ___ (2023)
[90] Ibid at 1.

conflict with Ms Smiths' freedom of expression and manifestation rights. The Opinion of the Court had the concern that 'public accommodations statutes can sweep too broadly when deployed to compel speech',[91] which suggests that law should play a role in sacrificing LGBT dignity protection for freedom of expression and manifestation rights in this case. Similar to *Ashers*, while there is no discrimination involved, LGBT expressive harm was completely forgotten. This echoes the similar distorted function expressed by UK Equality law – law encourages social norms and exacerbates LGBT intolerance.

Learning from these examples, law does tend to treat LGBT expressive harm in a more invisible way compared with racial expressive harm (racism). In cases like *Ashers* and *303_Creative*, if the expressions have the meanings, such as 'White/Caucasian only' or 'I don't provide service other than to Asian people', there would have been no doubt that the service providers' expressions are considered as racist and their claims are dismissed in the courts. In those hypothetical scenarios, racial expressive harm would not be missed. In *Showboat Entertainment Centre Ltd. v Owens*, [92] the applicant, who is a white employee, refused to follow the racist policy to exclude black customers from the centre. He was dismissed by the employer, and he argued that he had been unlawfully discriminated against by the employers. The industrial tribunal held that the policy not to admit blacks was unlawful; the applicant's dismissal was discrimination on racial grounds against the applicant personally and that he was entitled to compensation. The EAT supported this decision. The EAT further stated that 'the words "on racial grounds" are perfectly capable in their ordinary sense of covering any reason for an action based on race, whether it be the race of the person affected by the action or of others'.[93] This case suggests that UK Equality law recognises racial expressive harm as a cultural harm. The policy certainly delivered racial expressive harm in this case. But whether or not the black customers felt racially discriminated is not the determinant to recognise the existence of harm. Following from Connolly, this approach provides a more fluid and wider perspective to protect human dignity and address racial expressive harm in UK Equality law, which should have been adopted in *Ashers* by UK Supreme Court in terms of addressing LGBT

[91] Ibid at 14
[92] [1984] 1 W.L.R. 384
[93] Ibid at 388

protection.[94] Before same-sex marriage law enactment, the 'separate but equal' legal system (civil partnership) reinforced the orthodox heteronormativity in 'marriage';[95] Nowadays, in *Ashers*, addressing LGBT people's expressive harm still has to rely on discrimination on the grounds of sexual orientation and gender identities. Compared to the racial expressive harm approach, UK Equality law has never learned any lessons from LGBT legal developments and made little difference to addressing LGBT expressive harm as a substantive task. LGBT expressive harm ought to have been able to justify *per se*, but this is still difficult to happen in the current UK Equality legal system.

2.2.D. Connection between expressive harm and material harm

As argued in Chapter 1, expressive harm is usually entwined with material harm. I would argue that LGBT expressive harm can lead to material harm which interferes with LGBT people's interests or rights in legal protection. One example of showing an expressive harm leading to material harm to LGBT people is the scandal of Barilla SpA (an Italian pasta company).[96] In 2013, the chairman Guido Barilla spoke in the live interview that I would never do a commercial with a homosexual family, not for lack of respect, but because we don't agree with them'.[97] The corporate Chairman caused LGBT expressive harm by expressing disregard on homosexual orientation and same-sex living interests. Moreover, this expressive disregard could motivate the company to refuse to engage with LGBT people in activities, such as the commercial. This can potentially encourage corporate culture that LGBT people are treated

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[94] Michael Connolly, The 'associative' discrimination fiction: Part 1' [2021] Northern Ireland Legal Quarterly 29 at 45 and 46. Connolly argued for this case law approach as a fluid approach to develop associative discrimination and widen the meaning of 'discrimination' in equality law. He critiqued that this associative discrimination approach should have been cited in *Lee v Ashers Baking Co Ltd*.

[95] This has been argued in Chapter 1: the 'separate but equal' system caused expressive harm to LGBT people; this has been reinforced by other commentators. See Karon Monaghan, 'The Equality Bill: a sheep in wolf's clothing or something more?' [2009] European Human Rights Law Review 512 at 519.

[96] While this chapter is focused on the UK jurisdiction, the Italian company case study is only referred as an example to show that this scandal could happen in the UK too.

[97] Matt Simonetee, 'Anti-gay comments have activists saying 'pasta la vista' to Barilla' [2013] Windy City Media Group <https://go.gale.com/ps/i.do?p=STND&u=ustrath&id=GALE%7CA348647344&v=2.1&it=r>

unfairly in the company, such as discrimination and harassment on the ground of sexual orientation.[98]

The danger of expressive harm is that it can encourage LGBT-phobic culture which encourages material behaviours to violate LGBT rights. LGBT phobia issues, such as homophobia and transphobia, are far more complex, including but not limited to some direct material and specific LGBT-critical actions like discrimination or inhuman treatment (torture).[99] The central point of LGBT phobia issues is focused on treating homosexual and transgender as inferior (in human dignity) to heterosexual and cisgender people on the ground of sexual orientation and gender identities.[100] LGBT-phobic culture can be caused not only by actions like torture but also by expressive disregard.

In *NH v Associazione Avvocatura per i diritti LGBTI*, the lawyer NH who during the radio interview released certain statements indicating his aversion to employing within his firm, or otherwise availing of the services of, homosexual lawyers. The statements were considered as 'homophobic' by the European Court of Justice (CJEU).[101] The association defended the rights of LGBT people and claimed that NH caused discrimination on the ground of sexual orientation. The Tribunal found that NH had discriminated on the ground of sexual orientation. NH appealed against the order. The homophobic statements can be understood as the 'expressive disregard' to LGBT people in organisational engagements. To tackle the homophobic circumstance, the CJEU imposed the proportionate restriction on the lawyers' right to freely express the statements. As the Court indicated, the expression can encourage discrimination in employment and occupation against LGBT people.[102] The restriction on the lawyer's

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[98] E.g. *Bull v Hall* (Chapter 1);in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission,* the cakeshop company owner held the religious belief which disagrees with LGBT people's interests and rejected to sell a cake for a same-sex couple 584 U. S. ____ (2018)

[99] Helen Fenwick, Daniel Fenwick, 'Finding "East"/"West" divisions in Council of Europe states on treatment of sexual minorities: the response of the Strasbourg Court and the role of consensus analysis'[2019] European Human Rights Law Review 247, 253 to256.

[100] *Campbell v Dugdale* [2020] CSIH 27, 481 at 485 to 486. (For instance, homophobia is understood as the damage to gay people's character by considering homosexual people as lesser beings than heterosexual people.)

[101] [2020] 3 C.M.L.R. 33 1223, at 1260.

[102] Ibid at 1261.

statement intends to prohibit the potential of less favourable treatment or disadvantage to LGBT people motivated by expressive disregard. Even though the lawyer's statement is just the expression, it can encourage homophobic culture and be manifested through the recruitment policy in the firm, further causing some material forms of harm to LGBT people. This judgment in the CJEU is a key example to show that LGBT-critical expression can foster LGBT-phobic culture which inspires individuals to incite material harm (i.e. discrimination) to LGBT people in social areas, such as organisations.

Another example is homophobia in sports (football). It is argued by many sociological commentators that English football is a featured with heteronormative culture – the football has been a 'a male-dominated and masculine-coded affair', creating a concurrent culture of heterosexual normalisation and homophobia throughout society.[103] In sports clubs (institutions), extra protection from the UK Equality law can encourage sports players to develop the homophobic culture by expressing the LGBT-content (underpinned by heteronormativity), such as anti-gay views or jokes amongst the club.

The homophobic culture fostered by expressive disregard can lead to harassment to LGBT people.[104] In a Homophobia in Sports UK Parliamentary report, a football player Adam McCabe, who is a gay football player, did not feel comfortable about releasing his sexual orientation to the public because he heard many jokes opposing gay people in football clubs.[105] Those jokes contain lots of expressive disregard to homosexual orientation, making

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[103] E.g., Andrew Parker, 'Soccer, Servitude and Sub-cultural Identity: Football Traineeship and Masculine Construction' [2001] soccer and society 59 at 69 to 70; Momin Rahman, 'The burdens of the flesh: star power and the queer dialectic in sports celebrity' [2011] celebrities studies 150 at 152; Jonah Bury, 'Non-performing inclusion: A critique of the English Football Association's Action Plan on homophobia in football' [2015] International Review for the Sociology of Sport 211 at 213.

[104] Harassment can be motivated by expressive disregard to LGBT people. But not all expressive disregard to LGBT people can be categorised as harassment. As discussed before, while people like Ms Smith and McArthurs delivered expressive disregard to LGBT people, Equality law seems reluctant to categorise their expressions as harassment owing to freedom of expression and manifestation rights. For me, expressions which can cause harassment are mainly those delivering unwanted or hurtful meanings in equality law, which cannot represent entirety of expressive harm and consequential harm on human dignity, as argued in Chapter 1.

[105] House of Commons (parliamentary report, 2016-17), Homophobia in Sport < https://publications.parliament.uk/pa/cm201617/cmselect/cmcumeds/113/113.pdf> (Accessed on 1st April) at 10

gay players feel emotionally hurt and embarrassed about themselves.[106] In the same report, a study from Stonewall showed that 72% of football fans have heard homophobic abuses and statements. [107] Those comments can certainly cause disregard on LGBT identities and expressive harm to LGBT people, despite the LGBT people feeling emotionally hurt or not. Furthermore, these expressions can create unwanted cultural environment that negatively affects LGBT people. According to Equality and Human Rights Commission, these unwanted expressions are categorised as unwanted conduct, including spoken words and banters/jokes, interpreted under section 26 of Equality Act 2010 in relation to harassment.[108] LGBT football players can encounter harassment in a homophobic culture motivated by LGBT expressive disregard. In fact, verbal harassments are usually associated with other material harms. In a survey in 2018 of 1000 lawyers and other employees working in the UK's top 100 law firms, the researchers found that 42% of women said that they had experienced sexual harassment at work, including suggestive comments and physical bullies.[109] Learning from this sexual harassment example, it can be projected that LGBT football players can encounter similar physical harms, such as bully or attack, in a homophobic environment.

2.2.E. Provisional conclusion

While UK Equality law embodies LGBT tolerance from the ECtHR and EU law, it is not able to entirely address LGBT expressive harm. Following anti-discrimination rulings, the UK law can address material harms derived from expressive harm, such as discrimination and harassment. But the UK law does not go further than this. Learning from *Ashers*, the UK Supreme Court is reluctant to reasonably limit individual's freedom of expressing and manifesting LGBT-critical beliefs/views for LGBT dignity protection. Compared to the ECtHR and CJEU, the UK law fails to recognise that individuals can exceed limits of mutual tolerance and can deliver expressive harm *per se* to LGBT people (extra protection). The embodied 'mutual tolerance' in the UK is

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[106] ibid at 11.
[107] ibid at 3
[108] Equality and Human Rights Commission, Sexual Harassment and Harassment at Work: Technical Guidance (2020) at 16. < https://www.equalityhumanrights.com/sites/default/files/2021/sexual-harassment-and-harassment-at-work.pdf> (Accessed on 1st April 2024)
[109] Sam Middlemiss, 'New developments in the campaign against unwanted workplace banter' [2021] Industrial Law Journal 330 at 331

not profound; UK Equality law continues to function in a way that encourages LGBT intolerance in life.

Section 3 Influence of UK Equality law on UK Corporate Governance law (2.3)

I would argue that the existing UK Equality law does not have a positive influence on UK Corporate Governance law in LGBT dignity protection. Insufficient LGBT tolerance protection delivered in equality law can convey the message that corporate governance law does not need to address LGBT expressive harm in corporate activities and its impacts on wider society. UK Equality law's limitations can be culturally impactful to the whole UK legal system in LGBT dignity protection. Here are the two main limitations in UK Equality law: material harm focus and lack of labilities on employers.

2.3.A. Material harm principle emphasised in the proportionate approach and its limitations

2.3.A.1. Material harm principle and the UK proportionate approach

From the case law discussion, I would argue that the UK Equality law has the main focus on the material harm principle when dealing with the conflicted interests between LGBT interests and the competing interests. The material harm principle requires that the UK law should remove or overrule the LGBT-critical expression when these can cause the potential material harms, such as discrimination.[110]

The material harm principle was embodied in the UK Supreme Court. As discussed before, McArthurs' expression/manifestation did not result in denial of service, less favourable treatment or putting homosexual people at disadvantage in the service, which suggests that their behaviours did not cause any interference with LGBT people's rights.[111] Since the expression did not invoke material harm, the Court allowed the manifestation and stated that

[110] Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' [2014] The Modern Law Review 223 at 228 to 230.
[111] See *Lee v Ashers Baking Company Ltd* [2018] at 11.

'they would be entitled to refuse to do that whatever the message convey'.[112] Learning from *Ashers*, the material harm principle in LGBT legal protection can be understood with the feature: the consideration of material forms of harm or matters become the key metric in proportionate protection between LGBT-critical expression and manifestation and LGBT rights. In *Ashers*, the Court assessed whether McArthur's rights should be limited on the basis of the consequence in relation to whether or not McArthur's refusal (manifestation) caused discrimination to Mr Lee (e.g., LGBT customers).

The consideration of material harm is reflected in other cases. In *R (Core Issues Trust) v Transport for London*[113] the claimant and an organisation sought to place an advertisement on buses containing the counter slogan "Not gay! Ex-gay, post-gay and proud. Get over it!". While the defendant had accepted an advertisement ("the Stonewall advertisement") by an organisation which promoted the rights of homosexuals and included the slogan "Some people are gay. Get over it", the defendant refused to accept the proposed advertisement by the claimant. The claimants alleged that the refusal to take the advertisement caused discrimination to them. It was stated by the Court that the claimant's advertisement 'was likely to cause widespread or serious offence or related to matters of public controversy' against LGBT people.[114] It can be argued that expression like the advertisement which conveys LGBT-critical content towards the public can cause intolerance to LGBT people. The Court agreed that 'the advertisement is liable to encourage homophobic views and homophobia places gays at risk'.[115] To look into the case, the Court adopted the material harm principle to protect LGBT people from intolerance circumstances. In the discussion, the Court was primarily focused on whether the expression could cause any consequential material harm to LGBT people. The advertisement was destined for London buses, which meant that Londoners and people visiting London who might be offended could not avoid them. [116] For the reason, the 'widespread or serious offences', such as violence or hate speech, were likely to happen to

[112] Ibid.
[113] [2014] EWCA Civ 34
[114] Ibid at 806 to 807.
[115] Ibid at 807.
[116] Oliver Bray, Robert Johnson, 'Some advertising bans are lawful. Get over it! Core Issues Trust v Transport for London' [2013] Entertainment Law Review 222 at 225.

LGBT people as the consequence. Since the message could ignite offensive behaviours to interfere with LGBT people's rights, the advertisement was objected, and the claimant's right to freely express LGBT-critical beliefs was proportionately restricted by the Court.

In *Page v NHS Trust Development Authority*,[117] Mr Page, who had been a non-executive director of an NHS and social care trust responsible for delivering mental health services, delivered the expression to the press based on his Christian belief that it was in a child's best interests to be brought up by a mother and a father. As consequence, he encountered the disciplinary action from the Trust. He was suspended by the Trust and claimed that he encountered discrimination. In the Court of Appeal, it was held that Mr Page had not been discriminated against because of his religious belief.[118] The Court adopted the material principle to assess protection on the freedom of expression right. It was stated by the Court that:

> The primary element in that justification is…found to be a genuine and reasonable concern that the expression by the Appellant in the national media of his views about homosexuality **risked impairing the willingness of gay people with mental health difficulties to engage with its services…**[119]

It seems to the Court that the expression would add more hinderances for LGBT people to engage with the services in the Trust. The LGBT-critical expression can be understood as interfering with LGBT people's rights to the service. Mr Page's right to freely express the LGBT-critical beliefs was to be proportionately limited because it would have the potential to obstruct the equal access to the services as other people are entitled. Once again we see that the courts focusing on the material harm that intolerance of LGBT people may cause than the expression itself.

In *Mackereth v Department for Work and Pensions*,[120] the claimant is a Christian believer and a doctor who contracted with the second respondent to carry out assessments of disability-

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[117] [2021] WL 00738691
[118] Ibid at 25.
[119] Ibid at 15 to 16.
[120] [2022] EAT 99

related benefit claimants as a Health and Disability Assessor, on behalf of the Department for Work and Pensions. During his induction, the claimant informed the centre's lead physician that he would not refer to transgender persons in a way inconsistent with their birth gender, which conflicted with the DWP's Policy on Gender Reassignment. The claimant ended up being dismissed from his post. The claimant brought claims in the ET of direct discrimination, harassment and indirect discrimination, relying on the protected characteristic of religion or belief. The ET found that the claimant's belief manifestations 'failed *Grainge*r (v)[121], as they were incompatible with human dignity and conflicted with the fundamental rights of others, specifically transgender individuals.'[122] However, in terms of the belief, the EAT provided a different judgment. The EAT found that 'the Employment Tribunal erred in its approach to *Grainger* (v) by imposing too high a threshold for the protection of a belief under section 10 of EA 2010.'[123] Following from the approach in *Forstater*[124], the EAT implied that while the belief (which includes LGBT-critical content) was likely to cause offence, it cannot be excluded from protection. [125] On the one hand, the EAT held that the belief should be entitled to protection; on the other hand, the EAT did not error in the judgment on direct discrimination. Following from *Page*, the EAT identified the potential risks which can cause material harm on transgender patients. It can be perceived that the claimant would manifest the belief in his job and violate the rights of others, and thus his discrimination complaint was dismissed.[126] Again, the EAT still focused on the material harm approach. If an individual had no clear attempt to manifest his LGBT-critical content and was possible to cause discrimination, there

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[121] In *Grainger plc & others v Nicholson* [2010] ICR 360, the EAT established the Grainger Criteria. It is a test for whether something qualifies as a "philosophical belief" under the Equality Act. There are five criteria such a belief must meet: (i) The belief must be genuinely held. (ii) It must be a belief and not, [simply], an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others. The last one, which is relevant to my thesis, is named as 'Grainger (v)'

[122] See *Mackereth* at [36] and [37].

[123] Ibid at [117]

[124] [117]: "in order for a conviction or belief to satisfy threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others" See *Forstater v CGD Europe and ors* [2022] ICR 1 [59] (case details discussed below)

[125] [119]

[126] [124] to [128]

would be no significant limit on the LGBT-critical content. This further suggests that an individual can be allowed to express his belief at work (in corporate engagements). The potential intolerance of LGBT people arising from the content and expression itself does not seem to fall into the interest of the UK courts.[127]

2.3.A.2. The limitations of the material harm principle in the proportionate approach

While the material harm principle can be helpful to tackle some offensive or violent behaviours to LGBT people, it is difficult to radically tackle LGBT intolerance issues, in particular the expressive harm. From the case examples above, the material harm principle is mainly focused on connection between the LGBT-critical expression/manifestation and material harm (e.g. discrimination or offence). It is emphasised on whether or not the freedom of expression right can cause interference with LGBT rights in terms of material harm. Addressing those material harm can be helpful to limit LGBT-critical manifestation and to protect LGBT dignity. But what if there is no potential material harm? Expressive harm can still happen without potential material harm. This constitutes the flaw of a material harm based proportionate approach.

In *Ngole v Sheffield University*,[128] the student Ngole holds orthodox religious views on the immorality of homosexuality (LGBT-critical belief). Ngole posted a series of comments using his Facebook account in which he disapproved of homosexual acts. He also included a number of Biblical quotations, some of which contained strong language, such as referring to homosexuality as an 'abomination'. The university was notified of the comments and embarked on disciplinary proceedings. At the conclusion of the proceedings, the university was of the opinion that Ngole's actions breached two requirements of the code of conduct, including to make sure that his behaviour did not damage public confidence in the profession. As a result, Ngole was removed from his social worker qualification course. Ngole sought the judicial review, complaining that the decision was an unlawful interference with his rights

[127] Also see *Preddy v Bull [2013] 1 WLR 3741*; *Black v Wilkinson* [2013] 1 WLR 2490. In these cases, while the expression of LGBT-critical content was involved, the main focus of the courts was discrimination.
[128] [2019] EWCA Civ 1127, 1

under the Article 9 and 10 of ECHR. It was held by the Court that the disciplinary proceedings should be overruled.[129] It was stated by the Court that 'the Appellant had never been shown actually to have acted in a discriminatory fashion' and 'there was no evidence of any actual damage to the regulation of the profession'.[130] To conclude the disciplinary proceedings as disproportionate suggests that the exercise of the freedom of expression right did not interfere with LGBT people's rights. It can be perceived that the Court relied on the material harm proportionate approach – since there was no clear evidence to indicate sexual orientation discrimination, the LGBT-critical content was allowed to express on social media. Thus, the Court was emphasised on the consequence of the expression and LGBT tolerance in this case.

However, the Court did not examine potentials of the LGBT-critical expression. The expression has the inclination to disregard LGBT identities. While it did not cause any material harm in this case and he promised that he would not manifest it in his job, his expression can still cause LGBT intolerance. What if Mr Ngole said the LGBT-critical content as his personal views at the placement and the content was heard by LGBT employees and clients? The Court only assessed the disciplinary proceedings based on the discrimination, but it considered little about the possibility that Ngole would express and manifest his LGBT-critical content through his social working service provision in an organisation.

In *Forstater v CGD Europe*,[131] the claimant held gender-critical beliefs, which include the belief that sex is immutable and not to be conflated with gender identity and engaged in the discussion on social media about gender identity issues. The Claimant has been a Visiting Fellow and has entered into consultancy agreements with the Respondent since January 2015. The last consultancy agreement ended on 31 December 2018. The Claimant contends that the relationship came to an end and/or the Respondent refused to continue it because she expressed 'gender critical' opinions. In 2018, employees of CGD complained on the basis that they were offended by tweets posted by Ms Forstater which, in their opinion, also posed a

[129]Ibid at 2.
[130] Ibid at 25.
[131] [2023] WL 04332628 1

reputational risk to CGD. Following receipt of the complaints, CGD decided not to renew Ms Forstater's visiting fellowship, and also failed to offer her a contract of employment. The Claimant complained that she was discriminated against because of her belief. The Tribunal held that the belief was not 'worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others' according to the fifth *Grainger* principle. Ms Forstater appealed to the EAT. Although some transgender people and some colleagues found the expression offensive, it was stated by the EAT that the conclusion predicted on the assumption that the Claimant would always misgender trans people is incorrect.[132] But the EAT held that gender critical beliefs cannot be used to 'misgender' trans people with impunity.[133] To 'misgender' trans people is not allowed because it can potentially cause discrimination and harassment to transgender people. While the EAT recognised the potential harm of the gender critical beliefs towards transgender people, it was only emphasised on the connection the transgender people's harm and 'misgender' or 'discrimination'. Instead, it did not consider that the wider impacts of expression of gender critical beliefs through organisational engagements can cause intolerance to transgender people. In early 2023 the Tribunal released their judgment on remedies. Ms Forstater has been awarded £106,404.31.[134]

Ellis v Parmagan Ltd[135] is another case example to show that UK courts are reluctant to identify expressive harm *per se* motivated by the sole material harm principle. In this case, Mr Ellis, who was the director of the company, expressed his belief 'homosexuality was contrary to god's law and nature' on the basis of Bible. This expression (integrated another one that the holocaust did not happen) offended employees of the company. In the preliminary hearing, his opinions did not fall within in the definition of belief for the purposes of Section 10 the Equality Act 2010. In the ET, he claimed that he had been subject to direct discrimination. The ET dismissed his claim and found that:

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[132] Ibid 29.
[133] Ibid 2.
[134] Ibid.
[135] 2014 WL 10246833

> Mr Ellis expressed himself in a formal disciplinary interview illuminates the true characteristic of his belief. He holds a fundamental antipathy towards homosexual people, his belief is that expressed plainly even when facing a disciplinary sanction for being aggressive to a colleague because of that person's homosexuality; he considers that characteristic to be a perversion and he is intolerant of it per se… I do not accept that Mr Ellis' belief is one which is worthy of respect in a democratic society…Moreover his belief is clearly in conflict with the fundamental rights of others.[136]

While the tribunal did not use the term 'expressive harm', the extracted judgement suggests that Ellis delivered expressive disregard and can cause expressive harm to LGBT people; the tribunal showed the intention of addressing intolerance to LGBT people. Nevertheless, the tribunal fails to fully engage with Waldron's dignity as the theoretical foundation in providing much assistance to the judiciary in balancing competing interests.[137] While the tribunal dismissed Ellis' claim that he was under direct discrimination, the tribunal provided little justification on the harmful impacts of Ellis' expression, such as what LGBT fundamental rights are violated, and clarifications on the 'offend' to other employees, and what responsibilities an individual shall hold in expressions. The tribunal ought to have gone beyond the existing judgment and have identified expressive harm to LGBT people.

From these case examples, the common principle is that when the expression could not cause material harm, there was no further limit on the expression itself and the wider consideration of the expressive harm towards LGBT intolerance. If the LGBT-critical expression (without causing material harm) is accommodated in legal protection like these cases, then LGBT people are likely to repetitively confront this kind of expression which contains 'expressive disregard' to their characteristics by anyone.[138] I am far from arguing that Mr Ngole and Ms Forstater are not entitled to the right to freely express their beliefs. They are certainly entitled

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[136] Ibid [23] and [27]

[137] Lucy Vickers, 'Is all harassment equal? The case of religious harassment' [2006] Cambridge Law Journal 579 at 604: 'The concept of dignity may provide some help in determining how various clashes of rights should be resolved, such as clashes between some religious employees and gay employees'.

[138] Bruce MacDougall, Elsje Bonthuys, Kenneth McK. Norrie & Marjolein van den Brink, 'Conscientious Objection to Creating Same-Sex Unions: An International Analysis' [2012] Canadian Journal of Human Rights 128 at 159; in *Ellis v Parmagan Ltd,* while the tribunal dismissed Ellis' claim, without any further clarifications on expressive harm, other individuals could continue similar expressions. Effects of the judgment is limited.

to expressing the beliefs and opinions on their social media as long as their expressions are under control: these beliefs would not be expressed at work and the professional conducts like Ms Ladele.

Furthermore, this common principle that does not effectively address LGBT expressive harm can bring more hinderance on UK Corporate Governance law. For cases above, LGBT expressive harm can happen in corporate activities too. With embodiment of corporate social responsibility concept, corporate governance legal frameworks are suggested to move towards a more transformative socially responsible direction, as will be argued in Chapter 4. For instance, Carol Liao argued that corporate directors should have a responsibility of addressing relevant racism and sexism matters and culture in corporate activities.[139] This common principle in UK Equality law fails to provide clear legal guidance on how corporate directors should exercise power to balance LGBT dignity protection and the competing interests. In fact, with 'extra protection' on freedom of expressions and manifestation rights by UK courts, corporate directors would find it not possible to limit individual speakers' freedom in order to address LGBT expressive harm. UK Equality law only delivers the message that corporate governance merely needs to tackle discrimination and harassment on the ground of LGBT identities. This insufficient LGBT tolerance protection in UK Equality law can successfully pass to UK Corporate Governance law: directors are allowed to ignore LGBT expressive harm.

2.3.B. The lack of employers' liabilities

Another limitation of UK Equality law is the lack of employers' liabilities in protecting LGBT employees from third parties. This can be witnessed in UK case law development in relation to racial and gender protection. In *Burton v De Vere Hotels Ltd*[140] the applicants were both black, and were employed as casual waitresses at an hotel owned by the respondents in Derby. One evening, at the hotel, the Round Table employed the services of Mr Bernard Manning (the third party) as a speaker. In the course of his presentation, he made sexist and racist jokes

[139] Carol Liao, 'An anti-racist feminist agenda for sustainable corporate law' in Christopher Bruner and Marc T Moore (eds), *A Research Agenda for Corporate Law* (EE, 2023) at 156.
[140] [1997] I.C.R. 1

and used offensive racist terms, and on spotting the applicants clearing the tables made specific sexist and racist comments directed at them. After complaints to the management by the women, apologies were offered. Nonetheless, the victims of the harassment decided to exercise their right to bring a case for race discrimination. The tribunal accepted that the applicants had suffered a detriment but did not accept that their employers were responsible for it, on the basis that the nature of the incident could not have been foreseen by management.[141] The EAT overturned the tribunal decision, contending and clarifying the meaning of 'subjecting' in Equality law:

> A person "subjects" another to something if he causes or allows that thing to happen in circumstances where he can control whether it happens or not. An employer subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances in which he can control whether it happens or not.[142]

The effect is that employers can be held vicariously liable for the action of an individual who is not their servant or agent but harasses their employees, including LGBT employees, where the employer is in a position to exercise control over the harm. Employers may be vicariously liable for the unlawful behaviour of customers, clients or other persons visiting their premises. With this strict ruling of liabilities in Equality law, employers, including corporate entities, would be likely to proactively take effective measures to protect LGBT employees from harassment by third parties.[143] This ruling can play a vital role in deterrence, preventing corporate governance from neglecting LGBT employees' rights. Furthermore, this ruling, in the sense of protecting employees in corporate governance, can set a good example as requiring directors to take measures to protect other relevant other stakeholders (beyond employees), such as LGBT customers, and other people who can be affected in the wider society. This ruling could have been a solid foundation in Equality law from which UK corporate

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[141] Ibid at 3.
[142] Ibid at 7.
[143] Sam Middlemiss and Richard Mays, 'The common law and statutory concepts of vicarious liability: the parting of the ways' [1997] Scots Law Times 95 at 97. (After *Burton*, the employer will have to ensure that their policies and procedures, which might include aspects such as equal opportunities training and ensuring adequate supervision of staff and third parties in the workplace)

governance law is imposed with directors' duties and liabilities on protecting LGBT stakeholders from expressive harm. However, this ruling did not last long enough.

The ruling of imposing employer's liabilities was watered down in *Pearce v Governing Body of Mayfield Secondary School*.[144] Ms Pearce, who is a lesbian, had worked as a science teacher in an inner city comprehensive school in Portsmouth. Pupils subjected her to a "sustained campaign of abuse' that included the shouting of the words " in lessons, in the school corridors, and on one occasion at a bus stop outside the school. Because of this abuse, she was absent from school and suffering from depression and stress. On her return it seems that little was done to prevent a repeat of what had happened, and that the school was somewhat less than wholly sympathetic. She applied to the ET, seeking compensation on the grounds that the school had failed to prevent harassment by the pupils. The ET, EAT and Court of Appeal dismissed her claim. Both Ms Pearce and the two applicants in *Burton* experienced similar harassments from the third party, but the outcomes were different in law. In *Pearce*, it was held by the House of Lords that 'the failure of the school to prevent that treatment would not *per se* have constituted discrimination so as to render the school itself liable'.[145] The House of Lords disapproved of *Burton*. Lord Nicholls referred *Burton* as 'not a satisfactory decision':

> There is, surely, everything to be said in favour of a conclusion which requires employers to take reasonable steps to protect employees from racial or sexual abuse by third parties. But is a failure to do so "discrimination" by the employer? Where the *Burton* decision is, indeed, vulnerable is that it treats an employer's inadvertent failure to take such steps as discrimination even though the failure had nothing to do with the sex or race of the employees. In this crucially important respect the decision gives insufficient heed to the statutory discrimination provisions…. **Unless the employer's conduct satisfies this "less favourable treatment" test, the employer is not guilty of direct sex or racial discrimination**.[146]

For Lord Nicholls, in *Burton*, the hotel may have 'fallen short of the standards required by good employment practice', but they should not be deemed as 'racial discrimination'.[147] The House

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[144] [2003] I.C.R. 937
[145] Ibid at 940.
[146] Ibid at 947.
[147] Ibid at 948

of Lords, in *Pearce*, limited the scope of employers' liabilities for unlawful behaviours from third parties.

This disapproval of employer's liabilities was challenged in the post-Pearce period. In *Gravell v Bexley London Borough Council*[148] Gravell was employed by the London Borough of Bexley as a Prevention and Advice Officer within its Housing Department. She is white and of British/English nationality. She complained that a service user used the word 'paki', which offended her. She complained of racial harassment, relying on the allegation that it was her employers' policy that racist comments or behaviour from service users should be ignored rather than challenged. The ET followed the approach from *Pearce* that the employer was not liable for the unlawful harassment by the third parties. However, this was overruled by the EAT. Judge Peter Clark reiterated that:

> I have considered whether…Pearce precludes an Employment Tribunal from finding that an employer has liability for harassment by a third party…in the absence of control. In my view it does not. The case which the Claimant wishes to advance is that the Respondent's policy of not challenging racist behaviour by clients is capable of itself of having the effect of creating an offensive environment for her. [149]

Following this, it can be safely said that employers can be still liable for unlawful actions from third parties to employees. *Pearce* did not create absolutism.[150]

While Pearce can be challenged, employers can be held liable for unlawful behaviours by third parties in limited circumstances. In *Unite the Union v Nailard*[151] the Court of Appeal provided evaluation on *Pearce* and *Burton*:

> The essence of that ratio is that in such a case the protected characteristic has to be the "**ground of**"—or reason for—the employer's failure to protect the employee against the harassment by the

[148] 2007 WL 1243146
[149] Ibid paragraph [18]
[150] E.g., *Equal Opportunities Commission* v *Secretary of State for Trade and Industry,* the High Court held that aspects of the Pearce decision were not compatible with an employer's obligations to protect its employees from harassment under the Equal Treatment Directive. (2007) IRLR 327.
[151] [2019] I.C.R. 28

> third party, and that that is not established by showing simply that what he failed to protect the employee against was unlawful discrimination: the focus is on the grounds for the *employer's* action, not the third party's… that is the **only route** by which the employer can be liable. [152]

Although it is not wise for employers to neglect their potential liabilities, there seems to be a very high threshold to prove that employers can be held liable for failing to take actions in relation to unlawful behaviours from third parties.[153] As Morris argued, the overturning of the *Burton* principle in UK case law narrows the scope for discrimination claims based on the conduct of third parties.[154] According to Middlemiss, employers could escape liability by successfully arguing that they did not know about and could not be reasonably expected to know about the harassment by a third party.[155] In *Burton*, Bernard Manning's expressions had caused significantly detrimental dignitary harms on the two black female applicants. If the employers' liabilities work in a very limited way, third parties like Manning would have no problem about expressing harmful content to LGBT people in an institution or a company; this expressive harm can happen to not only LGBT employees like the two applicants but also other LGBT stakeholders (e.g. LGBT customers). It is difficult for UK Equality law to strictly impose liabilities on employers for third parties' harm. It is also difficult for UK Equality law to provide legal guidance on corporate directors to address LGBT expressive harm. Even though the House of Lords in *Pearce* did not overrule the legal implication that employers should take effective measures to prevent unlawful behaviours by third parties.[156] Without a strict liability approach from UK Equality law, this legal implication seems toothless to guide corporate governance.[157] It is more likely to be utilised as an instrument for business case in directors'

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[152] Ibid at paragraph [89]

[153] Cases in the post-Pearce period, such as *Sheffield City Council* v *Norouzi* [2011] UKEAT/0497/10 and *Conteh v Parking Partners Ltd* [2011] ICR 341, suggest that the employers' liabilities can be held in limited circumstances.

[154] Gillian S Morris, 'A year (or so) in the life of employment law' [2003] Journal of Local Government Law 115 at 116.

[155] Sam Middlemiss, 'Liability of employers for third party harassment in the UK' [2021] International Journal of Law and Management 147 at 149.

[156] See (n 144) *Pearce* at paragraph [103]: 'It was the responsibility of the school to face up to the problem of abuse by pupils'.

[157] E.g., Samuels argued that Pearce placed 'insufficient emphasis on preventive action'; Manknell critiqued *Pearce* and argued that overruling of *Burton* displays a reluctance to expand liability of employers and reveals a less paternalistic view of an employment relationship. Thus, we can conclude that the interventive responsibility after *Pearce* became toothless. See Harriet Samuels, 'A Defining

duties than substantively address LGBT expressive harm. I agree with Walker – 'The ghost of Mr Manning seems set to haunt employers, including companies, for some time yet'![158]

2.3.C. Provisional conclusion

The insufficient LGBT tolerance in UK Equality law is mainly manifested in: 1) failure to identify LGBT expressive harm in the proportionate approach 2) failure to impose a strict liability approach on employer for expressive harm from third parties. Certainly, these aspects of insufficient LGBT tolerance can encourage extra protection on freedom of expression and manifestation rights and drift the law farther away from tackling LGBT expressive harm. More importantly, with these limitations of UK Equality law, the business-orientation nature of UK Corporate Governance law will not change; corporate directors and managers would neither learn nor be educated to adopt effective mechanisms to address LGBT expressive harm in corporate activities and wider society. UK Equality law creates antithesis of shaping UK corporate governance system as a transformative socially responsible model for LGBT human dignity protection. From the discussion of limitations, Section 4 will present some 'lessons' learned from UK Equality law which can be embodied in UK Corporate Governance law to address LGBT expressive harm.

Section 4 LGBT dignity protection 'lessons' to be embodied UK Corporate Governance law (2.4)

In the context of LGBT expressive harm, the LGBT dignity protection 'lessons' reflect the potential changes that need to happen in UK Equality law in the future. These 'lessons' echo the discussed limitations and look at regulating LGBT-critical content in expressions and manifestations, imposing responsibilities on individual speakers, and empowering the role of employers in addressing expressive harm. These LGBT dignity protection 'lessons' will be

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Moment/ a Feminist Perspective on the Law of Sexual Harassment in the Workplace in the Light of the Equal Treatment Amendment Directive' [2004] Feminist Legal Studies 181 at 183; David Manknell, 'Discrimination on grounds of sexual orientation, harassment, and liability for third parties' [2003] Industrial Law Journal 297 at 306.

[158] Susan Walker, 'Is Bernard Manning back in fashion?' [2007] Employment Law Bulletin 3 at 5.

suggestions to be weaved into UK Corporate Governance law and propose changes in addressing LGBT expressive harm.

2.4.A.LGBT-critical content regulation

One lesson associated with tackling LGBT expressive harm is the regulation or observation on the LGBT-critical content in corporate activities. This is learned from the ECtHR approach. In *Pastörs v Germany,*[159] a German Land MP complained of having been convicted of Holocaust denial, as a result of various statements he had made in the Land Parliament. The ECtHR, while acknowledging the limitation of the right of the MP to freely express the statement, stated this:

> The applicant sought to use his right to freedom of expression [art 10] with the aim of promoting ideas contrary to the text and spirit of the Convention. This weighs heavily in the assessment of the necessity of the interference .... While interferences with the right to freedom of expression call for the **closest scrutiny** when they concern statements made by elected representatives in Parliament, utterances in such scenarios deserve little, if any, protection if their content is at odds with the democratic values of the Convention system.[160]

On this basis, while individuals are allowed to hold the beliefs or views that may be inconsistent with dignity value in ECHR, the beliefs or views, which are further from the core value, seem to be more possible to invite restraint on expressing and manifesting those beliefs in proportionate approach.[161]

Learning from the ECtHR approach, law should play a role in observing individual's expressed or manifested content. From the ECtHR, if content of belief or view itself is far from respecting human dignity, the expression or manifestation on the beliefs/views was to be observed by the ECtHR on whether or not it would interfere with other people's rights or cause intolerance to others in the proportionate approach. This has an impact on observing LGBT-critical content.

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[159] Appl. 55225/14, 3 October 2019
[160] Ibid 47.
[161] Kenneth M. Norrie, 'What Level of Respect Do the Beliefs of the Ashers Baking Company Limited Deserve in A Democratic Society' [2023] Northern Ireland Legal Quarterly 417 at 423

The LGBT-critical beliefs or views involve the content opposing LGBT identities or life interests, which is inconsistent with the human dignity value in ECHR. Following from the ECtHR approach, any expressed beliefs or views involving LGBT-critical content ought to be observed in corporate life. As argued above, the UK proportionate approach does not suggest observing or distinguishing the nature and wider impacts of the expressing content. The ECtHR approach is a good model to suggest a LGBT protection lesson embodied in UK Corporate Governance law changes: directors need to be imposed with obligations to observe or remove the LGBT-critical content in expressions and manifestations through corporate activities.

To observe the LGBT-critical content is underpinned by the content-based theoretical approach. The content-based approach was discussed by Jeremy Waldron as an approach to restricting the content to avoid hate speech.[162] According to Wright, the restriction or strict scrutiny on the content happens because the message or content could cause harm to the audience, in particular some emotional harm or distractions to their life.[163] The ultimate purpose of the content-based approach is to promote dignity of human beings in the context of free speech. The content-based approach emphasises the impact on not only material harms but also 'communicative impact' on other people which is linked with the prohibition on 'expressive harm' to cause intolerance to others. The content-based approach can assist the legal protection in assessing the freedom of expression right based on the content. Some individuals' freedom of expression needs to be proportionately limited because expressing the content can cause interference with others' rights but also the 'expressive disregard' to other people's human status.

In the ECtHR judgment, the Court stated in *Eweida (Ladele)* case and echoed Waldron's content-based approach in dignity protection:

> It cannot be said that, when she [Ms Ladele] entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the

[162] See (n 72) *The Harm in Hate Speech* at 151 to 153.
[163] R. George Wright, 'Content-Based on Content-Neutral Regulation of Speech: The Limitations of a Common Distinction' [2006] U. MIAMI L. REV. 333 at 334 to 335.

creation of civil partnerships, since this requirement was introduced by her employer at a later date. **On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention**[164]

The Court acknowledged the right for Ms Ladele to manifest her religious belief which contains LGBT-critical content. However, the registration for civil partnership was introduced 'at a later date' in the job duties. In order to achieve 'mutual tolerance' for religious interests and LGBT interests, she was not allowed to manifest (act) the specific LGBT-critical content in the religious belief during carrying out the professional conducts. Furthermore, it was argued by Smet that Ms Ladele's behaviour can lead to expressive harm to LGBT people by expressing the content which contains that homosexual people are less worthy of human dignity than heterosexual people. [165] In terms of living identities, her expression/manifestation sounds very similar to racial segregation statement 'I don't provide service for black or Asian people but someone else would do that'. It is apparent that racial segregation expression can be considered as the denial of racial characteristics and cause disturbance to racial groups' dignity. If racial segregation content in expression needs to be removed, why should LGBT-critical content not be scrutinised or removed in the expression in corporate activities? According to Paul Johnson, the greatest criticism of the UK courts is the limited engagement with the actual human rights issues.[166] As he noted, the material harm proportionate approach can fail to strike a fair balance between LGBT interests and freedom of expression rights.[167] It seems to him that UK courts have not sufficiently understood the weight of the ECtHR which would give more weight on the protection of LGBT (private life) interests in *Ladele*.[168] Following this wider proportionate approach underpinned by the dignity philosophy, the ECtHR observed the LGBT-critical

[164] *Eweida* at 249 to 250
[165] Stijn Smet, 'Conscientious Objection to Same-sex Marriages: Beyond the Limits of Toleration' [2016] Religion and Human Rights 115 at 133 to 135.
[166] Paul Johnson, 'The love of law, and the law of love: Jonathan Cooper and LGBT human rights advocacy' [2022] EHRLR 33 at 45.
[167] Ibid 45
[168] Ibid 45

content and concluded that the interference with the rights of manifestation by Ms Ladele was justified.

Likewise, the content-based approach can be perceived in *NH*. In the judgment, the CJEU limited the right of the lawyer to express the statement because it was likely to cause discrimination. Moreover, the Court referred the Article 11 of CFEU in the judgment to limit the expression based on the content because the expression can cause homophobia – to treat homosexual people as less worthy of human dignity than heterosexual people. The reason of the Court to limit the expression right can be interpreted as the expression containing the LGBT-critical content and furthering expressive harm to LGBT people. As reinforced by Kulak, the content in the expression or speech in *NH* can contribute to the social exclusion of homosexual people in organisational engagements and thus the acts on the content need to be scrutinised.[169] It can be argued that the limit on the expression on the basis of the LGBT-critical content can contribute to LGBT people's human dignity protection.

These cases show that to limit or scrutinise the content in the expression or manifestation can be embodied in corporate governance law. The content-based approach seems to be more profound than the material harm principle in preserving LGBT dignity protection in organisational engagements. For cases like *Ashers* and *Ngole*, Foster put forward the same question: 'what would otherwise be unlawful discrimination when a person has religious or other deeply held convictions that oppose equality and diversity in sexual orientation'?[170] According to Nehushtan, the content-based approach can be helpful to tackle Foster's question by restricting unjustifiable exemption to intolerant religious or philosophical objections.[171] In corporate governance discussion, if corporate governance law should move

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[169] Maciej Kulak, 'Does the Feryn-Accept-NH doctrine enhance a common level of protection against discrimination in the EU? A reflection on the procedural aspects of the CJEU's concept of discriminatory speech' [2021] E.L.R 551 at 554.

[170] Steve Foster, 'Accommodating intolerant speech religious free speech versus equality and diversity' [2019] E.H.L.R. 609 at 625.

[171] See (n 73) Yossi Nehushtan, Conscientious objection and equality laws at 232.

towards a substantively socially responsible direction, then corporate governance should be obliged to observe and limit the LGBT-critical content in expressions and manifestations in order to tackle LGBT expressive harm in corporate activities and society. This change should happen in both UK Equality law and Corporate Governance law.

2.4.B. Individual responsibilities

Another lesson associated with increasing tolerance to LGBT people in corporate engagements is to regulate individual responsibilities in corporate governance law. This can be considered as the approach to reinforcing the content-based approach to observing and limiting the LGBT-critical content in expression. Regulating individual speakers' responsibility in the company provides another legal guidance for corporate directors and managers in internalise and develop internal policies on in governance.

Individual responsibility is a concept to be embodied in the ECHR. In Article 10 (2), individual responsibility is stipulated in the provision and states that 'the exercise of these freedoms [freedom of expression], since it carries with it *duties and responsibilities*, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society..'. The duties and responsibilities can be interpreted in the case law. In *E.S. v Austria,* as discussed in Section 1, it was stated by both the ECtHR and the Regional Court that:

> …anyone who wished to exercise their rights under Article 10 of the Convention was subject to **duties and responsibilities**, such as refraining from making statements which hurt others without reason and therefore did not contribute to a debate of public interest...[172]

The 'duties and responsibilities' suggest that individual speakers should be aware of the content of their expression and speech, and the speakers have the obligation of ensuring their expression to be consistent with the 'fundamental values' in ECHR. In the case, E.S. had

[172] NO. 38450/12, December 2018 at 4.

the responsibility to ensure that the religious content she expressed would not cause intolerance and disturbance to other people's rights.

In *Lilliendahl v Iceland*[173] a man expressed very strongly hostile anti-gay information, such as 'homosexuality is disgusting', and he was charged with hate speech. This was held not be inconsistent with Article 10 of ECHR. Although individual responsibility was not the focus in this case, it was still discussed by the ECtHR that the applicant had the individual responsibility for his expression and ensure the expression is consistent with the tolerance and pluralism to achieve dignity protection under ECHR. This can suggest that the applicant failed to take his responsibility for his expression and he had to confront the consequential restriction on his freedom of expression right. Following *Vejdeland* (Section 1), it was stated by the Court that 'one such obligation [is], as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights'.[174] Thus, individual speakers should take the responsibility for the expressive content so as to ensure that it would not cause intolerance to LGBT people.

From this line of cases, we can see that individual responsibility can contribute to limiting or qualifying the right to freely express any content which would disturb other people's dignity. In LGBT protection, individual responsibility seems to suggest that individuals have the obligation to carefully consider whether or not the content which they would express could convey 'expressive disregard' to LGBT people and exceed the limits of tolerance. Individual responsibility is a helpful technique to support restricting corporate LGBT-phobic/heterosexual superiority culture arising from LGBT-critical content in legal protection.

Following the ECtHR cases, the concept of individual responsibility is reflected in the UK domestic law. In *Hammond v DPP*,[175] Mr Hammond, who is a Christian, had preached with a sign made bearing the words: 'Stop Immorality', 'Stop Homosexuality' and 'Stop Lesbianism' in The Square, Bournemouth. In the context of freedom of speech, his conduct

[173] Application no. 29297/18, May 2020, 1, at 13 to 14
[174] [2014] 58 E.H.R.R. 15 at 9.
[175] 2004 WL 34252 [2004], 1

was considered as not reasonable and his right to freely express was not unlimited under the Article 10 of ECHR.[176] Although this case was not related to LGBT protection in organisational engagements, it coveys that the UK law adopts the mechanism that individuals should have the responsibility for their statement/content. It was stated by the Court that although everyone has the freedom of expression, they should have the responsibility for 'prevention of disorder or crime'.[177] In this case, Mr Hammond can be considered as not carefully taking the responsibility of the content which he expressed. Similar to *Vejdeland* and *Lilliendahl,* Mr Hammond had to confront the limitation on his right to freely express. Thus, it can be argued that the UK law interprets the Article 10 of ECHR to develop individual responsibility on their statement to restrict intolerance to LGBT people.

Apart from *Hammond*, other cases in the context of organisational engagements can also reflect the embodiment of individual responsibility concept to increase tolerance to LGBT people. In *Ngole*, the Court focused on the Article 10 and seemed to accept that Ngole could rely on it. Since he was a social worker student, it was stated by the Court that 'the appellant [Ngole] had an *obligation* not to allow his views about a person's lifestyle to prejudice his interactions with service users by creating the impression that he would discriminate against them'.[178] *Ngole* was advised in the judgment to carefully consider his statement but also to avoid his LGBT-critical belief manifestation to cause discriminatory issues while at work. It can be argued that employees should take the individual responsibility to scrutinise or limit their LGBT-critical content while working with their customers. Apart from *Ngole*, other cases, such as *Core Issues Trust* and *Page*, also discussed the individual responsibility in the judgment and suggested that the applicants should have carefully taken the responsibility of their content before expressing or manifesting their views, which would be helpful to avoid the discriminatory impacts in those cases. In *Forstater*, the EAT discussed the Article 10 of the Convention right and suggested that people who hold gender critical belief still should take the responsibility of their content to avoid intolerant circumstances to trans people, such as misgendering or harassment. Thus, it can be argued that the individual

[176] Ibid 9.
[177] Ibid at 4.
[178] See (n 128) *Ngole* at 21.

responsibility of legal protection is adopted to maintain tolerance of LGBT people so as to respect human dignity in employment and service provision areas. If this suggestion has already been embodied in the law of employment and service, why is it not possible to be embodied in UK Corporate Governance law to tackle expressive harm to LGBT people in corporate activities?

Moreover, if the individual does not take the responsibility, it is likely that they would have to confront the consequences, including from corporate employers, in case law. From *Core Issues Trust* and *Page*, the facts that applicants encountered the restriction on their freedom of expression right can be considered as the consequence of not carefully taking the responsibility of the statement. In *Ngole*, it was stated that:

> …**universities** have a wide range of responsibilities to their students…For courses leading to professional registration, universities also have an additional set of responsibilities. They have to be rigorous in protecting the public from people whose professionalism is uncertain. This has to be balanced with being fair and supportive to the students on those courses.[179]

As an organisation, the university has the responsibility to observe Ngole's expression and limit the expression which may cause intolerance to other people, including LGBT people. While the university was considered to have acted disproportionately in their disciplinary proceedings by the Court of Appeal, the Court never said anything like the university has no position of sanctioning the student or worker when their expression causes intolerance to other people. The university may be a quite different organisation from others, such as private entities or commercial companies. But the main point conveyed by the extracted judgment is that employees ought to take the responsibility of their expressions and manifestations in corporate conduct and otherwise it would trigger sanctions on employees.

In *Omooba v Michael Garret Associates*, the actress Omooba expressed the LGBT-critical content based on her religious beliefs on social media. In the meanwhile, she was offered a role as a gay-friendly character in a show, but that offer was withdrawn when her content

[179] See (n 128) *Ngole* at 17.

became known. She claimed this was unlawful discrimination. It was stated by the Court that the 'Claimant's beliefs as manifested in the Facebook post …. did scrape over the threshold for protection'.[180] Moreover, because of the LGBT-critical belief manifestation, her theatre companies withdraw the gay friendly role and terminated the contract. It was held by the Tribunal that the termination was not considered as discrimination nor harassment on the basis of her religious belief content.[181] Her belief had been posted on social media and this is similar to Forstater and Ngole. Ms Omooba's right to express the view was protected similarly to Forstater and Ngole. But the difference is that Omooba could not be believable in the role offered for the theatre companies and could have the adverse impact on the show.[182] For the reason, Omooba lost the role and she cannot seek to be protected from the economic consequences.

From the judgment, it can be perceived that Omooba did not take the responsibility for carefully assessing the LGBT-critical content before expressing it in her specific circumstance. The lack of individual responsibility makes her pay for the consequence of termination or withdrawal. If corporate purpose embodies LGBT (stakeholders) interests, this case suggests that corporate managers or directors are allowed to make employment sanctions on employees because they neglect the individual responsibility on the content of expression and cause intolerance to LGBT people (as disturbing corporate purpose).[183] This case judgement suggests that when people express the LGBT-critical content, they need to be careful with their consequence of content expression because their expression have impacts on LGBT people's life.

While individual speakers' responsibility is reflected in UK case law, it still does not provide a clear statutory guidance on how the individual speakers' responsibility can be regulated and implemented to LGBT dignity protection, such as providing internal corporate policies, carrying out proceedings, ordering individuals to rectify the content, declaration of not

[180] Employment Tribunal Case Number 2202946/19, 2602362/19, February 17, 2021, at 17.
[181] Ibid at 1.
[182] Ibid at 18.
[183] The social perspective of corporate purpose, as in protecting other stakeholders' interests, will be discussed in Chapter 4 and 5.

speaking in corporate activities and remedying actions (e.g. termination). This ought to be furthered as more specific changes in UK Equality law in the future. Also, the individual speakers' responsibility can be an important source to be embodied through changes of directors' duties in addressing LGBT expressive harm in UK Corporate Governance law.

2.4.C. The proactive role of employers in addressing LGBT expressive harm

The duty to prevent and mitigate LGBT expressive harm is another 'lesson' that can be learned from UK Equality law and further embodied in UK Corporate Governance law. This duty is learned from the employers' duty to prevent harassment on employees caused by third parties in Equality law. As argued in Section 3, in *Pearce v Governing Body of Mayfield Secondary School*[184] while the House of Lords watered down the employers' liabilities on unlawful harassment caused by third parties, Lord Nicholls acknowledged the importance of the duty of employers to prevent and mitigate discriminations and harassments caused by third parties.[185] From a line of cases after *Pearce*, Equality law implied that employers needed to take practical steps and participate in addressing harassments, such as preventive mechanisms, trainings, and constructive complaint systems.[186] In other words, Equality law implied a sense of legal responsibility on employers, including corporate employers. In 2022 to 2023, this legal responsibility was enacted in Worker Protection (Amendment of Equality Act 2010) Act 2023. S.1 of the 2023 Act clearly requires employers to prevent sexual harassment of employees. As Gilroy-Scott and Gittins argued, s.1 of the 2023 Act makes the law clearer (than previous s.40 of Equality Act 2010) for employers to bear regulatory burden of providing effective protection to employees, especially for employees dealing with customers and other third parties.[187] As Kenyon and Lianne commented, the s.1 requires employers to 'take reasonable steps to prevent sexual harassment', echoing the proactive

[184] [2003] UKHL 34
[185] Ibid '…There is, surely, everything to be said in favour of a conclusion which requires employers to take reasonable steps to protect employees from racial or sexual abuse by third parties…'[29]
[186] See (n 155) Sam Middlemiss, 'Liability of employers for third party harassment in the UK' at 153.
[187] Clare Gilroy-Scott and Charlotte Gittins, 'Russell Brand and workplace sexual harassment - what obligation does an employer have?' [2024] Entertainment Law Review 7 at 8.

nature of the duty imposed on employers.[188] Combined with the two 'lessons' about addressing expressive harm above, this new proactive duty can provide a foundation for developing the duty of employers to prevent and address LGBT-critical content, including imposing responsibilities on individual speakers for LGBT dignity protection. The 'third-party' emphasised in the 2023 Act, combined with the Equality Act 2010, indicates that employers need to take the duty to prevent and mitigate harassments throughout employment and service provisions. Looking back the case law developments, this new Act does not yet re-activate the employer's liabilities, but it can be an initial development on prescribing employers' duties in UK Equality law; this may motivate more changes about the role of employers in the UK law, including employers' liabilities. More importantly in this thesis, this can reinforce the role of corporate employers, such as managers and directors, in addressing LGBT expressive harm throughout corporate professional employment and service provision areas. This duty to prevent and mitigate harassments can be evolved as a corporate duty to prohibit LGBT expressive harm from all relevant LGBT stakeholders inside the company but also those who can be affected in the wider society.

2.4.D. Provisional conclusion

The synthesised 'lessons' suggest further changes in UK Equality law in the future. For my thesis, more importantly, these lessons suggest a direction where directors' duties can be changed to enhance LGBT dignity protection and address LGBT expressive harm. Following the lessons, directors need to be required with the duty to identify, prevent and mitigate LGBT-critical content in expressions and manifestations in corporate activities; meanwhile, directors and senior managers need to provide guidance on individuals, highlighting their responsibilities and potential consequences of delivering expressive harm in corporate professional conducts. This duty will be combined with the transformative Corporate Social Responsibility (CSR) approach with radical feminist 'care and compassion' principle and proposed on the basis of the corporate due diligence form in the following chapters.

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[188] Richard Kenyon and Mark Linnane, 'Employment law in the UK: a look forward to 2024' [2024] Compliance & Risk 10 at 12.

Conclusion

UK Equality law, in particular Equality Act 2010 and relevant case law, has consolidated 'mutual tolerance' from the ECtHR and CJEU by providing stringent regulations in anti-discrimination on the ground of LGBT identities. This has made a significant contribution to LGBT dignity protection.

Nevertheless, LGBT dignity protection should not stand still at the anti-discrimination level. Since *Lee v Ashers Baking Co Ltd*, LGBT dignity protection has been at stake due to 'direct conflict with the fundamental premises on which equality law is based': UK Equality law resolved this conflict by prioritising the Convention right (e.g. freedom of expression and manifestation in LGBT-critical content) and yet neglecting to justify the reasons for LGBT rights.[189] This is the evidence for insufficient LGBT tolerance meaning in UK Equality law, failing to prevent competing interests from exceeding the limits of mutual tolerance in society. Also, UK Equality law delivers the 'legal statement' that it is OK to express and manifest LGBT-critical content in life, including corporate and business practices. The law plays a role in accommodating LGBT expressive harm. The law will certainly encourage more material harms on LGBT people's existing rights, such as discrimination and harassment. More fundamentally, the allowance of LGBT expressive harm suggests that it is OK to take all LGBT people's equal high-ranking status away in human society. UK Equality law turns out to be a semi-fulfilled law to LGBT dignity protection.

The limitations of UK Equality law will also have a negative impact on UK Corporate Governance law in the context of LGBT dignity protection. Shareholder primacy prevailed in UK Corporate Governance law requires directors to lay significant emphasis on corporate profits and shareholder wealth generation, neglecting LGBT expressive harm (Discussed in Chapter 3). The lack of strict rulings on addressing LGBT expressive harm in UK Equality law

[189] E.g., Nicole Busby, 'Lee v Ashers Baking Company Ltd' [2019] Employment Law Bulletin 2 at 4; also, Connolly critiqued UK Equality law and argued that UK Supreme Court in Ashers 'fell short of supplying a detailed consideration of when such an infringement could be justified and ducked the challenging interpretive task of how to read the definition of direct discrimination to comply with the Convention in such cases'. Michael Connolly, 'Lee v Ashers Baking and its ramifications for employment law' [2019] Industrial Law Journal 240 at 258.

will become an excuse for directors to prioritise shareholder primacy and perpetuate expressive harm to LGBT people/stakeholders in corporate activities. In fact, UK Corporate Governance law can tune into the message that it does not need to function well in LGBT dignity protection. The limitations of UK Equality law will not only hinder governance practices in addressing LGBT expressive harm but also lessen the importance of LGBT non-discrimination protection in corporate governance. In other words, UK Corporate Governance law will be pushed by these limitations, albeit belonging to Equality law, towards the direction where heterosexual and cisgender superiority is a norm in corporate governance and culture.

Certainly, UK Equality law ought to change. The law needs to more strictly follow the ECtHR proportionate approach, balancing LGBT dignity and competing interests by reasonably limiting LGBT-critical content in expressions and manifestations in social arenas, such as employment and service provision in organisational/corporate activities. Due to lacking the employers' liabilities, the law needs to reiterate the importance of employers' responsibility for providing effective protection for LGBT employees from unlawful behaviours from third parties.[190] These two directions of legal changes are reflected in the LGBT protection 'lessons', including regulating LGBT-critical content in expressions and manifestations, individual speakers' responsibilities, and the role of employers' duty. The regulation of the LGBT-critical content needs to be adopted by the courts to go beyond just the material harm principle; the individual speakers' responsibilities need to be clearly prescribed in the legislation. While the employer's duty has been prescribed in the new 2023 Act, following detailed compliance and liabilities need to be enacted to reinforce the duty. These future changes in Equality law will create sufficient legal guidance (lessons) on facilitating directors' power beyond shareholder primacy and modernising UK Corporate Governance law as a key regulation in tackling LGBT expressive harm. The proposed LGBT Due Diligence Process in Chapter 6 will show how these changes in UK Equality law would reinforce LGBT dignity protection in corporate governance law. Questions, such as why directors' duties need to be changed and how directors' duties need to be changed, will be discussed in Chapter 3, 4, and Chapter 5.

[190] See (187)at 8 to 9.

Chapter 3: The inadequacy of UK corporate governance law in LGBT protection

Introduction

In Chapter 2, I laid the argument about why LGBT dignity protection is an issue in UK Equality law. With the impacts of UK Equality law, in this chapter, I would argue why LGBT dignity protection and expressive harm is an issue in UK Corporate Governance law.

In the thesis Introduction, I presented a brief description about corporate governance law, including the key actors: directors, shareholders, and other (non-shareholding) stakeholders. UK Corporate Governance law can be understood as law of regulating power and responsibilities of directors to the company, shareholders, and stakeholders. The 'law' is primarily sourced from UK Company law, including statutory principles and case law. Since the separate legal personality in case law, the company has been an independent entity from its shareholders and other stakeholders; corporate decision-making power has been vested in directors' hands. In the UK corporate legal structure, shareholders have interests in the surplus created by the productive activity of the company;[1] shareholders also retain some control of the delegated management powers by altering the articles (the company's constitution) and a special resolution.[2] Thus, directors are obliged to promote corporate profit-making and shareholders' interests. Apart from shareholders, other stakeholders, such as employees and customers, can be affected by corporate activities; reflected in case law, directors have responsibilities for stakeholder interests protection.[3] These rulings in UK Company law bring forth other corporate governance soft-law documents, such as UK Corporate Governance

[1] E.g., *Bligh v Brent* (1837) 2Y. & C.268*; Charitable Corp. v. Sutton*(1742) 26 Eng. Rep. 642

[2] Ss21 to 22, Companies Act 2006; Paul L. Davies, *Introduction to Company Law* (OUP, 2020) at 35. While shareholders can hold control to directors in managing the company, the UK corporate legal structure never acknowledge that corporate governance works for shareholders solely. In *Allen v Gold Reefs of West Africa Ltd*, Lindley MR stated that shareholders' alterations must be cognizant of the interests of the company as a whole. [1900] 1 Ch 656

[3] E.g., *Winkworth v. Edward Baron Development Co Ltd* [1986] 1 WLR 1512 (interests of creditors); *Vedanta Resources plc v Lungowe* [2019] UKSC 20 (human rights and environmental interests of people in the local society)

Code 2024,[4] and UK Stewardship Code 2020[5], to guide how directors' power and responsibilities should be exercised.

Furthermore, in the context of stakeholder protection, the 'law' of corporate governance needs to be sourced from other areas of law (than company law). As Watson commented on corporate governance, directors' power should be justified and must act in the public interests.[6] But due to prevalence of shareholder primacy, corporate governance – implementation of directors' duties – tends to shift towards generating corporate profits for shareholders' wealth. As Bruner argued, this shareholder-centric model can concede directors' ability to internalise social and environmental impacts (associated with other stakeholders' interests) in corporate operation.[7] To go beyond this shareholder-centric model, Choudhury, as an example, suggested that international human rights legal requirements need to be embodied in interpreting how directors' duties are implemented.[8] Commentators, such as Liao,[9] and Russell,[10] suggested that key legal principles about gender and racial non-discrimination in Equality law need to be utilised to interpret directors' duties implementation. UK Corporate governance law has incorporated other areas of law to 'nudge' directors in safeguarding other stakeholders' interests in society. For instance, section 7 of the Bribery Act 2010 indicates that directors need to exercise power to prevent corruptions from corporate activities;[11] section 54 of the Modern Slavery Act 2015 suggests that directors need to exercise

[4] The UK Corporate Governance Code entails more detailed recommendations on how directors' duties are implemented to protect the interests of shareholders and other stakeholders, such as corporate purpose and directors' duties.
[5] Under the UK Stewardship Code, institutional investors (shareholders) are encouraged to monitor and engage with corporate matters to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society. This empowers the role of shareholders to steward how directors' powers and duties are implemented.
[6] Susan Watson, *The Making of the Modern Company* (Oxford: Hart Publishing, 2022) at 242.
[7] Christopher Bruner, 'Corporate Governance Reform and the Sustainability Imperative Corporate Governance Reform and the Sustainability Imperative' [2022] Yale L. J. 1217 at 1225.
[8] Barnali Choudhury, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough' [2023] Business and Human Rights Journal 180 at 181 and 195.
[9] Carol Liao, 'An anti-racist feminist agenda for sustainable corporate law' in Christopher Bruner and Marc Moore (eds), *A Research Agenda in Corporate Law* (EE, 2023) at 151 and 152.
[10] Roseanne Russell, 'The problem with selling gender equality as business innovation' in Beate Sjåfjell, Carol Liao, Peter A. Allard, and Aikaterini Argyrou (eds), Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene (EE, 2022) at 75 to 76.
[11] Section 7 of the Bribery Act 2010: Failure of commercial organisations to prevent bribery

power to prevent human trafficking and slavery from corporate activities and its supply chains.[12] Thus, in UK Corporate Governance law, regulating directors' duties and power is influenced by company law but also should be influenced by external laws.

The Companies Act 2006 (UK Company law) stipulates statutory principles to regulate how directors exercise their power. S.172(1), which is the most relevant duty to LGBT stakeholder/people protection, said 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, and in doing so have regard (amongst other matters) to—
>
> (a)the likely consequences of any decision in the long term,
>
> (b)the interests of the company's employees,
>
> (c)the need to foster the company's business relationships with suppliers, customers and others,
>
> (d)the impact of the company's operations on the community and the environment,
>
> (e)the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f)the need to act fairly as between members of the company.

A number of commentators argue that s.172 consequently requires directors to only promote stakeholder protection for the benefits of shareholders.[13] According to Choudhury and Petrin, this duty has no proactive obligations to broadly provide positive actions or steps to stakeholder protection.[14] The duty leaves human rights and environmental protection outside corporate governance,[15] including LGBT dignity protection. Apart from the interpretation in

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[12] Section 54 of the Modern Slavery Act 2015: Transparency in supply chains etc
[13] E.g. Barnali Choudhury & Martin Petrin, 'Stuck In Neutral? Reforming Corporate Purpose And Fiduciary Duties' [2023] Canadian Business Law Journal 1 at 8 (There are more academic discussions in Section 3 about the s.172 duty)
[14] Ibid.
[15] Ibid 45; Barnali Choudhury, 'Enforcing International Human Rights Law Against Corporations' [2023-24] Comparative Enforcement of International Law 1 at 2 to 3.

company law, UK Equality law exacerbates the circumstance where LGBT dignity legal protection is excluded from directors' duty implementation. As concluded in Chapter 2, UK Equality law fails to impose obligations on organisations, including companies, to address LGBT expressive harm. This failure does not have positive impacts on regulating directors' duties and responsibilities in LGBT dignity protection. This failure coneys that directors under s.172 of the 2006 Act bear no obligations to prevent and address LGBT expressive harm in corporate activities. Thus, UK Company law integrated with UK Equality law encourages a shareholder-centric corporate governance legal model, where directors exercise power to generate profits for shareholders at expense of LGBT people's dignity. LGBT expressive harm is such a concern in UK corporate life.

This chapter aims to investigate why the s.172 duty is inadequate to provide sufficient LGBT dignity protection in UK Corporate Governance law. Section 1 will investigate through shareholder primacy development and find out what shareholder primacy means. My shareholder primacy discussion will focus on the perspectives of shareholder and stakeholder protection in directors' duties: shareholder value creation is centred; stakeholder protection is excluded. Section 2 will investigate the aim of s.172 by exploring legal developments before the 2006 Act, including pre-existing case law, legislations and governmental reports. It will find out whether or not s.172 is aimed to embody shareholder primacy in directors' duties. Section 3 will look at whether or not s.172 can actually create shareholder primacy effects in UK corporate governance. Section 4 will provide evidence on how the s.172 duty actually works and how it affects LGBT protection in corporate activities and wider society. It will be concluded that UK Corporate Governance law ought to change for enhancing LGBT dignity protection.

Section 1 shareholder primacy discussion (3.1)

3.1.A. A brief understanding of shareholder primacy

Shareholder primacy is the key corporate theory to influence directors' duties in corporate governance legal frameworks. Shareholder primacy is described as requiring corporate

governance to generate profits to exclusively maximise shareholder' wealth, in particular short-term wealth. This encompasses directors' duties in managing the company in such a way that the wealth of shareholders is maximised as fully as possible.[16] This suggests that the ultimate control and objective of the company is oriented to shareholders' interests. Shareholder primacy can be exchangeable with 'shareholder wealth maximisation'.

Shareholders' interests or wealth are focused on the profits imperative of the collective shareholder group. According to Sneirson, shareholders' interests or wealth is denoted as shareholders' profits or financial returns.[17] Shareholders are the investor group who have made the investment in the company. Shareholders' interests are perceived as expecting directors to protect and enhance their investment to the company.[18] In public companies, shareholders have an interest in the distribution of the corporate capital/value and the public securities markets.[19] In both private and public companies, shareholders have interests in the increased corporate profits. Shareholder primacy requires corporate directors to increase corporate profits to shareholder wealth, such as dividends and share price. Furthermore, shareholder primacy is not focused on one or two individual shareholders' interests. According to Millon, shareholder primacy assumes that a unitary body of shareholders have the same interest in maximising their share value of their (residual) claims on the increased corporate value, including corporate assets or income.[20] Under shareholder primacy, directors will be tasked to make as much money as they can to increase corporate profits in order to maximise shareholders' returns, namely 'maximising shareholder wealth/value' in shareholder primacy.

Shareholder primacy requires directors' duties to be merely oriented to shareholders' interests, which develops the single-value approach in corporate governance. Keay suggests

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[16] Andrew Keay, 'Shareholder Primacy in Corporate Law: Can It Survive - Should It Survive'[2010] ECFR 369 at 375.
[17] 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* (CUP, 2019) at 73.
[18] See (n 16) at 375
[19] Adolf A. Berle and Gardiner Means, *The Modern Corporation and Private Property* (MacMillan Company, New York, 1932) at 121
[20] David Millon 'Radical Shareholder Primacy' [2013] U. ST. THOMAS L.J. 1013 at 1018

that directors seem to have no other obligations to other participants or groups in corporate responsibility under shareholder primacy.[21] If there were a conflict between shareholders' interests and others, the board of directors should benefit and produce wealth for shareholders so as to enhance their investment. According to Sneirson, shareholder primacy encompasses the duty of directors to prioritise shareholders' interests and eschew the interests of other participants/stakeholders, such as employees, customers, creditors and suppliers.[22] Shareholder primacy takes an efficiency-based approach[23] as the central duty of directors to rapidly 'aggregate money' for shareholders in a short term, without embodying any social purpose and addressing any adverse corporate social and environmental impacts. Therefore, shareholder primacy theory can create antithesis of embodying LGBT legal protection in corporate governance law.

3.1.B. The development of shareholder primacy in corporate governance theory

3.1.B.1 The initial stage of shareholder primacy: Adam Smith and Adolf Berle

In shareholder primacy, shareholder wealth generation is considered as the exclusive and prioritised obligation in directors' duties due to the concern of unfettered directors' managerial power. According to shareholder primacy theorists, in modern manager-control companies, directors, who oversee the investment of shareholders, could provide self-serving interests for themselves. Adam Smith, in *The Wealth of Nations*, argued that:

> [I]t cannot well be expected that [directors of joint-stock companies] should watch over [the firm] with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own…[24]

[21] Andrew Keay, 'Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado about Little?' [2011] European Business Law Review 1 at 9.
[22] See (n 17) Sneirson, The History of shareholder primacy at 74.
[23] Beate Sjåfjell and Jukka Mähönen, 'Corporate purpose and the misleading shareholder vs stakeholder dichotomy' [2022] University of Oslo Faculty of Law Legal Studies Research Paper Series 1 at 3 (The efficiency-based approach means that company operate efficiently and aggregate maximum profits.)
[24] Adam Smith, *The Wealth of Nation: Book 5*(London: Strahan & Cadell, 1776) at 990.

In a company, managers may be driven by managerial self-interest and prioritise their ends over the interests of shareholders.[25] Directors and managers are not guaranteed to drive the enterprise and utilise resources efficiently to grow the business for accumulating profits for shareholders.[26] For this reason, Smith continued that shareholders should be 'solely entitled to all fruits of their property's profits'.[27] Shareholder wealth generation as the exclusive purpose seems for Smith to be able to tackle the self-serving issues from managers.

Adolf A. Berle, called the 'grandfather of modern shareholder primacy',[28] followed on from Adam Smith and attempted to adopt the similar shareholder primacy approach to deal with the managerial concern. Before the Berle-Dodd debate,[29] it seems to me that Berle's main proposition was to take shareholder wealth generation as the exclusive approach in corporate governance. Berle was a classic commentator who favoured shareholder primacy in 1920s and early 1930s. In *The Modern Corporation and Private Property*, Berle and Means discussed the separation of ownership and control theory. They noted that the wider dispersion of shareholder ownership was a major characteristic of the modern company, in particular large public companies.[30] As a result, the ownership of the company had become separated from control and the managerial power/control is delegated to managers or directors.

Similar to Adam Smith, Berle had the concern that the concentration of so much economic power in business elites (directors) may render the vulnerable position of shareholders.[31] Berle and Means argued:

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[25] Karen Zouwen Ho, *Liquidated: An Ethnography of Wall Street* (Durham, NC: Duke University Press, 2009) at 73.
[26] Ibid 173; See (n 24) at 999.
[27] See (n 24) Smith at 173
[28] William W. Bratton & Michael L. Wachter, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation [2008] Journal of Corporation Law 99 at 101.
[29] The Berle-Dodd debate will be explained in Chapter 4 in detail.
[30] See (n 19) Berle and Means at 64.
[31] Ibid 4.

> a control which tends to move further and further away from ownership and ultimately to lie in the hands of the management itself, a management capable of perpetuating its own **position**. At the same time the problems of control have become problems in economic government.[32]

When the concentration of economic power (control) completely shifted from shareholders' hands to directors, directors' management can lead to self-serving interests and shareholders' interests were not well promoted.

To constrain self-serving interests, Berle argued that the controlling group managers or directors should be treated as trustees who have fiduciary obligations to act for the benefit of shareholders and to treat them evenhandedly.[33] In the Harvard Law Review article, *Corporate Powers as Powers In Trust*, (which was further added as a chapter in *The Modern Corporation* book) Berle's approach was described:

> The power to issue stock is at all times subject to the **equitable limitation** that such issue must be so accomplished as to protect the ratable interest of existing and prospective shareholders; The power to declare or withhold dividends must be so used as to tend to the benefit not only of the corporation as a whole but also of all of its shareholders to the extent that this is possible.[34]

The equitable limitation principle can be perceived as when the power has been exercised to detriment such[shareholders] interests, the use of power needs to be subject to 'equitable limitation'.[35]

This principle seems to restrict the untrammelled managerial power from diluting shareholders' interests and producing self-serving interests for managers themselves. Despite the power to issue stock, the equitable limitation principle requires that managers 'must so issue it that the stockholders would be given an opportunity to protect their equities by subscribing to rateable shares of new stock'.[36] It indicates that the managers should show

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[32] Ibid 124 and 125.
[33] Adolf A. Berle, 'Participating Preferred Stock' [1926] 26 Columbia Law Review 303 at 303, 305 and 317.
[34] Adolf A. Berle, 'Corporate Power as Powers In Trust' [1931] Harvard Law Review 1049 at 1050 and 1060
[35] ibid 1049
[36] Ibid 1056

'good faith' by which 'the directors must use their power to test the quality and appraise the value of the consideration offered for stock in such a manner that creditors and shareholders will not be hurt'.[37] Thus, this can be argued that each shareholder is a *cestui que trust*[38] (or beneficiary) according to his interest and shares while the board is the trustee group. In Berle-Dodd debate, Berle held the view that 'business corporations exist for the sole purpose of making profits for their stockholders" until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else'.[39] The approach which Berle and Means adopted contributed to addressing the self-serving interests in management but also prioritising shareholders' interests at the heart of directors' duties in shareholder primacy development.

3.1.B.2. From shareholder wealth generation to profit-maximisation for shareholders

To strengthen protection of shareholders' interests, shareholder primacy development attempted to narrow the corporate objective to profit-maximisation for shareholders. In 1930s and later, Berle and Means held the 'neutral technocracy' concept, which suggested that directors' duties should be widened to not only shareholders but also other people who can affect the corporate activity in the wider society, such as employees, customers etc.[40] It seems that the corporate directors may have diverse objectives towards which to work and balance.

The 'wider objectives' certainly encounter critiques from shareholder primacy theorists. The typical author Henry Manne brought up the criticism that the 'wider responsibilities' were liable to cause inefficiency 'in purely business terms to lower returns because of time and resources spent on non-profit-motivated activities'.[41] According to John Linter, the company should be understood that:

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[37] Ibid 1058
[38] Ibid 1058.
[39] Adolf A. Berle Jr., 'For Whom Corporate Managers are Trustees: A Note' [1932] 45 Harv L Rev 1365 at 1367.
[40] The neutral technocracy concept will be discussed more in Chapter 4 Section 3: the neutral technocracy concept can be seen as the transition point from shareholder prioritisation to corporate social responsibility in Berle's arguments, in particular after Berle-Dodd debate.
[41] Henry G. Manne, 'The Higher Criticism of the Modern Corporation', [1962] COLUM. L. REV. 399 at 415.

> Corporations have not become free of the constraints of the **capital market**… The profitability and the pressure of increasing sales are still the dominant determinants of investment outlays – as they should be in a free-enterprise, **market-controlled economy**…[42]

Linter's argument on the corporate finance suggested that corporate governance should be oriented to the market control and business efficiency, opposing potential wider responsibilities of directors. For shareholder primacy theorists, 'wider responsibilities' could make directors accountable to stakeholders, such as employees and creditors, but not shareholders, thus putting shareholders at risk.[43] Similarly, Daniel Fischel showed the concern over the efficiency for shareholders. He brought up the example of the takeover in corporate finance to critique discouragement of hostile takeover[44] in management and attempted to align the management with shareholders' interests. In the takeover context, he suggested that managers should act in the best financial interest of shareholders to maximise their wealth and that the interests of other stakeholders, such as employees, are always subject to shareholders' dominance.[45] For Fischel, the interests of other stakeholders seemed to work for efficiency's sake and to successfully raise capital in the competitive market for investor value.[46] Under the 'efficiency' focal point, shareholder primacy sets shareholders as not only primary beneficiaries but also ultimate beneficiaries of the company.

In the seminal work *The Social Responsibility of Business is to increase Its Profits*, Milton Friedman demonstrated the central position of exclusive shareholder wealth generation in governance when maximising corporate profits. Friedman discussed the nature of the company:

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[42] John Lintner, 'The Financing of Corporations' in Edward S. Mason(ed), *The Corporation In Modern Society* (HUP. 1959) at 189 to 190
[43] See (n 41) Manne at 402
[44] The 'hostile takeover' is associated with the acquisition which is opposed by the target company's board. See Marc Moore, Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (1st published, Palgrave 2017) at 267.
[45] Daniel R. Fischel, 'Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers' [1978] TEX. L. REV. 1 at 38.
[46] Frank H. Easterbrook and Daniel. R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1991) at 4 to11; Kent Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*(The University of Chicago Press, 2006) at 57 and 86

> A corporation is an artificial person and in this sense may have artificial responsibilities, but "business" as a whole cannot be said to have responsibilities, even in this vague sense. The individuals who are to be responsible are businessmen, which means individual proprietors or corporate executives…. there is one and only one social responsibility of business – to use it resources and engage in activities designed to increase its profits[47]

According to Friedman, business nature is interchangeable with corporate nature. His statements suggest that the only purpose of a company is to enhance business development and profits for its shareholders' wealth. This constitutes the profit-maximisation approach for shareholders' wealth in shareholder primacy and governance discussion.

Friedman's shareholder primacy approach attempted to exclude corporate responsibility to other non-shareholding stakeholders. He argued that 'insofar as his[manager's] actions in accord with his "social responsibility" reduce returns to stockholders, he is spending their money.'[48] Similar to Fischel, stakeholder consideration, for Friedman, has only one purpose: maximising corporate profits for shareholders' wealth creation.

Likewise, Hayek argued that corporate objective is focused on long-run profit maximisation; corporate social policies, which are not driven by profits, are likely to produce undesirable results to shareholders. [49] As Hayek insisted, if corporate social policies are not aimed to promote the profit-maximisation, these policies would be deemed as 'vague and almost meaningless', and would place governance efficiency at risk.[50] The 'long-term maximisation of return' by Hayek or 'social responsibility' by Friedman are both emphasised on using the social responsibility or policies of business/companies for maximising shareholder wealth.

Friedman and Hayek's shareholder primacy approaches move towards a more shareholder exclusivity direction compared to Berle's shareholder primacy approach(1920s). Friedman's

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[47]Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' [1970] The New York Times Magazine 173 at 173.
[48] Ibid 174
[49] Friedrich Hayek, 'The Corporation in a Democratic Society: in Whose Interest Ought It and Will It Be Run?', in Melvin Anshen, George L. Bach (eds), *Management and Corporations* (New York: McGraw-Hill, 1985) at 100.
[50] Ibid 107.

shareholder primacy prioritises shareholders at the central position in directors' duties and corporate governance but also downgrades other stakeholders (e.g. employees and customers) as mere instrumentals to maximise corporate profits for shareholders' wealth. Friedman said that the consequence of 'permitting the corporate executive is to be selected by the stockholders is that the executive is an agent serving the interests of his principal'.[51] Managers or directors can be seen as playing the role as an 'agent' to exclusively promoting the interests of shareholders in corporate governance. This provides a foundational discourse regarding the development of agency theory in shareholder primacy (from late 1970s onwards).

3.1.B.3. Agency theory: radical shareholder primacy

The agency theory reaffirms the radical form – profit-maximisation for shareholder wealth creation in shareholder primacy. It is important to understand agency costs first. The agency costs, which are associated with the losses or cost by the principals (shareholders) in the company, will tend to be incurred due to the agents (managers/directors) failing to promote shareholders' best interest when running the business.[52] Agency costs problems include directors misusing their position[53] and engaging opportunistic behaviour,[54] which echoes the 'directors' self-serving interest' concern argued by Smith and Berle. The costs should be minimised for shareholders' interests, according to shareholder primacy.[55]

Echoing Friedman's shareholder primacy approach, agency theory reinforces treating shareholders as the sole principals and minimising their costs. The theory, which was based on the 'nexus of contracts' form, was introduced by Jensen and Meckling to secure shareholders' wealth maximisation by management. Jensen and Meckling defined the company as 'a nexus for contracting relationships – it is characterised by the existence of

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[51] See (n 47) Friedman at 175
[52] Michael C. Jensen, William H. Meckling, 'The Theory of the Firm: Managerial Behaviour, Agency Cost and Ownership Structure' [1976] Journal of Financial Economics 305 at 308
[53] David Kershaw, *Company Law in Context* (OUP, 2012) at 177.
[54] Andrew Keay, 'Ascertaining The Corporate Objective: An Entity Maximisation and Sustainability Model' [2008] Modern Law Review 663 at 668.
[55] William W Bratton, 'Berle and Means Reconsidered at the Century's Turn' [2000-2001] J Corp L 737 at 756.

divisible residual claims on the assets and cashflows of the organisation and it can generally be sold without permission of the other contracting individuals'.[56] These are the particular collection of individuals who are involved in carrying the productive and wealth-generating operation in the company, including investors/shareholders, employees, creditors and customers.[57] In this nexus, a residual claimant is 'the party that is entitled to keep all the residual profits left over after a business has met its basic legal obligations (e.g., paying interest due to creditors, contract wages due to employees, and taxes due to governments)'.[58]

In the nexus of contracts discussion, shareholders are the only eligible residual claimants' group in the company. As shareholder primacy theorists noted, shareholders are considered to be vulnerable participants in the company, because other constituents have a contract and prioritised right to fixed payments, which shareholders do not have.[59] Jensen and Meckling argued that 'social responsibility', which is focused on protecting other stakeholders, is seriously misleading in the company, because corporate accountability should focus on maximising the residual interests of the principals (shareholders).[60] Therefore, shareholders are the residual claimants of a web of contracts that makes up the company and they are entitled to corporate profits.[61]

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[56] Ibid 31.
[57] Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' [1999] The Modern Law Review 32 at 56
[58] Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers, 2019) at 38 and 39.
[59] George W Dent Jr, 'Corporate Governance: Still Broke, No Fix in Sight' (2005-2006) 31 J Corp Law 39 at 53; John Amour, Henry Hansmann and Reinier Kraakman, 'What Is Corporate Law?' in Reinier Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, OUP 2017) at14; Jonathan R Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' [1991] Stetson L Rev 23 at 30-31. The viewpoint that shareholders are the only residual claimants is pushed back by many commentators, such as Lynn Stout, who argued that other stakeholders/participants can be vulnerable and considered to be residual risk bearers too. There are more push-backs from entity theorists and stakeholder theorists in latter chapters. See Lynn Stout, 'Bad and Not-so-bad Arguments for Shareholder Primacy' [2002] S Cal L Rev 1189 at 1194.
[60] See (n 52) Jensen and Meckling at 308 and 311
[61] Stephen M Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' [2002] NW U LR 547 at 563

The nexus of contracts form does not intend to directly protect stakeholders' interests. Each contractual participant, such as employees, will be driven by their self-interest to locate contracting solutions to maximise corporate profits.[62] The nexus of contracts form usually does not impose costs to deal with external stakeholders/people's interests outside the nexus; its optimal contractual approach is to maximise corporate profits for the purpose of aggregating wealth of society.[63] Corporate profits are reflected in share price. Thus, it seems to shareholder primacy theorists that the nexus of contracts form can contribute to addressing social concerns through producing corporate profits for shareholders.[64] They argued that this shareholder-orientation/exclusivity strategy in the nexus of contracts can serve all interests of contractual participants and people in the wider society.[65] In the seminal work 'The End of History of Corporate Law', Hansmann and Kraakman argued that each contractual participant should contribute to maximising corporate profits and the company is ran for benefiting shareholders.[66] Following this approach, while shareholders have no greater weight than others, it is concluded in shareholder primacy that the best way to achieve wealth aggregate of society is to make directors only accountable to shareholders' interests.[67] This demonstrates that the nexus of contracts form strengthens the sole agency relationship between shareholders and directors. As commentators argued, stakeholders, who can be affected by the company, hold the interests which are legitimate to be protected, but the better solution offered by shareholder primacy to cater to their interests should rather rely on external regulations outside of company law, such as environmental law, employment law and

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[62] Frank H Easterbrook and Daniel R Fischel, 'The Corporate Contract' [1989] Colum L Rev 1416 at 1421;

[63] Ibid 1421.

[64] Diane Denis, 'Corporate Governance and the Goal of the Firm: In Defence of Shareholder Wealth Maximization' [2005]The Financial Review 467 at 479.

[65] Michael Bradley, Cindy A Schipani, Anant K Sundaram and James P Welsh, 'The Purposes and Accountability of the Corporation in Contemporary Problems' [1999] Law and Contemporary Problems 9 at 38.

[66] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' [2000] Geo LJ 439 at 439.

[67] Ibid 439.

human rights law.[68] Therefore, the agency theory in shareholder primacy can weaken corporate accountability to stakeholders' interests protection.

3.1.C. Provisional conclusion

By 1980s, shareholder primacy arrived at the stage where 1) shareholders are the only residual claimants 2) directors' core duty is to maximise shareholders' wealth 3) social consideration is not the agenda in corporate governance. Therefore, shareholder primacy defines the role of directors as promoting corporate profits for shareholder wealth exclusively. Under shareholder primacy, directors are even allowed to perpetuate harm on stakeholders, including LGBT people, in corporate life. In UK Corporate Governance law, this shareholder primacy approach is embodied in the enlightened shareholder value principle (s.172 of the Companies Act 2006). How shareholder primacy is developed in the UK jurisdiction will be discussed in next sections.

Section 2: Enlightened shareholder value principle and its objective (3.2)

The enlightened shareholder value principle (ESV) was developed by the UK Company Law Review (CLR)[69] and subsequently embodied in s.172 of the Companies Act 2006. Lady Arden, who was a member of the Company Law Review Steering Group (CLRSG), provided the clarification that the ESV principle intends to entail and codify directors' duties in an *inclusive way* (inclusiveness) so as to require directors to have regard to all relationships on which the company depended on, including the interests of shareholders and other stakeholders.[70] This inclusive way is evidenced and explained in the pre-existing case law before the 2006 Act.[71]

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[68] Ibid 442; Luca Enriques, Henry Hansmann et al, 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies' in Reinier H. Kraaman, Paul L. Davies, Henry Hansmann et al (eds) *The Anatomy of Corporate Law: A Comparative and Functional Approach*(OUP) at 107.

[69] The CLR was established in 1998 by the Department of Trade and Industry (DTI). The DTI was evolved to the current Department of Business, Innovation and Skills

[70] Mary Arden, 'Reforming the Companies Acts - the way ahead' [2002] J.B.L. 579 at 587.

[71] The ESV principle is a legislative restatement of the principles for directors' in case law, ibid 587; In the Companies Act 2006, 170(3) stipulates that 'the general duties [sections 171 to 177] shall be interpreted and applied in the same way as common law rules or equitable principles'.

3.2.A. The interests of the company in the pre-existing directors' duties

UK Company law was initially developed from partnership law, and early Companies Acts drew from the partnership concept that the partners were an integral characteristic of the partnership itself.[72] Commentators, such as Keay and Ireland, pointed that the Joint Stock Companies Act 1856 allowed that seven or more persons formed themselves into a company.[73] Keay argued that the company was equivalent to its creators, as in its shareholders.[74] As Talbot noted, these early deed of settlement companies were fundamentally different from modern companies.[75] Under early deed of settlement companies, directors acted as trustees and managed the business on behalf of the beneficiaries (or shareholders), who held unlimited liability and had an interest in the corporate assets.[76] For instance, in *Charitable Corp. v. Sutton*[77], Lindley observed that:

> It is part of the contract into which the members of a company enter, that the management of its concern shall be confided to a few chosen individuals. But whilst this contract limits the right of each member . . . to interfere in the conduct of its affairs, . . . it, if possible, increases **the obligation of the directors to observe good faith towards the great body of shareholders**, to attend diligently to their interests and to act within the limits of the authority conferred by them….[78]

Lindley's statement supported the idea that the obligation or expectation of 'trust' or 'trustees' imposed on directors result from shareholders empowering the directors to act on their

[72] See (n 57) Ireland, 'Company Law and the Myth of Shareholder Ownership' at 38.
[73] Andrew Keay, 'Ascertaining The Corporate Objective: An Entity Maximisation and Sustainability Model' [2008] 71(5) MLR 663, 681; Paddy Ireland, 'Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?' [1996] Journal of Law and Society 287 at 301; Paddy Ireland, Ian Grigg-Spall and Dave Kelly, 'The Conceptual Foundations of Modern Company Law' [1987] Journal of Law and Society 149 at 150.
[74] Ibid 681.
[75] Lorrain Talbot, *Critical Company Law* (Routledge, 2016) at 53
[76] Ibid.
[77] (1742) 26 Eng. Rep. 642
[78] (1742) 26 Eng. Rep. 642, 644.

behalf.[79] Thus, shareholders were deemed as beneficial owners in corporate governance law.[80]

However, by the time of the Companies Act 1862, this position had changed. Shareholders no longer represented the company, meaning that company was created by shareholders but not of shareholders.[81] By the second half of the 19th century, the incorporation of a company was identified as the creation of a separate legal entity which was 'emptied' or 'cleansed' of shareholders.[82] In other words, the company was independent from its shareholders.

As Talbot noted, the development of identifying the company as a separate legal entity in law impacted the change of the nature of fiduciary duties.[83] Initially, the company was viewed as its assets, then as a function of its assets.[84] Dignam interrogated the role of shareholders in directors' duties:

> A strict adherence to **the idea of shareholders "being" the company** created tension (conflation) between the core principle that the company is separate from the shareholders and the principle of judicial consideration of the extent to which directors have an independent power conferred upon them in the articles. **How can shareholders be both separate from the company and the substance of the company at the same time**?[85]

After the separate legal entity entrancement, shareholders are no longer sole beneficiaries in directors' duties. This change of directors' duties is witnessed by the leading case *Percival v*

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[79] David Kershaw, 'The Path of Corporate Fiduciary Law' [2012] Journal of Law & Business 395 at 430.
[80] See (n 75) Talbot at 153
[81] Paddy Ireland, Ian Grigg-Spall and Dave Kelly, 'The Conceptual Foundations of Modern Company Law' [1987] 14(1) Journal of Law and Society 149 at 150.
[82] Paddy Ireland, 'Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?' [1996] Journal of Law and Society 287 at 301; Separate legal personality became a fundamental underpinning of UK Company Law since 1897 House of Lords case of Salomon v A. Salomon and Co. Ltd. [1897] AC 22, affirmed by other following cases, such as *Macaura v Northern Assurance Co. Ltd.* [1925] AC 619; *Lee v Lee's Air Farming Ltd.* [1961] AC 12; *Prest v Petrodel* [2013] UKSC 34.
[83] See (n 75) Talbot at 159.
[84] See (n 75)Talbot at 154 and 155; See also Ireland, Grigg-Spall and Kelly (n 81) at 150.
[85] Alan Dignam, 'The Future of Shareholder Democracy in the Shadow of the Financial Crisis' [2013] SSRN 639 at 664 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207685 > (Accessed on 3rd April 2023)

Wright.[86] In terms of 'to whom does the director owe a fiduciary duty', Swinfen Eady J held that the directors owed a duty to act in 'managing the business of the company in the ordinary course of management, and that directors were not 'trustees for individual shareholders'.[87] On this subject, It was concluded that there should be no equivalency between the creation of company and sole shareholder wealth creation.

Moreover, the pre-existing case law sets out the task on directors – the interests of the company acted on by directors was interpreted as the 'best interests of the company'. Len Sealy, who was the leading corporate lawyer in the UK, considered the term 'good faith' as being 'genuine' or 'acting honestly with the best intention'.[88] This can be reinforced by the leading case law *Re Smith & Fawcett Ltd*.[89] In this case, Lord Greene M.R. stated the critical matter that: 'they [directors] must exercise their discretion *bona fide* in what they consider - not what a court may consider - is in the interests of the company.'[90] This contributed to the subjective test of 'good faith' in company law. In *Regentcrest Plc (In Liquidation) v Cohen*[91], Jonathan Parker J. seemed to follow the logic of the subjective standard from *Smith & Fawcett Ltd* and stated that:

> The duty imposed on directors to act bona fide in the interests of the company is a subjective one. 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**.[92]

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[86] [1902] 2 Ch. 421
[87] [1902] 2 Ch. 421 at 426; also see *Aberdeen Railway Co. v Blaikie* [1854] 17 D. (H.L.) 20 at [20]: The directors' fiduciary duties are run for the corporate benefits. They are not the trustees or managers for merely shareholders.
[88] Len S. Sealy, 'Bona Fides and Proper Purposes in Corporate Decisions' [1989] Monash U. L. REV. 265 at 269.
[89] [1942] Ch. 304
[90] [1942] Ch. 304 at 306.
[91] [2001] B.C.C. 494
[92] [2001] B.C.C. 494 at 513 and 514.

According to the two leading cases, as long as a director acts honestly in what they believe is best for the company, they are considered to be acting in good faith. Following the case law logic, a joint report by Law Commission and Scottish Law Commission on directors' duties stated that the directors act in good faith in what they believe to be the company's interests and the duty is a subjective one.[93] This subjective mind provides ample space for directors to include other stakeholders' interests, including LGBT protection, to achieve the best interest of the company. As Petrin noted, the subjective mind or discretion provides that the law could expressly put shareholders and other stakeholders' interests on an equal footing.[94] In pre-existing law, directors can exercise discretion to transcend shareholder primacy and recognise the externalities (i.e. corporate social and environmental impacts on people) in the best interest of the company. The shift from sole shareholder interests to the interests of the company in pre-existing law marks the inclusive way in the ESV principle.

3.2.B. Beyond shareholder primacy: stakeholder inclusion in the pre-existing directors' duties

It is possible for commentators to still argue that shareholder primacy is embodied in the pre-existing law; however, this seems incorrect to me. The pre-existing law is inclusive to shareholder wealth creation as well as stakeholder protection in directors' duties.

Here is the example that pre-existing law is interpreted by commentators as the shareholder primacy approach. In *Hutton v West Cork Railway Company*[95] Bowen L.J. said: '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 required for the benefit of the company'.[96] The cake and ale was a metaphor to pay employees' service in this case. In *Parke v Daily News Ltd*[97] Plowman J. permitted the board

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[93] 'Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties' Law Com No 261 and Scot Law Com No 173 [1999] 1 at 183.
[94] Martin Petrin, 'Beyond Shareholder Value: Exploring Justifications For A Broader Corporate Purpose' in Elizabeth Pollman, Robert B. Thompson, and others (eds), *Research Handbook on Corporate Purpose and Personhood* (Edward Elgar, 2021) at 21. The limits on directors' discretion for LGBT protection will be further discussed in Chapter 6.
[95] (1883) 23 Ch. D. 654
[96] (1883) 23 Ch. D. 654 at 673
[97] [1962] Ch 927

to distribute a gratuitous payment amongst certain employees only based on a pro-shareholder primacy decision.[98] Sealy and Worthington, in their highly authoritative UK Company law treatise, provided comments on the two cases that 'the generosity to employees was held to be lawful only if it could be justified by reference to the long-term interests of the shareholders'.[99] These two cases can be referred by commentators to suggest that stakeholders' interests act as the sole function to increase shareholders' wealth.[100]

Another noticeable case which is possible to be read as shareholder primacy is *Greenhalgh v Arderne Cinemas Ltd.*[101] The issued ordinary capital of the defendant company consisted of 205,000 shares. Of those 205,000 shares, 85,815 were held by the managing director of the company, Mallard, and 50,000 by another company, Tegarn Cinemas. Mallard agreed to sell his shares in Arderne Cinemas to Mr Sheckman, who, at the time, acquired control of Tegarn Cinemas. However, there was an obstacle to the completion of the contract between Mallard and Sheckman: Sheckman was not a member of Arderne Cinemas, the articles of association of which provided that no shares in the company should 'be transferred to a person not a member of the company so long as any members of the company may be willing to purchase such shares at a fair value'. Therefore, in order to give effect to the agreement entered into between Mallard and Sheckman, the articles of Arderne Cinemas were altered so as to enable any member with the sanction of an ordinary resolution passed at any general meeting of the company to transfer his shares to any person named in such a resolution. The plaintiff, Mr Greenhalgh, unsuccessfully sought a declaration that the alteration was invalid. Evershed MR advanced the proposition that the notion of 'the benefit of the company as a whole' – *bona fide* pursuit of which is customarily regarded as a director's proper fiduciary objective – should not be understood in terms of the autonomous interest of 'the company' in itself as a

[98] [1962] Ch 927 at 954-955.
[99] Len Sealy and Sarah Worthington, *Cases and Materials in Company Law* (OUP, 2016) at 320.
[100] E.g. John Lowry, 'The Duty of Loyalty of Company Directors: Bridging The Accountability Gap Through Efficient Disclosure' [2009] The Cambridge Law Journal 607 at 618.
[101] [1951] Ch 286.

commercial entity, but rather as denoting nothing more than the aggregate personal interests of the shareholders 'as a general body'.[102]

From this authority line, some commentators have perceived that the pre-existing law has told directors to exercise discretion to merely act in shareholders' interests. For instance, according to Hannigan, although pre-existing common law stated that directors owe duties to promote the success of the corporate entity, this calls for a balancing of the short and long-term interests of the shareholders.[103] As Nolan pointed out, the purpose of the company has not changed in one hundred and fifty years; it is primarily a vehicle to raise capital and to make and distribute profits for shareholders.[104] Wu has stated that the common law has always reflected the shareholder primacy approach, which means that 'to hold that members' interests represent the company's interests is just a recognition of the shareholder primacy principle that has long been deeply embedded in company law'.[105] These propositions deliver that shareholder primacy does exist in pre-existing law.

Instead of following the shareholder primacy discussion, I align to the viewpoint conveyed by the leading commentator Daniel Attenborough that *Greenhalgh* is indeed bad law, at least when cited for the shareholder primacy proposition that the directors' duties are or should be run for promoting shareholder wealth.[106] The key point is that *Greenhalgh* was not intending to deal with the question regarding to whom directors' duties are owed to and the corporate objective question. It is the case which attempted to deal with a dispute between

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[102] [1951] Ch 286 at 291; In *Gaiman v National Association for Mental Health*, Megarry J followed *Greenhalgh* and held that the corporate objective should be grounded on 'the interests of both present and future members of the company as a whole' [1971] Ch. 317 at 331; In *Brady v Brady*, Nourse L.J. held that the company, as an artificial person, cannot be distinguished from present and future shareholders [[1988] BCLC 20]

[103] Brenda Hannigan, *Company Law* (OUP, 2016) at 216.

[104] RC Nolan, 'The Continuing Evolution of Shareholder Governance' [2006] Cambridge Law Journal 92 at 97.

[105] Davy Ka Chee Wu, 'Managerial Behaviour, Company Law, and the Problem of Enlightened Shareholder Value' [2010] Company Lawyer 53 at 56.

[106] Daniel Attenborough, 'How Directors Should Act When Owing Duties to the Companies' Shareholders: Why we need to Stop Applying Greenhalgh' [2009] International Company Law and Commercial Review 339 at 344.

shareholders. Mr Greenhalgh objected to a proposed alteration of the articles, where he felt sacrificed the interests of the minority to those of the majority. In such a context, it is hardly surprising that the interests of shareholders should be put as the fore interests, and the interests of other corporate stakeholders and the company as a commercial entity may not be simply not at stake.[107] Moore commented that Evershed MR's reference to 'the benefit of the company as a whole' in *Greenhalgh* would appear specifically in relation to 'the judicial test for establishing the (in)equity of a proposed constitutional alteration in a private company context, where a focus on the personal interests of shareholders was not only appropriate but indeed practically necessary'.[108] Therefore, *Greenhalgh* should not be the authority which affirms shareholder primacy in the pre-existing case law.

The pre-existing case law only treats shareholders' interests as part of the interests of the company but does not conclude that the company and its shareholders are equivalent.[109] In *Overend & Gurney Co v Gibb*[110] the House of Lords interpreted 'interests of the company' as managing the company, as an independent entity from shareholders, in a way that 'flourishing and successful' business concern is centralised.[111] This is echoed in *Lagunas Nitrate Co v Lagunas Syndicate*[112] where the Court of Appeal regarded companies as 'distinct commercial bodies' which 'exist and carry out the purpose of their creation'.[113] These two cases reinforced the doctrine in *Percival v. Wright* that directors owe their duties to the corporate entity rather than shareholders, as discussed above. In *Hutton*, Bowen L.J. explained that:

> The money which is going to be spent is not the money of the majority. That is clear. It is the **money of the company**, and the majority want to spend it…They can only spend money which is not theirs

[107] F.G. Rixon, 'Competing Interests and Conflicting Principles: An Examination of the Power of Alteration of Articles of Association' [1986] Modern Law Review 446 at 467.
[108] Marc T Moore, 'Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law' [2016] University of Faculty of Law Research Paper 142 at 153.
[109] Eva Micheler, *Company Law: A Real Entity Theory* (OUP, 2021) at 132.
[110] (1872) LR 5 HL 480
[111](1872) LR 5 HL 480 at 491.
[112] [1899] 2 Ch 392 .
[113] [1899] 2 Ch 392 at 422 and 465.

but the company's, **if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company**. That is the general doctrine.[114]

Based on these cases, when corporate funds are distributed to shareholders, it means that directors reasonably deem it fit for furthering the interests of business which belong to the corporate entity.[115] In *Hutton/Parke*, the gratuitous payment to employees should not be interpreted as exclusively furthering shareholder wealth.

Furthermore, when Attenborough commented on *Greenhalgh*, he continued to argue that many modern cases 'contain contrary dicta playing down the prominence of shareholders' interests' or 'indicate that directors owe duties beyond those owed to shareholders'.[116] In *Re a Company (No 004415 of 1996)*[117], Sir Richard Scott V.C. stated that 'it is long established and basic law that the directors of a company owe their fiduciary duties to the company and not to the shareholders'.[118] In the 1980s, the UK government introduced the change of the provision in the Companies Act 1985. The s.309 (1)(2) of the 1985 Act stated that:

(1)The matters to which the directors of a company are to have regard in the performance of their functions include **the interests of the company's employees in general, as well as the interests of its members.**

(2)Accordingly, the duty imposed by **this section on the directors is owed by them to the company** (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.[119]

In the relevant case, *Fulham Football Club Ltd v Cabra Estates plc*[120], Lord Justice Neill stated that:

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[114] See (n 84) *Hutton* at 671.
[115] Marc T Moore, 'Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law' [2016] University of Faculty of Law Research Paper 142 at 156.
[116] See (n 85) Attenborough, How Directors Should Act When Owing Duties to the Companies at 345.
[117] [1997] 1 B.C.L.C. 479 Ch D
[118] [1997] 1 B.C.L.C. 479 Ch D at 491
[119] The Companies Act 1985, s 309 (1)(2).
[120] 1992 WL 895734

> …The duties owed by the directors are to the company and **the company is more than just the sum total of its members**. **Creditors**, both present and potential, are interested, while section 309 of the Companies Act 1985 imposes a specific duty on directors to have regard to the interests of the company's **employees in general**...[121]

From the legislation and case law, 'the interest of the company' Is not indicative of shareholder exclusivity and therefore should include employees and creditors. From the 'employees and creditors', this change implies that directors' duties moved towards a direction where other stakeholders' interests were progressively taken into consideration. According to Parkinson, the section 309 *at the very least* offered an effective doctrinal 'shield' to directors who gave extensive consideration to employee concerns, against potential allegations of breach of duty on account of neglecting the competing interests of shareholders.[122] While commentators, such as Wedderburn, argued that this section is not to mention the significance of the pre-2006 provision in formally enshrining employee welfare considerations as an explicit and central element of directors' fiduciary duties,[123] the legal development suggests the unalignment of shareholder primacy in the pre-existing case law.

Also, there are a number of cases reinforcing directors' fiduciary duties to protect creditors' interests over shareholders' wealth. This can be found, for example, in *Winkworth v. Edward Baron Development Co Ltd*[124] where the House of Lords approved that the directors owe some duties to its creditors both present and future. Explaining the views of the court, Lord Templeman asserted as follows:

> A company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred and the company is not obliged to avoid all ventures which involve an element of risk, but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts... A duty is owed by the directors to the company and

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[121] 1992 WL 895734 at 10;
[122] John E. Parkinson, *Corporate responsibility and power: Issues In the Theory* (OUP, 1993) at 85 to 87.
[123] Lord Wedderburn, *The Future of Company Law: Fat Cats, Corporate Governance and Workers* (University of Surrey, 2004) at 5 to 8.
[124] [1986] 1 WLR 1512

> to the creditors of the company to ensure that the property is not dissipated or exploited for the benefit of directors themselves to the prejudice of the creditors[125]

From the above, it can safely be said that the interests of creditors were not excluded in directors' fiduciary duties under the pre-existing law. In *Teck Corporation v. Millar*[126] where Berger J. said that:

> If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.[127]

This Canadian approach (common law) witnesses that pre-existing law provides considerable discretion to act in the interests of the company, including prioritising other stakeholders' interests.[128]

From examining pre-existing company law in the UK, it can be found that the shareholder primacy approach, which is emphasised on exclusively and ultimately promoting shareholders' wealth, was not firmly endorsed.[129] Alcock argued that a large amount of directors' discretion can allow 'an enlightened shareholder value approach, perhaps entity maximisation and even some profit-sacrificing social responsibility'.[130] As Villiers argued, directors did not always have

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[125] [1986] 1 WLR 1512 at 1516; These relevant cases, such as *Lonrho Ltd v. Shell Petroleum* [1980] 1 WLR 627, *Yukong Lines of Korea v. Rendsburg Investments Corp*. (No 2) [1998] 4 All ER 82, provide the similar judgments in relation to protecting the interests of creditors in directors' duties.

[126] (1972) 33 D.L.R. (3d). 288; While Teck Corp is a Canadian approach, it is usually referred as a common law example to discuss the role of stakeholder protection in directors' duties in the UK pre-existing law. E.g. Shuangge Wen, 'The Magnitude of Shareholder Value As The Overriding Objective In The UK: The Post-Crisis Perspective' [2011] J.I.B.L.R 325 at 330.

[127] Ibid 314; also see *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 W.L.R. 627 HL at 634 (a duty of the board to evaluate whether allowing an inspection of documents would be in the best interest of the company)

[128] Brian R. Cheffins and Richard Williams, 'Team Production Theory Across the Waves' [2021] Legal Studies Research Series 1 at 38; Irene-Marie Esser and Piet Delport, 'The protection of stakeholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: part 2' [2017] De Jure 221 at 237 and 238.

[129] See (n 10) Keay, Moving Towards Stakeholderism? at 22.

[130] Alistair Alcock, 'An Accidental Change to Directors' Duties?' [2009] Company Lawyer 362 at 366.

to exclusively act in the interests of the shareholders alone in the pre-existing law.[131] As a result, even though the pre-existing law does not advocate a substantive approach to protecting other stakeholders,[132] it has provided directors with sufficient flexibility to manage the company for the interests they deem the most appropriate in the circumstances, including social and environmental concerns in a wider community/society.[133]

3.2.C. The pre-existing law's impacts: the ESV principle objective in governmental policies

The inclusiveness of stakeholder protection in the pre-existing law constitutes the objective of the ESV principle in the 2006 Act. In 2002, the government produced the White Paper *Modernising Company Law,*[134] endorsing stakeholder protection and shareholder wealth protection referred in the ESV principle. It provides the explanation about the objective of directors' duties:

> We consider that the aim of the law[directors' fiduciary duties] should be to provide a framework to promote the long term health of companies, taking into account both the interests of shareholders and broader corporate social and environmental responsibilities.[135]

The White Paper suggests that the ESV principle codified the pre-existing directors' duties rules, requiring directors to act in the interests of shareholders as well as identify the

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[131] Charlotte Villiers, 'Narrative Reporting and Enlightened Shareholder Value under the Companies Act 2006' in Joan Loughrey (ed), *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (EE, 2012) at 101.
[132] Many commentators, such as Wu and Esser, argued that stakeholders were taken into account for the purpose of promoting the interests of the company from the *Hutton*/*Parke* cases. See (n 105) Wu at 55;See (n 128) Esser at 236.
[133] Ben Pettet, 'The Stirring of Corporate Social Conscience: From 'Cakes and Ale' to Community Programmes' [1997] Current Legal Problems 279 at 286 and 287.
[134] The CLR Steering Group produced a series of consultation documents/reports in relation to the corporate legislative reform between 1999 and 2001. The White Paper is the governmental report, which endorses the ethos of *Modern Company Law for a Competitive Econom, Final Report: Vols I and II* (Final Report) and accepts many of its recommendations. The White Paper on Modernising Company Law, House of Commons, Trade and Industry Committee (2002).
[135] The White Paper on Modernising Company Law at 7.

importance of other stakeholders and take their interests into consideration when carrying out the duty.[136]

This inclusiveness objective is reiterated in the Ministerial Statement on directors' duties under the Companies Act 2006 (Ministerial Statement).[137] According to Margaret Hodge, the tasks of 'pursuing the interests of shareholders' and 'embracing wider responsibilities' are not contradictory in the ESV principle.[138] The 'have regard to' in s.172 (1) does or should not mean 'ticking boxes' but mean 'give proper consideration to' – directors proactively take actions to achieve benefiting other stakeholders.[139] As Lord Goldsmith noted, the duty to benefit other stakeholders is a main duty when promoting the success of the company, which should not be watered down.[140] The ESV objective is understood as 'mutually beneficial to business and society' – benefiting business development of the corporate entity in the long run, including corporate profits generation and shareholder wealth promoting, as well as benefiting stakeholders who contribute to the corporate development and are can be affected by the corporate activities in wider society.[141] The ESV principle objective represents and should represent a sustainable/progressive corporate governance model which requires directors to do more than just a good business.[142]

3.2.D. Provisional Conclusion

The ESV principle does not intend to embody shareholder primacy in the 2006 Act. While commentators have dissenting arguments about the pre-existing law, the law is concluded by myself as including shareholder wealth protection as well as stakeholder protection in

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[136] Ibid 12.
[137] This Ministerial Statement is a governmental guidance document produced by Margaret Hodge, Minister of State for Industry and the Regions, explaining the background and the effect of codification of directors' duties, statement of specific duties and application of the duties. Ministerial Statement on directors' Duties under the Companies Act 2006, DTI (2007) < https://webarchive.nationalarchives.gov.uk/ukgwa/20070603154510/http://www.dti.gov.uk/files/file40139.pdf> (Accessed on 1st July 2023).
[138] The Ministerial Statement at 2.
[139] Ibid 9.
[140] Ibid 5 to 6.
[141] Ibid 9.
[142] Ibid 2.

directors' duties. In contrast to Friedman's shareholder primacy approach, the pre-existing law has no intention of subjecting stakeholder protection to shareholders.

Furthermore, it can be argued from the governmental discussions that directors are suggested to go beyond mere 'including' shareholder protection in the pre-existing law and to take stakeholder protection as one substantive goal in corporate governance through the ESV principle. Overall, the ESV principle intends to deliver the educational function that directors should exercise directional discretion to modernise a company in way that benefits business as well as society at large. This objective is certainly a beautiful envision, but the next question is whether the ESV principle will be practiced in this beautiful way or in an opposite way (shareholder primacy).

Section 3: The enlightened shareholder value principle and shareholder primacy (3.3)

While the ESV principle aims to benefit shareholders as well as other stakeholders, I would argue that there is potential of practicing this statutory principle as a shareholder primacy approach in corporate governance.

3.3.A. Directors' discretion from the pre-existing case law

Directors' discretion from the pre-existing law is codified in s.172 of the Companies Act 2006, adding contingencies that the ESV principle is not practiced as an inclusive duty by directors. As argued in Section 2, the pre-existing law indicates that courts give considerable discretion to directors: primarily, directors have the subjective mind to decide the interests of the company.[143] The courts are not likely to second-guess decisions by directors with regard to

[143] Andrew Keay, 'Good faith and directors' duty to promote the success of their company' [2011] Comp. Law. 138 at 143. There are exceptional considerations. First, where a director had actually failed to consider whether an action would be in the interests of the company the court would ask whether an intelligent and honest man in the position of a director of the company involved, could, in the whole of the circumstances, have reasonably believed that the transaction was for the benefit of the company (*Charterbridge Corp v Lloyds Bank Ltd* [1970] Ch. 62 at [74]) Secondly, a judge might, given all the evidence in the case, come to the view that the directors are not to be believed concerning what they assert was their state of mind, and hold them liable (*Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 B.C.L.C. 598 at [90]). In the context of stakeholder protection, directors primarily rely on the subjective mind.

how to promote the success of the company and have regard to stakeholder protection.[144] As Goddard noted, the ESV principle is a flexible duty and provides directors with discretion to decide how to take other stakeholders into account during decision-making.[145] According to Micheler, the ESV principle in practice requires directors to exercise subjectivity of the duty and *balance* shareholders' wealth creation and stakeholders' interests.[146] With considerable discretion, directors could create different 'balance' outcomes: first, directors could codify the pre-existing case law and benefit shareholders as well as other stakeholders; secondly, directors are likely to subject stakeholders to shareholders and promote shareholders' wealth as the ultimate task in corporate governance.[147] In other words, a great deal of discretion from case law allows directors to embody a shareholder primacy approach or articulate it as what is good for the company and society.[148]

3.3.B. The corporate governance codes and reports before the 2006 Act

Corporate governance codes/reports, as another important source of UK Corporate Governance law, provide guidance on how discretional power is exercised by directors when promoting the success of the company in the ESV principle. Most of the codes/reports before the 2006 Act can echo shareholder primacy, suggesting that directors should exercise discretion to prioritise shareholder wealth over stakeholder protection.

In 1992, the first corporate governance report – The Cadbury Code – in the UK was published by the Committee on the Financial Aspects of Corporate Governance under the Chairmanship of Sir Adrian Cadbury. Unlike pre-2006 company law, this Code developed two new principles

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[144] Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chain* (Edward Elgar, 2015) at 43; John Kong Shan Ho, 'Is section 172 of the Companies Act 2006 the guidance for CSR?' [2010] Comp. Law. 207 at 213.
[145] Robert Goddard, '"Modernising Company Law": The Government's White Paper' [2003] Modern Law Review 402 at 425 and 416; Also in Ministerial Statement, Margarete Hodge said that 'the decisions taken by a director and the weight given to the factors will continue to be a matter for his good faith judgment' [9] This indicates flexibility arising from directors' discretion in the pre-existing law.
[146] See (n 109) Eva Micheler at 135 to 137.
[147] See (n 128) Esser at 236 to 237; Andrew Keay, 'Having regard for stakeholders in practising enlightened shareholder value' [2019] Oxford University Commonwealth Law Journal 118 at 135.
[148] Daniel Attenborough, 'The Company Law Reform Bill: an analysis of directors' duties and the objective of the company' [2006] Comp. Law. 162 at 166.

in the UK corporate governance principles. First, the Code conveys a number of recommendations based on the voluntary nature for all listed companies.[149] The Committee on the Financial Aspects of Corporate Governance was a private-sector initiative, established by non-governmental agencies such as the Financial Reporting Council, the London Stock Exchange and the accountancy profession. This is contrasted from the mandatory nature in the legislative requirements and case law. Secondly, the voluntary Code of Conduction was developed through the 'comply-or-explain' procedure, whereby listed companies would either comply with recommendations in the voluntary Code or have to explain any alternative methods. Following the Code, this principle aims to recommend the companies going beyond the statutory minimum standard and embracing the spirits of their regulations.[150]

The Code directed board accountability to merely shareholders. It stipulates that:

> The shareholders as owners of the company elect the directors to run the business on their behalf and hold them accountable for its progress. The issue for corporate governance is how to strengthen the accountability of boards of directors to shareholders…. Shareholders have delegated many of their responsibilities as owners to the directors who act as their stewards.[151]

Following that, the Code can be seen as embracing with the shareholder primacy approach (i.e. Agency Theory). Many commentators argued that this Code following the agency theory attempts to reduce the agency cost issues in corporate management.[152] As was discussed in Section 1, with self-interested managerial agents, there was a risk that directors would fail to act in the best interests of the principals. The dispersed ownership system, where shareholders would hold interests that were insufficiently substantial to evoke attentive monitoring of management since Post-World War II British public companies, constitutes the

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[149] Committee on the Financial Aspects of Corporate Governance, Cadbury Report (1992) < https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf > (Accessed on 10th March 2023) para.1.10

[150] Ibid 1.10

[151] Ibid 6.1 and 6.6

[152] John Roberts, Paul Sanderson and others 'The UK Corporate Governance Code Principle of "Comply or Explain": Understanding Code Compliance as "Subjection"' [2020] ABACUS 602 at 619-620; Jeroen Veldman and Hugh Willmott, 'The Cultural Grammar of Governance: The UK Code of Corporate Governance, Reflexivity, and the Limits of "Soft" Regulation' [2016] Human Relations 581 at 590 and 592.

lack of dominant shareholders and may lead to agency costs problems.[153] Thus, the Code intended to recommend boards to work as monitors of executives and to foster communication between boards and shareholders.[154]

As the 2009 Walker Review on corporate governance of banks said, the role of corporate governance, which was developed from the Cadbury Code, was to 'protect and advance the interests of shareholders through...monitoring capable management to achieve this'.[155] While the Code mentioned that 'wider audience'[156] are important, the Code solely recommended specific mechanisms for the board to take in order to enhance shareholder wealth protection, such as shareholder communications. This provides the evidence that directors should prioritise shareholders over stakeholders in corporate governance, reinforcing the sole agency relationship between directors and shareholders. The shareholder primacy effect created by this Code suggested that shareholder primacy tended to be prevalently entailed in the UK corporate legal framework.[157] This Code provides little encouragement that the ESV principle should go further than shareholder primacy and sufficiently include stakeholders' interests protection.

Some corporate governance reviews were impacted by the Cadbury Code and entailed the shareholder primacy approach during the pre-2006 period. The Greenbury Report in 1995 looked at the remuneration of directors. The aim of the report was to 'provide a means of

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[153] Brian R. Cheffins, *Corporate Ownership and Control: British Business Transformed* (OUP, 2008) at 320 to 336; Brian R. Cheffins and Boddy V. Reddy, 'Thirty Years and Done – Time to Abolish the UK Corporate Governance Code' [2022] ECGI Working Paper Series in Law 1 at 13.

[154] Laura F. Spira and Judy Slinn, *The Cadbury Committee: A History* (OUP, 2013) at 34 and 37; (E.g. 'Reports and accounts are presented to shareholders Annual General Meeting, when they have the opportunity to comment on them and to raise their questions' in para. 6.7 of Cadbury Report 1992)

[155] A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations (Walker Review), HM Treasury (2009)
< https://www.ecgi.global/sites/default/files/codes/documents/walker_review_261109.pdf > at 23, 68.
[156] See (n 149) Cadbury Code para 2.7 – the wider audience can be understood as wider non-shareholding stakeholders, such as employees.
[157] Shuangge Wen, *Shareholder Primacy and Corporate Governance: Legal Aspects, Practices and Future Directions* (Routledge, 2013) at 12 to 13.

establishing a balance between executives' pay and their performance and enhancing accountability and transparency on executives' pay'.[158] The Report stipulates that:

> Boards of Directors [in all listed companies] need to delegate responsibility for determining executive remuneration to a group of people with a good knowledge of the company and responsive to **shareholders' interests**, but with no personal financial interest in the remuneration decisions they are taking.[159]

Following the principle of this report, the purpose of enhancing board accountability is to cater to shareholders' interests. Again, this report conveys shareholder primacy in the UK corporate governance framework and mentions little about stakeholder protection.

The Hampel Review 1998 was prepared to review the Cadbury Code and reforms implementing the Greenbury Report 1995 on executive pay.[160] The Hampel Review was focused on a board's first responsibility – to enhance the prosperity of the business over time.[161] The Review provides the relevance of 'business prosperity':

> People, teamwork, leadership, enterprise, experience and skills are what really produce prosperity…Good governance ensures that constituencies (stakeholders) with a relevant interest in the company's business are fully taken into account…. Corporate structures and governance arrangements… are a product of the local economic and social environment[162]

The Hampel Review does mention that other stakeholders, who have a relevant interest in the company, should be taken into account, the interests of other stakeholders are not required to be actually 'protected' or 'fulfilled' by directors. This report adds the 'long-term interests

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[158] Greenbury Report, Confederation of British Industry (1995) < https://www.icaew.com/technical/corporate-governance/codes-and-reports/greenbury-report > (Accessed on 10th March 2023) at 7.
[159] Ibid 1.14
[160] Hampel Review, Hampel Committee (1998) < https://www.icaew.com/technical/corporate-governance/codes-and-reports/hampel-report > (Accessed on 10th March) at 6.
[161] Ibid 1.1
[162] Ibid 1.1, 1.2 and 1.4

of shareholders': to pursue the long-term interests of shareholders, directors need to develop and sustain their stakeholders' relationships.[163]

Nevertheless, taking other stakeholders' interests into account does not exactly mean that directors provide the equal level of protection to interests of other stakeholders as shareholders. It suggests taking other stakeholders' interests into account *for the purpose of* pursuing the long-term shareholders' interests. The Review also provides that shareholders should recognise that it is in their interests for companies to take other stakeholders' interests into account and 'to have regard to the broader public acceptability of their conduct'.[164] Taking other stakeholders' interests into account seems to be an instrument to enhance the broader public acceptability and corporate value to ultimately promote shareholders' wealth in the long run. Therefore, the Hampel Review did not shift away from the shareholder primacy approach towards embodying both shareholders and stakeholders in corporate governance[165]

Just one year after the introduction of the Hampel Review, the Institute of Chartered Accountants in England and Wales published the Turnbull Guidance to Directors on Certain Aspects of the Combined Code of Corporate Governance in 1999. The Turnbull Guidance is emphasised on internal control and risk management in corporate governance to safeguarding the shareholders' investment and the company's assets. [166] The Turnbull Guidance also provides the 'control environment and control activities', which mentions other stakeholders' interests, such as 'health, safety and environmental protection'.[167] In spite of mentioning stakeholders' interests, it seems to me that shareholder wealth creation is the central emphasis and addressing these stakeholders' interests is to safeguard shareholders' investment. The Turnbull Guidance followed the 'long-term interests of shareholders' approach in the Hampel Review 1998. As Talbot reinforced, directors are recommended by

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[163] Hampel Review 1.18; The Hampel Review does not give up short-term interests of shareholders. In the same paragraph, it only states that directors should not exclusively run the company for the short-term interests of the shareholders.
[164] Ibid 1.18
[165] Lisa Benjamin and Stelios Andreadakis, 'Corporate Governance and Climate Change: Smoothing Temporal Dissonance to a Phased Approach' [2019] Business Law Review 146 at 149.
[166] Turnbull Report, Financial Reporting Council (1999) < https://www.icaew.com/technical/corporate-governance/codes-and-reports/turnbull-report > (Accessed on 10th March 2023) at 3.
[167] Ibid 14

Turnbull Guidance to take other stakeholders' interests into account for the purpose of managing potential risks and costs on shareholders' interests in corporate governance.[168] Again, Turnbull Guidance still reflects shareholder primacy in the UK corporate governance framework.[169]

The common ground of these corporate governance reviews is that shareholders' interests are taken at the heart of directors' duties; stakeholders' interests protection attracts little attention from corporate responsibility and governance mechanisms. As argued in 1.3.A., the ESV principle is not only an inclusive but also flexible duty. With influence of the pre-2006 corporate governance codes, directional discretion can be indicated to practice the ESV principle in a shareholder-oriented way that directors merely have regard to stakeholders only for the ultimate purpose of shareholder wealth creation.

3.3.C. Shareholder primacy implication in CLRSG consultation reports

Shareholder primacy is implied in some CLRSG consultation reports between 1999 and 2001. In the *Strategic Framework*, CLRSG stated that the ESV principle maintains the ultimate corporate objective of promoting maximum value for shareholders.[170] It also stated that directors should adopt a *long-term approach* which recognises wider interests of the community and, to the extent appropriate, minimise negative impacts of corporate activity.[171] This long-term approach is similar to another approach in relation to pursuing the 'long-term interests of shareholders' in the Hampel Review 1998. The 'have regard to' the environment and other stakeholders' interests (e.g., employees, customers, creditors, suppliers and people in the local communities) does not intend to regard stakeholder protection as a substantive governance goal. Instead, it intends to merely address potential risks which can affect the corporate success for shareholders' interests in the long run.

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[168] Lorraine Talbot, *Progressive Corporate Governance for the 21st Century* (Routledge, 2013) at 125.
[169] Dominic Elliott, Steve Letza, Martina McGuinness and Clive Smallman, 'Governance, Control and Operational Risk: The Turnbull Effect' [2000] Palgrave Macmillan Journals 47 at 50.
[170] CLRSG, Modern Company Law for a Competitive Economy: The Strategic Framework (DTI, 1999) 5.1.12
[171] Ibid 5.1.8, 5.1.9 and 5.1.19.

Furthermore, CLRSG intended to object the pluralist approach.[172] Under the pluralist approach, it was stated by the CLRSG that the directors are required to 'serve a wider range of interests, not subordinate to, or as a means of achieving, shareholder value (as envisaged in the enlightened shareholder value view), but as valid in their own right'.[173] This approach would require directors to further the success of the company for both shareholders and other relevant stakeholders.[174] Accordingly, directors' duties involve balancing the interests of shareholders and other stakeholders when there are conflicting interests.[175] The pluralist approach indicates that directors would be able to sacrifice some interests of shareholders in favour of other stakeholders' interests.[176] However, according to CLRSG reports, the pluralist approach would provide dangerously broader subjective discretion to directors' duties (than ESV) and directors can fail to safeguard shareholders' interests.[177] The discretion can also distract directors by requiring them to balance various interests at the expense of economic growth, business efficiency and market competitiveness.[178] In the *Final Report*, CLRSG recommended a 'sharper focus on shareholder' in the ESV principle.[179]

Following those shareholder primacy implications in CLRSG reports, academic commentators raised the concern that the ESV principle may not be interpreted and practiced as the expected inclusive duty to promote stakeholder protection. I would share the mainstream viewpoint that the ESV principle is not significantly different from the shareholder primacy principle.[180] In academic discussion, following these CLRSG reports, the ESV principle is

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[172] Ibid 5.1.25 to 5.1.33.
[173] Ibid 5.1.13.
[174] Ibid 5.1.15.
[175] Ibid 5.1.15.
[176] Ibid 5.1.15.
[177] Ibid 5.1.30.
[178] Ibid 5.1.24 to 5.1.33; CLRSG, Modern Company Law for a Competitive Economy: The Strategic Framework (DTI, 1999) para 3.24.
[179] CLRSG, Modern Company Law for a Competitive Economy: Final Report (DTI, 2001) para.1.56
[180] For instance, Andrew Johnston argued that 'in the end, s172 did not represent a radical break with the past [shareholder primacy]'; see Andrew Johnston, Market-Led Sustainability through Information Disclosure: The UK Approach' in In Beate Sjåfjell and Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, 2019) at 210.

understood by many commentators, such as Moore and Petrin,[181] as the long-term shareholder value creation approach. According to Bebchuk and others, the long-term shareholder value creation vested in the ESV principle, in which directors 'are able to justify a stakeholder-friendly decision on the grounds that it would contribute to long-term shareholder value', is an 'unhelpful but harmless' replacement of the traditional shareholder primacy.[182] This 'long-term shareholder value' concept can be reinforced by the 'Enlightened Value Maximisation' theory by Michael C. Jensen. In the work, Jensen described the 'Enlightened value Maximisation' as:

> We cannot maximize the long-term market value of an organization if we ignore or mistreat any important constituency. We cannot create value without good relations with customers, employees, financial backers, suppliers, regulators, and communities[183]

He argued that the 'long-term stock value' for stockholders/shareholders[184] is 'an important determinant of total long-term firm value'.[185] For Jensen, 'to maximize total long-term firm market value' is the 'overriding goal' in corporate governance.[186] The 'long-term' perspective is focused on the future performance of the value for shareholders in the company.[187] This is also reinforced by Jensen's article in 1976 in relation to the agency theory – directors are the agents for the shareholders (principals) in the company. As I discussed in Section 1, this theory suggests that to promote the shareholder value is the only interest in corporate governance.[188] Therefore, the long-term shareholder value approach in CLRSG reports does

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[181] See (n 44) Marc T Moore & Martin Petrin, *Corporate Governance: Law Regulation, and Theory* at 144: they interpreted the s172 as the long-run shareholder wealth promotion.
[182] Lucian A. Bebchuk Kobi Kastiel Roberto Tallarita, 'Does Enlightened Shareholder Value Add Value?' [2022] The Business Lawyer 1 at 27; Lucian A. Bebchuk Roberto Tallarita, 'The Illusory Promise Of Stakeholder Governance' [2020] Cornell Law Review 1 at 18.
[183] Michael C. Jensen, 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' [2002] Business Ethics Quarterly 235 at 251.
[184] In my thesis, the discussion on shareholders is emphasised on the ownership of shares in the company. My thesis is focused on the common ground that shareholders and stockholders both have the ownership of shares in the company. While there are some subtle differences between them, shareholders and stockholders are interchangeable in my thesis.
[185] See (n 183) Jensen, 'Value Maximisation' [2002] at 250.
[186] Ibid at 252.
[187] Ibid at 253.
[188] See (n 52) Jensen and Meckling, Theory of The Firm at 309.

not seem to significantly transcend the orthodox shareholder primacy (1980s) – regardless of 'long-term' or 'short-term', shareholder wealth creation is implied as the central focus in directors' duties in the ESV principle.

Moreover, the long-term shareholder value approach in the ESV principle does not intend to require directors to substantively protect stakeholders' interests or rights. As Jensen noted in the extract above, the consideration of other stakeholders in the long-term value approach does not mean protecting the interests of other stakeholders but attempting to reduce the social cost of the corporate value, such as the compensation to the injured employees or customers. The purpose of the social cost reduction is to ultimately sustain the shareholders' value in the future for the company.

Professor Andrew Keay, who is a leading author in the ESV principle analysis, commented that at first glance s 172(1) – the ESV principle – *appears to* move the UK a significant distance away from the shareholder value principle and closer to a stakeholder protection approach, but 'on more intense scrutiny this is not the case'.[189] According to Keay, ESV does not make directors effectively accountable to the interests of other stakeholders.[190] He inserted the similar concern (as mine) that the ESV duty of directors is to ultimately benefit shareholders' wealth promotion and directors would not be impugned even if directors would neglect some interests of other stakeholders in corporate governance.[191] Similarly, David Millon argued that the ESV does not seem to be a 'must' (requirement) for directors to actually take the interests of other stakeholders into account.[192] He further argued that 'there is certainly no suggestion that stakeholders' interests might deserve priority where that would work to the detriment of shareholders' interests'.[193]

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[189] Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' [2007] Sydney L. REV. 577 at 611.
[190] Ibid 611.
[191] Ibid 611.
[192] David Millon, 'Corporate social responsibility and environmental sustainability' in Beate Sjajell & Benjamin J. Richardson (eds), *Company Law And Sustainability: Legal Barriers and Opportunities* (CUP, 2015) at 60.
[193] Ibid 60.

From the Keay and Millon's arguments, it can be perceived that the ESV principle in practice is difficult to sacrifice shareholder wealth creation for stakeholders' interests protection. For instance, Paddy Ireland criticised the UK Company law as 'paying lip service to stakeholding' and 'enshrining shareholder primacy'.[194] According to Lilian Moncrieff, the ESV principle vested in the Companies Act 2006 limits the directors' capacity of bringing the social and environmental considerations to the level that is consistent with the promotion of shareholder value in corporate governance.[195] The ESV principle in the 2006 Act can be considered as 'the customary British route to a gentlemanly silence'[196] on dealing with the interests of other stakeholders.

3.3.D. Provisional Conclusion

The ESV principle is possible to have little effect to create substantive stakeholder protection in directors' duties. The government did intend to create an inclusive duty which has the objective of protecting stakeholders. However, it is certainly easier said than done. A great deal of directional discretion, as the internal factor, allows directors to not to carry out the ESV principle as an inclusive duty. The external factors are not friendly with the inclusiveness objective either. The pre-2006 corporate governance codes/reports, which embodied shareholder primacy feature, suggests that directors should carry out the ESV principle as a shareholder primacy duty. The CLRSG reports also embodied shareholder primacy implications, encouraging directors to take stakeholders in a mere instrumental way to exclusively promote shareholder wealth. When CLRSG discarded the pluralist approach which reinforces the inclusiveness objective, it clearly expressed the failure of the ESV principle to achieve substantive stakeholder protection. As a result, the ESV principle is more plausible to create shareholder primacy implications in UK Corporate Governance law.

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[194] Paddy Ireland, 'From Lonrho to BHS: The Changing Character of Corporate Governance in Contemporary Capitalism' [2018] King's Law Journal 3 at 25.
[195] Lilian Moncrieff, 'Karl Polanyi and the Problem of Corporate Social Responsibility' [2015] Journal of Law and Society 434 at 443.
[196] Lord Wedderburn, 'The Legal Development of Corporate Responsibility: For Whom will Corporate Managers be Trustees?' in K. J. Hopt and G. Teubner (eds.), *Corporate Governance and Directors' Liabilities* (Berlin: de Gruyter, 1985) at 10.

Section 4: Evidence of the ESV principle practice in post-2006 period (3.4)

This section will provide evidence to demonstrate why there is a strong tendency/plausibility that the ESV principle is practiced in a way which creates antithesis of stakeholder protection, including LGBT protection, in UK Corporate Governance law.

3.4.A. Post-2006 case law

Post-2006 case law provides the evidence that the ESV principle does not regard stakeholder protection as a substantive goal in directors' duties in UK Corporate Governance law. In *GHLM Trading Ltd v Anil Kumar Maroo & Others,*[197] s.172 was described as the 'touchstone'[198] provision, requiring directors to act in good faith in the interests of the company. In this case, s.172 was described as making the duty to promote the success of the company 'prescriptive'.[199] In *Stimpson v Southern Landlord Association,*[200] Judge Pelling QC provided the guidance on the 'prescriptive' understanding of s.172. He stated that directors can act in any way they consider, in good faith, to be most likely to promote the success of the company, but where the company has mixed objectives, the interests of the members cannot be ignored.[201] In circumstances of conflict between the achievement of other objectives and benefiting the members, he stated that a balancing exercise will be required.[202] His approach has been supported by Justice Popplewell in *Madoff Securities International Ltd (in liquidation) v Stephen Raven & Others,*[203] who stated that 'the predominant interests to which the directors of a solvent company must have regard are the interests of the shareholders as a whole, present and future' in s.172.[204] This line of case law suggested that s.172 (ESV principle)

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[197] [2012] EWHC 61(Ch)
[198] [2012] EWHC 61(Ch) at [198]
[199] Ibid [193].
[200] [2010] BCC 387
[201] [2010] BCC 387 at [26]; Also see *Richmond Pharmacology Ltd v Chester Overseas Ltd* [2014] EWHC 2692 (Ch) at [66] to [68], *Re Southern Countries Fresh Foods Ltd* [2008] EWHC 2810 (Ch) at [53], and *Lesini v Westrip Holdings* [2010] BCC 420 421. These cases reinforce the subjective mind or directional discretion by directors when exercising s.172.
[202] Ibid [26]
[203] [2013] EWHC 3147 (Comm)
[204] [2013] EWHC 3147 (Comm) at [188]

does follow from the directorial discretion in the pre-existing case law and give directors considerable discretion to decide how to achieve the mixed objectives, including shareholders and stakeholder protection. However, directorial discretion in post-2006 case law said nothing about carrying out substantive stakeholder protection in directors' duties.

In the post-2006 case law, there are some case judgements which can indicate shareholder primacy embodiment in s.172 (ESV principle). In *The Queen on the Application of the People and the Planet v HM Treasury*[205] HM Treasury became a majority shareholder in Royal Bank of Scotland (RBS) through a subsidiary of HM Treasury, UK Financial Investment Ltd (UKFI). There was a judicial review brought by the claimant, an NGO, to review HM Treasury's decisions not to require RBS to reduce its carbon emissions and be more respectful of human rights during the corporate operation. The Court reinforced a 'commercial approach' through which UKFI only played an active role to 'influence' the RBS board to have regard to environmental and human rights considerations.[206] As the Court noted, if UKFI pressed RBS for environmental and human rights policies, it would 'have a tendency to come into conflict with' and also would 'would cut across the fundamental legal duty of boards to manage their companies in the interests of all their shareholders' as set out in s.172 (1).[207] This case judgment indicates that stakeholder protection is mere a secondary obligation in s.172.

A more recent case is *BTI 2014 LLC v Sequana SA*[208] where shareholder primacy is confirmed to be enshrined in s.172 of CA 2006. Lord Reed stated that:

> Since the duty under section 172(1) is focused on promoting the success of the company "for the benefit of its members as a whole", it is clear that, although the duty is owed to the company, **the shareholders are the intended beneficiaries of that duty**. To that extent, the common law approach of **shareholder primacy** is carried forward into the 2006 Act… In carrying out their

[205] [2009] EWHC 3020 (Admin)
[206] [2009] EWHC 3020 (Admin) at [13]; Also See *Lesini v Westrip Holdings* [2010] BCC 420 at [85]: 'The weighing of all these considerations is essentially a commercial decision'.
[207] Ibid [13], [34] and [35]
[208] [2022] 3 W.L.R. 709

> primary duty under section 172(1) , the directors are also **under a secondary obligation** to have regard "amongst other matters" to the considerations listed in paragraphs (a) to (f).[209]

On this basis, s.172 (1) clearly represents shareholder primacy. The judgment reflected the shareholder primacy theoretical discussion (Section 1) that shareholders are the sole objective in corporate purpose and directors' duties and other stakeholders are 'secondary groups' in corporate governance. In the same case, Lady Arden discussed the 'long-termism':

> Directors have the obligation…to consider the likely consequences of their decision in the long term, and to take into account the company's relationship with other stakeholders, such as employees, suppliers and local communities…. **The company must pay them promptly and treat them properly to maintain its reputation and to obtain long-term benefits**.[210]

Lady Arden seemed to interpret the 'secondary obligation' for other stakeholders – they are mere 'instruments' or 'means' to maintain a long-term corporate profits aggregation so as to benefit shareholders' wealth. This illustrates 'having regard to other stakeholders' interests' in s.172 (1) when interpreting directors' duties.[211] While she said that 'shareholder primacy does not mean that shareholders' interests exclude those of others with legitimate interests',[212] s.172 or ESV principle does not require directors to provide substantive protection to other stakeholders' interests. The extracted case judgment from *Sequana SA* provides an encouragement of using directional discretion to entrench shareholder primacy in UK Corporate Governance law through s.172.

3.4.B. Environment protection and stakeholders/people in a wider society

Following from the post-2006 case law, it is possible to argue that the ESV principle is inadequate to provide environmental protection. The lack of environmental protection in corporate governance can lead to adverse impacts on people/stakeholders in a wider

[209] [2022] 3 W.L.R. 709 at [65].
[210] at [386]
[211] Lady Arden stated that 'the directors are placed under an obligation to have regard to the other stakeholders' interests at [386]
[212] Ibid [386]

society.[213] For instance, BP oil spill in the Gulf of Mexico caused a large amount of oil leaking over the waters in 2010. The environmental damage can cause harmful impacts to people in the local community, such as shrimp fishers and the industry.[214] For the reason, BP encountered a lot of criticism by society, such as in 'Blood Petroleum'.[215] According to Bradshaw, the ESV principle does not impose a 'profit-sacrificing' duty on directors, which 'does not provide a direct means to address negative environmental externalities'[216] for the purpose of preventing and mitigating petroleum disasters like BP. She continued that the ESV principle can be applied by directors to consider environmental protection in terms of benefits to the company, rather than environmental protection as a valuable goal in and of itself.[217] The lack of specific measures, such as the important right to initiate legal proceedings for a breach of s.172, can constitute the environmental irrelevance in the ESV principle.[218] The so-called 'environmental consideration' is mainly instrumental for business and corporate profits enhancement. Bradshaw's argument indicated that the ESV principle provides little true care to protecting environment and stakeholders in a wider society.

Impacted by the ESV principle, many companies have adopted voluntary codes of conducts as the specific measures to 'have regard to' the environment. However, the effectiveness of these voluntary codes of conducts can be questionable. In the environmental protection, Lisa

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[213] Chapter 4 will provide more discussion about environmental protection and human rights of other stakeholders in a wider society.

[214] Jill Ann Harrison , 'Down Here We Rely on Fishing and Oil": Work Identity and Fishers' Responses to the BP Oil Spill Disaster' [2020] Sociological Perspectives 330 at 334.

[215]Ted Atkinson, 'Blood Petroleum': True Blood, the BP Oil Spill, and Fictions of Energy/Culture' [2013] Journal of American Studies 213 at 214 and 215.

[216] Carrie Bradshaw, 'The environmental business case and unenlightened shareholder value' [2013] Legal Studies 141 at 157.

[217] Carrie Bradshaw, Environmental Voice within Companies and Company Law: Environmental Management System [2013] White Rose Research < https://eprints.whiterose.ac.uk/135704/ > (Draft Working Paper) 1 at 7.

[218] The environmental business case and unenlightened shareholder value at 157; Charlotte Villiers, 'Directors' Duties and the Company's Internal Structures under the UK Companies Act 2006: Obstacles for Sustainable Development' [2010] University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2010-03 47 at 55; Andrew Keay, 'The Duty to Promote the Success of the Company: Is it Fit for Purpose?' [2010] University of Leeds School of Law, Centre for Business Law and Practice Working Paper 1 at 36.

Benjamin conducted a research on the impacts of ESV principle in GHG emissions in five big energy companies. In the research, she reviewed the corporate policies and found that all the companies endorsed the relevant internal policies. For instance, BG Group produced 'Business Principles', which set out the group's core standard of ethical conduct, and the company's responsibility to people and the environment (BG Group); Royal Dutch Shell set out its 'core values' of honesty, respect and integrity as the basis of its eight 'General Business Principles' (which include health, safety, and the environment).[219] While the ESV principle impacted on the development of internal environmental protection policies, she argued that there was tenuous connection between those initiatives and activities which direct GHG reductions, as there was no demonstrated specific measures on how the companies conducted corporate management.[220] In the same research, Benjamin analysed UK Company law and found that the corporate annual reports mentioned nothing about 'profit-sacrificing activities in environmental protection.[221] As she noted, the shareholder primacy model is the radical obstacle to sustainable environment development in corporate governance.[222] It can be concluded with the inadequacy of the voluntary codes of conducts in environmental protection.[223]

Learning from Benjamin's research, it can be assumed that voluntary internal policies suggested by the ESV principle are mostly ticking the boxes of each relevant stakeholders – the initiatives or measures, such as environmental protection and LGBT protection, may be created, but they are not effective to protect other stakeholders as the 'ends'. This is evidenced in another empirical research conducted by Keay and Iqbal. The research reviewed the impacts of the ESV principle in the annual reports of the large listed the companies. According to the research, although most of companies have disclosed the emphasis on stakeholders' interests, either directly or indirectly, there is no clarification about the relationship between

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[219] Lisa Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' [2016] Transnational Environmental Law 353 at 369.
[220] Ibid 373.
[221] See (n 219) Benjamin at 375
[222] Ibid 377; Beate Sjåfjell, Andrew Johnston and others, 'Shareholder Primacy: The Main Barrier to Sustainable Companies', in Beate Sjåfjell & Benjamin J. Richardson (eds), *Company Law And Sustainability: Legal Barriers And Opportunities* (CUP, 2015) at 147.
[223] Ibid 373.

shareholders and other stakeholders in directors' duties.[224] It could be said that 'these companies were engaged in practising shareholder value as shareholder value theory does permit companies to take into account the interests of non-shareholder stakeholders'.[225] For instance, Next Plc stated that the goal of corporate governance policies was to consider other stakeholders' interests for the purpose of 'deliver[ing] long term return to shareholders through a combination of sustainable growth'.[226]

The empirical study provides the evidence that the ESV principle is likely to be interpreted as taking other stakeholder protection merely for corporate profits and shareholder wealth creation. As discussed before, Lord Goldsmith reiterated the importance of not ticking the boxes or watering down stakeholder protection in the ESV principle. But from those derived voluntary environmental policies, the ESV principle does not achieve to substantively prevent and mitigate environmental damages to protect people in a wider society. Through the lens of social and environmental protection, the ESV principle is likely to be used in a way that well benefits shareholders but exclude stakeholders' interests in corporate governance.

3.4.C. Corporate scandals

In the post-2006 period, a number of corporate scandals and collapses are evidence that the ESV principle is essentially used as a shareholder primacy duty by directors in corporate governance.

One example is the BHS collapse. In the House of Commons report, the investigation showed the controlling shareholder/director took the company as the device to increase profits for its shareholders.[227] To look back at the profit development in BHS, there was an increase in profits, and dividends were paid in these years. However, the Green family, who were the large shareholding groups, received a larger amount of dividend than value which belongs to the

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[224] Andrew Keay, Taskin Iqbal, 'The Impact Of Enlightened Shareholder Value' [2019] Journal of Business Law 304 at 315 and 316.
[225] Ibid 315.
[226] Ibid 314 and 315.
[227] House of Commons, Work and Pensions and Business, Innovation and Skills Committees, BHS Report (2016-17) < https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/54/54.pdf > (Accessed on 20th June 2022) at 5.

company itself. Thus, this precluded the company from the purposes such as investment or pension funds. The company BHS seemed to be managed for promoting profits and dividends for shareholders only. According to the report, the jobs of the 11,000 employees of BHS, the majority of whom were low paid, were now at risk.[228] These employees had to face uncertain future seeking work or unemployment. Also, the unsustainable governance caused difficulties to pensioners. Its 20,000 current and future pensioners face substantial cuts to their entitlements. Their pension costs will now be met through levies paid by other pension schemes, including many attached to small companies.[229] As a result, stakeholders were losers in this governance 'game', whereas the only winners were shareholders and directors.

Another similar example is Carillon. The company Carillon's collapse was also investigated in a parliamentary report. The key business strategy in Carillon was criticised as 'Dash for Cash'.[230] According to the report, instead of injecting equity for more corporate opportunities, the corporate management funded its spending spree through debt. The company accumulated heavy debt and seemed to be difficult to reduce it. Also, the company purchased rivals for its home turf and expanded into new markets which could not deliver the return that the company projected.[231] It was criticised in the report that there was inadequate review over the operational contracts but for the purpose of pushing for money at the period of end.[232] The corporate management was mainly focused on very short-term value aggregation to 'dash for cash' on the one hand; on the other hand, in the company's final years, directors rewarded themselves and other shareholders by choosing to pay out more in dividends than the company generated in cash, despite increased borrowing, low levels of investment and a growing pension deficit.[233] It seems that the ultimate purpose of the company Carillon was only for improving shareholders' return. The report also stated that it is difficult to conclude

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[228] Ibid 4.
[229] Ibid 4.
[230] House of Commons, Business, Energy and Industrial Strategy and Work and Pensions Committees, Carillon Report (2017-19) < https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/769/769.pdf > (Accessed on 20th June 2022) at 13
[231] Ibid 15 to 16.
[232] ibid 16.
[233] Ibid 19.

that they adequately took into account the interests of employees, their relationships with suppliers and customers, the need for high standards of conduct, or the long-term sustainability of the company as a whole.[234] Similar to BHS, the company's employees, its suppliers, and their employees face at best an uncertain future; pension scheme members will see their entitlements cut, their reduced pensions subsidised by levies on other pension schemes.[235] Again, stakeholder's interests were neglected in the governance decision-making.

One more example, where corporate profits and shareholder wealth are aggregated at expense of other stakeholders, is Sports Direct. The House of Commons reported on Sports Direct which is a profitable, though declining, business but which operates with a business model that 'involves treating workers as commodities rather than as human beings with rights, responsibilities and aspirations'. Sports Direct was marked as maximising its profits, involving a great deal of exploiting the workers and using it as a 'means' to increase profits. Sports Direct was described by witnesses as 'a gulag, as Victorian, as a workhouse, not a warehouse'.[236] The workers there were 'treated without dignity or respect.[237] They 'were not being paid the national minimum wage, and were being penalised for matters such as taking a short break to drink water and for taking time off work when ill.'[238] While the nasty governance from Sports Direct led to human rights to employees/workers, the governance law, in particular s.172, seems to allow the company to externalise those human rights issues to other areas of law; corporate governance law has no interest to intervene in the issues.

These three examples reinforce those commentators' concern in Section 3 – the ESV principle is likely to be utilised as shareholder primacy in corporate governance. According to Villiers, the scandals of BHS and Carillion showed that the ESV principle allows directors to subordinate

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[234] See (n 230) Carillion Report at 67.
[235] Ibid 68.
[236]House of Commons, Business, Innovation and Skills Committee, Employment practices at Sports Direct (Third Report of Session 2016–17) at 8 < https://publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf > (Accessed on 24th June 2022)

[237] ibid 26

[238] Ibid 3.

stakeholders and their interests to the overall corporate success (corporate profits) and shareholder wealth creation.[239] Hudson critiqued on BHS and argued that the ESV principle made little effort to advance substantive recognition of other stakeholders' interests, including employees, customers and people in a wider society.[240] According to Ireland, through these corporate scandals, corporate responsibility for dealing with deleterious consequences of corporate activities, such as environmental disasters, lost jobs, lower wages, lost pensions, or growing inequality, has been seriously undermined.[241] The ESV principle is certainly not discretionally exercised by directors as an inclusive duty to protect shareholder wealth and other stakeholders' interests with equal footing. The practice of the ESV principle fails the governmental objective. In the ESV principle practice, other stakeholders are either used for corporate profits and shareholder wealth creation or disappointed/neglected by directors.[242] The ESV principle is merely a 'pseudo positive balance sheet of the companies' – companies are thought to be done well to an ordinary eye but only to collapse with serious social adverse impacts on stakeholders in a wide society.[243] There is certainly a far stronger sense of shareholder primacy encouragement than stakeholder interests protection implied in the s.172 of the Companies Act 2006.

3.4.D. The ESV principle in the application of LGBT protection

Following vast evidence discussion above, the ESV principle is inadequate to introduce UK Corporate Governance law into LGBT legal protection. In feminist critiques, shareholder primacy reinforces the hierarchical structure in corporate governance in which human

[239] Charlotte Villiers, 'Corporate governance, employee voice and the interests of employees: the broken promise of a "World Leading Package of Corporate Reforms"[2021] I.L.J. 159 at 178.
[240] Alastair Hudson, 'BHS and the Reform of company law' [2016] Comp. Law. 364 at 365.

[241] See (n 127)Ireland, 'From Lonrho to BHS' at 23.
[242] Charlotte Villiers, 'A Game of Cat and Mouse: Human Rights Protection and The Problem Of Corporate Law And Power' [2023] L.J.I.L. 415 at 427; Andrew Johnston & Lorraine Talbot, 'Why Is Modern Capitalism Irresponsible And What Would Make It More Responsible? A Company Law Perspective'[2018] King's Law Journal111 at 126.
[243] Igho Dabor, 'To comply or not to comply: towards an effective UK corporate governance code' [2021] I.C.C.L.R 309 at 315.

problems, such as sexuality and gender discrimination, are ignored.[244] According to Testy, the wealth creation, echoing shareholder primacy, is increasing at alarming levels, which exacerbates different forms of subordination, such as race and gender.[245] To combine with the corporate scandals evidence, the ESV principle is likely to neglect care to LGBT people/stakeholders' dignity in corporate activities.

While many companies have devised so-called 'LGBT inclusion' policies, from the environmental protection example, those policies are mainly playing the 'LGBT-washing'[246] games for shareholder wealth creation. As Joo argued, racial protection mechanisms, such as racially diverse boards, are likely to be utilised to yield corporate profits and thus for non-racial values.[247] Likewise, many commentators brought up critiques over 'neo-liberalising feminism': merging gender equality protection with corporate profits creation.[248] For instance, according to Elisa, while many corporate-led gender initiatives were produced by companies, the real motivation is to link gender equality straightforwardly with economic growth and competitiveness.[249] The neoliberalist mechanisms convey the implications that gender and racial inequality issues, such as discrimination and violence, might be addressed only because it creates opportunities for shareholder wealth promotion. The 'neo-liberalising feminism' can shed lights on understanding LGBT dignity protection in UK corporate governance. Under the

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[244] Kathleen A. Lahey & Sarah W. Salter, 'Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism' [1985] Osgoode Hall Law Journal 544 at 547; Charlotte Villiers, 'Corporate Governance, Responsibility and Compassion: Why we should Care' in Nina Boeger and Charlotte Villiers, *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Bloomsbury, 2018) at 154.

[245] Kellye Y. Testy, 'Linking Progressive Corporate Law with Progressive Social Movements' [2002] Tulane Law Review 1224 at 1227.

[246] In Testy's work above, she argued that despite increased attention to 'green-washing' the society, continuing environmental degradation is well documented [1244]. 'LGBT-washing' indicates that while many companies have adopted LGBT-related policies, LGBT people continue to suffer intolerance in corporate activities.

[247] Thomas W. Joo, 'Race, Corporate Law, and Shareholder Value' [2004] J Legal Educ 351at 363.

[248] Elisabeth Prügl and Jacqui True, 'Equality means business? Governing gender through transnational public-private partnerships' [2014] Review of International Political Economy 1137 at 1158.

[249] Juanita Elias, 'Davos Woman to the Rescue of Global Capitalism: Postfeminist Politics and Competitiveness Promotion at the World Economic Forum' [2013] International Political Sociology 152 at 166; Also see Adrienne Roberts, 'Financial Crisis, Financial Firms... And Financial Feminism? The Rise Of 'Transnational Business Feminism' And the Necessity Of Marxist-Feminist IPE' [2012] Socialist Studies 85 at 92.(The gender equality initiatives help to legitimise capitalism, including shareholder primacy, that has sustained gender-based inequality and oppression)

ESV principle, directors either utilise LGBT as an instrument to aggregate 'pink money'[250] or make money at expense of LGBT people's interests.

Where expressive harm happens to LGBT stakeholders in companies, UK Corporate Governance law is quite limited. As discussed in Chapter 2, in companies like the Ashers Baking Company and football clubs, UK Equality law imposes 'extra protection' on LGBT-critical expressions/manifestations over LGBT dignity unless there is potential material harm. Also, learning from the Equality case law, employers would not be liable for expressive harm to LGBT employees caused by third parties. Certainly, UK Equality law makes the ESV principle more toothless: directors have no obligations or liability for expressive harm to LGBT stakeholders. Without 'legal guidance' from equality law, the ESV principle can be utilised closer towards shareholder primacy. All the ESV principle does is to give a moral pressure; however, a determined director, without concerns for LGBT protection, would not be deterred.[251]

3.4.E. Provisional Conclusion

According to the vast evidence discussion, it is concluded that the lack of strict stakeholder protection requirement explains failure of the ESV principle in UK Corporate Governance law. This section proves that 'have regard to' in s.172 (1) downgrades stakeholder protection as an instrumental way for shareholder wealth creation.

Furthermore, it is concluded that the ESV principle does not make a contribution to reordering corporate culture.[252] The ESV principle fails to challenge the exclusive profit-maximisation culture in BHS, Carillon, BP and Sports Direct. Certainly, the ESV principle also fails to challenge

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[250] Denise Potoskya, Pornsit Jiraporna, and Sangmook Leea, 'Corporate Governance and LGBT-Supportive HR Policies from CSR, Resource-based, and Agency Perspectives' [2018] Human Resource Management 317 at 336 (This empirical study concluded that LGBT-supportive policies production is primarily driven by shareholder wealth and corporate profits in governance)

[251] Nicholas Grier, 'the irresponsible director' [2017] I.C.C.L.R 355at 357.

[252] Alexi Boddy, 'To what extent will the concept of "building back better" and mandatory reporting on climate-related activities impact and develop the UK Corporate Governance Code? ' [2022] I.C.C.L.R. 587.

heterosexual and cisgender superiority culture which cause disturbance to LGBT stakeholders/people's dignified life in corporate activities and wider society.

Conclusion

S.172 (the ESV principle) of the Companies Act 2006 creates a shareholder primacy effect in UK Corporate Governance law. The ESV principle is intended to codify the pre-existing law and to strengthen the role of directors in ensuring stakeholder protection in corporate activities and wider society. Nevertheless, the ESV principle fails to achieve this objective. A great deal of directional discretion in the post-2006 case law and the lack of substantive stakeholder protection requirement in the ESV principle makes it difficult to require directors to sufficiently protect stakeholders' interests. The evidence of environmental protection and corporate scandals demonstrate that the ESV principle practice can be closely identified as the shareholder primacy approach evolving from the agency theory: 1) shareholders are the centre of directors' duties 2) other stakeholders are only considered for the purpose of shareholder wealth creation. In fact, the ESV principle represents a profit-maximisation approach in UK Corporate Governance law.

The ESV principle does not make the contribution to modernising corporate governance and law in the UK jurisdiction. Through the ESV principle, directors can externalise social problems from corporate governance to other areas of law. Nowadays, LGBT dignity protection has been introduced to a number of areas of law in the UK, including human rights law, equality law, family law and immigration law. From the ESV principle discussion, UK Corporate Governance law, unlike other areas of law, creates antithesis of internalising LGBT stakeholder/people's protection and addressing LGBT expressive harm. In fact, due to the narrowed focus on shareholders, the ESV principle allows directors to turn a blind eye to corporate heterosexual (and cisgender) superiority culture, which silently encourages LGBT intolerance to occur in both companies but also wider society. Certainly, directors' duties are outdated and inadequate to LGBT dignity protection in the UK jurisdiction.

It is concluded that UK Corporate Governance law ought to be changed for enhancing LGBT dignity protection: directors' duties ought to be widened beyond shareholder primacy and

directors ought to be required with the duty to challenge heterosexual superiority culture and LGBT intolerance in corporate activities and wider society (i.e. embodying LGBT dignity protection 'lessons' in Chapter 2). Next chapter will present a transformative Corporate Social Responsibility approach to provide theoretical guidance on how directors' duties are widened towards a substantively social perspective in order to enhance LGBT protection.

Chapter 4: The embodiment of transformative Corporate Social Responsibility (CSR) theoretical approach

Introduction

In Chapter 3, I argued that UK Corporate Governance law is inadequate to embody LGBT protection. In this chapter, I will present the transformative Corporate Social Responsibility (CSR) theoretical approach in order to widen corporate responsibility in UK corporate governance, in particular directors' duties: going beyond shareholder primacy and providing substantive stakeholder protection, including LGBT protection.

The transformative CSR theoretical approach stems from corporate purpose/objective in legal documents. For instance, in the 2021 Norwegian corporate governance code, corporate purpose and responsibility needs to 'ensure the greatest possible value creation over time in the best interests of shareholders, employees and other stakeholders'.[1] From this European legal example, corporate purpose has been suggested to progressively shift away from orthodox shareholder primacy and profit-maximisation approach. This 'new' corporate purpose development prepares to embody substantive stakeholder protection in corporate responsibility.

This chapter will be divided into three sections: Section 1 will present the new corporate purpose, identifying wider corporate governance agendas than shareholder wealth creation in the UK law. Following the new purpose, Section 2 will present the transformative CSR approach, widening directors' duties and recognising the equal level of importance between shareholders and other stakeholders. This transformative CSR aims to reflect the new corporate purpose and advance stakeholder protection. Section 3, grounded on corporate theories, including the separation of ownership and control theory, corporate citizenship theory, argues that a company has the social perspective or foundation to locate the

[1] The Norwegian Code of Practice for Corporate Governance < https://nues.no/eierstyring-og-selskapsledelse-engelsk/> (Accessed on 23rd July 2022) at 6.

transformative CSR theoretical approach. The transformative CSR discussion will be a theoretical 'bridge' to link corporate governance and LGBT protection in corporate literature, manifesting the LGBT due diligence process proposal in Chapter 6.

Section 1: The new corporate objective/purpose (4.1)

4.1.A. The general understanding of the Triple Bottom Line

In 1997, John Elkington brought up the concept 'Triple Bottom Line'. This concept is understood as 'profits, planet and people'. These three terms 'profits, planet and people' respectively represent the economic bottom line, the environmental bottom line and the social bottom line. [2] The economic bottom line is emphasised on increasing financial performance and market competition of the company.[3] The increased financial performance aims to increase the corporate entity's value, including income and assets.

I argue that Triple Bottom Line significantly points out wider tasks in corporate purpose than shareholder primacy, including social and environmental agendas. The environmental bottom line is associated with tackling the environmental issues which may be caused by corporate activity.[4] The social bottom line emphasises the interests of people who may get involved or participate in the company in the wider society, including shareholders' interest and other interests of participants in the wider society, such as labour, health.[5] The environmental and social bottom lines can be combined to achieve the protection of people who are associated with the company. It suggests that a company should not cause harm, including environmental damage, to affect the human interests or claims of the relevant people in the wider society.[6]

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[2] John Elkington, *Cannibals With Forks: The Triple Bottom Line of 21st Century Business* (Capstone Publishing Limited, 1997) at 74 to 85.
[3] ibid at 74.
[4] ibid at 79.
[5] ibid at 85
[6] The 'environmental bottom line' ultimately needs to be achieved to reinforce the 'social bottom line'. This will be discussed in the planetary boundaries theory – the aim of environmental protection is to achieve the social foundation, as in human activities and life. See 2.3 Planetary boundaries theory; See also 52nd Session of the Human Rights Council (OHCHR), Panel discussion on climate change's negative impact on the full and effective enjoyment of human rights by people in vulnerable situations [2023] In the Opening Remarks, para.16 stated that 'a safe and stable climate is an integral component of the right to a healthy environment'. Human rights protection cannot be dissociated with environmental protection.

For instance, the emitted waste to the environment could cause health and safety issues to the neighbourhoods and local communities. This can violate the right of an individual to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.[7] In 2022, UN General Assembly adopted a resolution declaring that everyone on the planet has the right to a healthy environment.[8] Therefore, the purpose of embodying the environment line is to yield substantive achievement of the social bottom line – to protect the relevant/affected people in society and contribute to realising their human living activities on the earth.

Learning from Triple Bottom Line Theory, a company or corporate governance does not seem to be a simple device that only makes money for shareholders. Other tasks, including social and environmental agendas, ought to be well embodied in the purpose of corporate governance.

4.1.B. From 'Triple Bottom Line' to the 'new corporate purpose'

The Triple Bottom Line concept can be considered as a beginning stage to indicate the wider corporate purpose/objective. Budling on Triple Bottom Line, I would delineate the new corporate purpose, including perspectives of corporate entity, shareholder wealth and other stakeholders.

4.1.B.1 Entity interests

I would argue that corporate profits generation is to ensure the long-term development of the corporate entity in the new corporate purpose. Elkington argued that 'profits' or the economic bottom line is to contribute to 'long-lived' companies.[9] Likewise, Andrew Keay presented the Entity Maximisation and Sustainability(EMS) Model and interpreted the 'long-term' or 'long-

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< https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change> (Accessed on 3rd March 2023).

[7] Article 11 of International Covenant on Economic, Social and Cultural Rights; A UN report provided the example that the emitted waste can cause contamination of water and can limit the access for local people to safe and clean in life. < https://news.un.org/en/story/2021/10/1103082> (Accessed on 3rd March 2023)

[8] UN, UN General Assembly declares access to clean and healthy environment a universal human right< https://news.un.org/en/story/2022/07/1123482> (Accessed on 3rd March 2023)

[9] See (n 2) Triple Bottom Line at 345.

lived' companies. The 'long-term development' is emphasised on the long-term survival and wealth maximisation of the company.[10] Both 'long-term survival' and 'long-lived' are interpreted as: the company can be imagined as an independent person in society, its life or existence needs to be prolonged in the long run.

The long-term survival of the company is something that has to be 'aimed for' through profits generation.[11] According to Gordon, growth and survival seem to be 'the two sides of the same coin'.[12] While survival provides the essence for growth of entity wealth, the company has to grow and cannot stand still. This calls for long-term wealth maximisation of the entity. The long-term maximisation suggests that the profit-generation is to increase the corporate financial assets and values, such as investment activities and equity, so as to explore more opportunities to pursue the business development and competence.[13] The wealth maximisation of the entity is associated with increasing the market value of the corporate entity. Also, Keay said that maximising wealth is to be aspired to while keeping a watchful eye on the survival of the company. The wealth maximisation cannot be disassociated with the long-term survival of the corporate entity; the entity might entail making less profits one year compared with the previous year to maintain 'survival', but still maximising profits for the future.[14]

In the new corporate purpose, corporate entity's interest is located as longevity of the company, including long-term survival and wealth maximisation. This marks a shift from profit-maximisation for shareholder wealth creation towards profit-generation for the corporate 'life' as well as shareholders and stakeholders.

4.1.B.2. Shareholders' interests

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[10] Andrew Keay, 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' [2008] MOD. L. REV. 663 at 693.
[11] DH. Li,'The Nature of Corporate Residual Equity Under the Equity Concept' [1960] Accounting Review 258, 259
[12] Myron J. Gordon, Finance, *Investment and Macroeconomics: The Neoclassical and a Post Keynesian Solution*(Aldershot: Edward Elgar, 1994) 94.
[13] Blair M. Margaret, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century' [2003] 51 UCLA L. REV. 387 at 391 to 394.
[14] See (n 10) at 685

Shareholders are not the ultimate beneficiaries in the new corporate purpose. Unlike shareholder primacy, a company under the new corporate purpose would be required to treat shareholders as merely investors who contribute the financial capital to the business of entity. Shareholders only make financial contributions to the company and should not be seen as only residual claimants or principals of the company who own all leftover profits of the company.[15] In the EMS Model, Keay explained that corporate profits can be understood as the 'income' of the company itself, which means more than the sums that are paid to shareholders as dividends.[16] It is appropriate to see dividends only as the business expenses of the entity which need to be paid to satisfy and retain shareholders.[17] Therefore, corporate profits can benefit shareholders but are not 'of' shareholders.

4.1.B.3. (Substantive) stakeholder protection

Stakeholder protection is an important perspective of the new corporate purpose. The 'business expenses' of the entity include not only shareholders' interests but also other stakeholders' interests. To maintain the long-term survival and wealth maximisation, the company needs to deal with the social agenda, such as keeping the work environment satisfied for employees.[18] Keay suggested that it is possible to trigger a concern over the long-term value creation of the entity if it does not address the interests of other stakeholders as the intangible benefits, such as reputation.[19] It was also argued by McBarnet that intangible benefits, such as branding and reputation, can cause risk to the long-term creation of the entity.[20] As evidenced in corporate literature, stakeholders' contribution is named as 'firm specific investment' by commentators, such as Parkinson and Kelly. They described stakeholders' investments as 'firm-specific' attributes, which range from 'hard' skills investment such as the ability to operate the customised machinery to 'soft' investments

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[15] See (n 2) Elkington, 'Triple Bottom Line'at 74 and 78.

[16] See (n 10) Keay at 695.
[17] David E. Schrader, 'The Corporation and Profits' [1987] Journal of Business Ethics 589 at 599.
[18] See (n 10) Keay at 692 to 693
[19] Ibid 694
[20] Doreen McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law: the New Corporate Accountability' Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) at 16 to 17

including knowledge or language, or developing customer-specific production techniques to suppliers.[21]

Stakeholders play an important role in corporate development rather than mere instruments and therefore well deserve protection in corporate governance. As Lim noted, stakeholders, who contribute to the longevity of an entity, should be substantively catered to or protected in the new corporate objective and decision-making.[22] In the sustainable value creation concept, Sjåfjell argued that while pursing the profits for the company, it is crucial to address the interests of shareholders and other stakeholders to sustain the value creation for the entity in the long term.[23] Stakeholders, as significant contributors, should never be forgotten or subject to shareholders.

Furthermore, stakeholder protection is embodied in the new corporate purpose not only because they contribute to business development but also because their ways of living can be affected by companies. According to Andrew Johnston, corporate activities can cause negative external impacts, which are understood as harm to stakeholders, to stakeholders' life but bear no cost.[24] Ross Grantham argued that:

> A paradigm example of externalisation is the company that emits pollution into the atmosphere from its factor… the company is able to reduce its costs of production, and thereby increase its profits, by not buying air-cleaning equipment. Instead, it passes that portion of the cost of production

[21] Gavin Kelly and John Parkinson, 'The Conceptual Foundations of the Company: A Pluralist Approach' in John Parkinson and other authors, *The Political Economy of the Company* (Hart Publishing 2000) at 124 to 126.

[22] Ernest Lim, 'Corporate Governance and Company Law: The Disconnect between Accountability and Directors' Duties' [2017] Hong Kong L.J.733 at 745 and 746. (Lim argued that during promoting the long-term business interest, directors are recommended by the EMS theory to give up profitable project with questionable labour or human rights. This shows the actual protection on human rights interests.)

[23] Beate Sjåfjell, Benjamin J. Richardson, 'The future of company law and sustainability' in Beate Sjåfjell, Benjamin J. Richardson(eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015) at 326,327

[24] Andrew Johnston, 'Governing Externalities: The Potential of Reflexive Corporate Social Responsibility' [2012] Centre for Business Research, University of Cambridge, Working Paper No. 436, 1 at 1 to 3;

represented by the costs of cleaning the air onto the community living downwind of the factory. The community then bears these costs as an impact on their health and reduced quality of life. [25]

The pollution example suggests that the corporate activity can cause external adverse effects to the wider society and environment, which can cause harm to stakeholders' life.

The negative external impacts can happen to the stakeholders/people in a wider society (local community in the example) as well as those stakeholders who make contribution to corporate activities, including customers and employees. Looking back corporate scandals in Chapter 3 (Section 4), employees and pensioners could suffer a lot due to careless corporate governance. Another example Foxconn (China) can be marked as another 'sweatshop' example which involved human rights issues. According to a research study, there was a high possibility of suicide occurrence among the low-skilled workers in the company.[26] The workers suffered a lot in Foxconn, especially in 24-hour non-stop assembly lines.[27] A considerable number of workers had great concern on the protection of their health and safety: more than 43 percent of the workers reported that they had experienced or witnessed an accident.[28] It is suggested in the study that the extreme amount of work pressure seems to be the cause for the workers to commit suicide. The sweatshop work environment could lead to damage to those workers' physical and mental integrity. Likewise, corporate activities can cause negative external impacts on LGBT stakeholders/people, allowing heterosexual superiority and hurting LGBT people's dignity, as argued in Chapter 2. Therefore, stakeholder protection ought to be an exact/substantive objective in corporate governance.

This substantive stakeholder protection is reinforced by the sustainable value creation approach. According to Sjåfjell, the company must go beyond just the minimal level which

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[25] Ross Grantham, 'People, Plant, and Profits: Re-Purposing the Company' [2021] Company and Securities Law Journal 250 at 266. (This echoes importance of environmental protection for people in a wider society in Chapter 3 Section 4)
[26] Lei Guo, Shih-Hsien Hsu, Avery Holton et al, 'A case study of the Foxconn suicides: An international perspective to framing the sweatshop issue' [2012] the International Communication Gazette 484 at 484.
[27] Jeff Hoi, Yan Yeung et al, 'Foxconn and the Serial Suicide Crisis (Case)' Operations Management Education Review [2014] 1 at 16
[28] Ibid at 16.

entails 'do no harm' business to the wider society.[29] She continued that the business of the company needs to be designed to contribute to secure the interests of wider society through corporate activity.[30] The 'secure' and 'contribute' have no tendency to suggest that the company should work as a government or local authority. Nor does it suggest that the company should work for the 'business case' in which the company internalise the adverse effects *merely* to promote the value creation of the business. In fact, the new corporate purpose suggests that the company must internalise the potential adverse effects as a substantive 'social agenda' in corporate governance, including not only 'do no harm' but also proactively tackling or prohibiting the potential adverse effects to the wider society, including people and the environment.[31]

This approach is underpinned by the 'planetary boundaries' theory, which was put forward by Rockström and others in 2009. According to Steffen and others, human production and consumption is placing us in increasingly high risk in relation to at least four boundaries: climate change, biosphere integrity (genetic diversity, with uncertainty concerning the boundary for functional diversity), land system change, and biogeochemical cycles (phosphorus and nitrogen).[32] The planetary boundaries theory can be summarised as 'estimating a safe operating space for humanity with respect to the functioning of the Earth System'.[33] The Earth System is interpreted as 'the coupled human-environmental systems'.[34] The planetary boundaries theory aims to ensure that human activity, including corporate activity, 'set[s] at a "safe" distance from a dangerous level (for processes without known thresholds at the continental to global scales) or from its global threshold'.[35] The planetary

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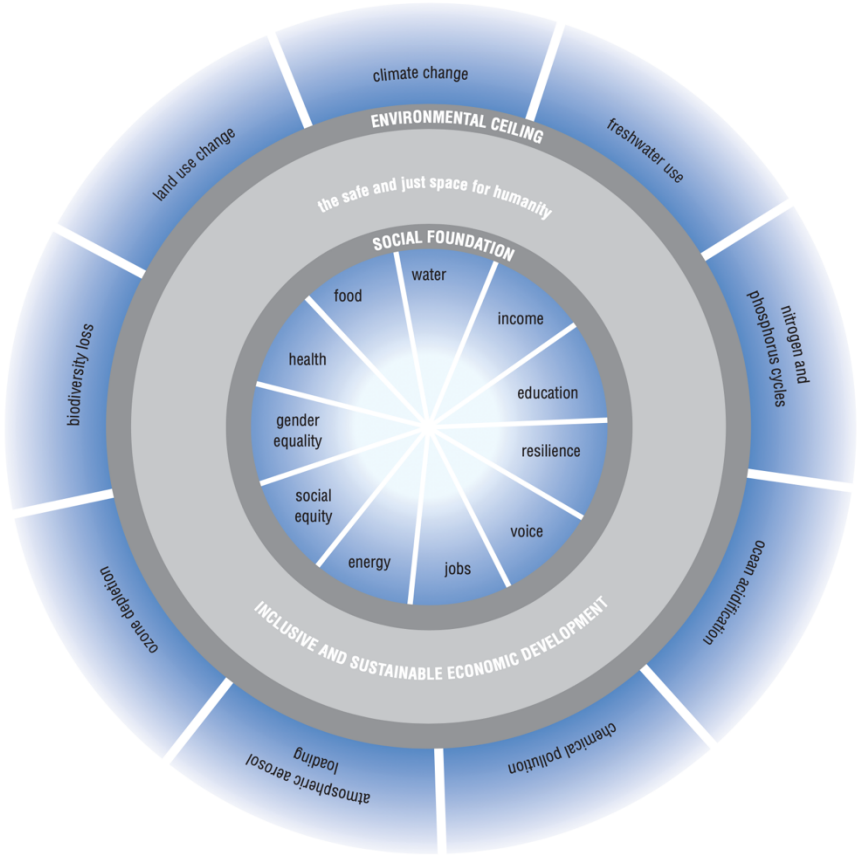
[29] Beate Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries— Reforming Corporate Purpose and Duties of the Corporate Board' [2020] University of Oslo Faculty of Law Legal Studies Research Paper Series 1 at 15.
[30] Ibid
[31] Andrew Johnston, Kenneth Amaeshi, Emmanuel Adegbite, Onyeka Osuji, 'Corporate Social Responsibility as Obligated Internalisation of Social Costs' [2021] Journal of Business Ethics 39 at 43.
[32] Will Steffen et al., 'Planetary Boundaries: Guiding human development on a changing planet' [2015] Science736 at 737.
[33] Johan Rockström, Will Steffen, Kevin Noone et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' [2009] Ecology and Society 32 at 34.
[34] ibid at 35.
[35] ibid at 35.

boundaries theory reinforces substantive environmental protection, including identifying, preventing and mitigating risks/issues, in corporate governance.

Figure 6.1. **Social and planetary boundaries**



Source: K. Raworth (2012), "A safe and just space for humanity: Can we live within the doughnut?" discussion paper, Oxfam, Oxford, based on J. Rockström et al. (2009), "A safe operating space for humanity", *Nature*, Vol. 461, pp. 472-475.

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As it can be seen in the picture, the planetary boundaries theory was initially focused on environmental interests, but the ultimate purpose or value of the theory is to protect people/human interests. Kate Raworth combined with the planetary boundaries theory and developed it as the social foundation of 'safe and just pathways to humanity'.[37] According to Raworth, the planetary boundaries theory proposes that 'humanity should place [protection]

[36] Melissa Leach, Kate Raworth and Johan Rockströ, 'Between social and planetary boundaries: Navigating pathways in the safe and just space for humanity' in International Social Science Council, *World Social Science Report: Changing Global Environments* (UESCO publishing, 2013) at 86 < https://read.oecd-ilibrary.org/social-issues-migration-health/world-social-science-report-2013_9789264203419-en#page1 > (Accessed on 24th July 2022).
[37] Ibid at 84.

on critical Earth systems in order to protect human well-being'.[38] This suggests the classical reason why environment needs to be protected by corporate activity is that it would ultimately protect human interests. The philosophical word 'humanity' or 'humanness' is associated with having access to the resources to meet their human rights or living ways, such as food, water, health and energy.[39] According to Sjåfjell, the limits from the planetary boundaries theory on the corporate activity can be considered as prohibiting the threat to human rights and living modes.[40] Therefore, the planetary boundaries theory, which imposes the limits on corporate activity and adverse effects, is emphasised on addressing stakeholders' human rights and interest issues in the company and wider society, including LGBT stakeholders/people's dignity.

4.1.C. Provisional conclusion

The new corporate purpose shifts away from profit maximisation and shareholder primacy. It is divided into three aspects: 1) the long-term profit aggregation for the entity and a profit-sacrificing approach 2) shareholders' wealth promotion 3) a substantive social agenda for other stakeholders' interests, including human rights and environmental protection. In contrast to the ESV principle, as argued in Chapter 3, the significance of this new purpose is to yield substantive protection on other stakeholders' interests so as to contribute to realising the human interests that they want to unfold through corporate activities and life. But this new purpose is not the end yet. While the new objective sheds light on wider 'tasks' on corporate directors' duties, it does not yet clarify how directors exercise the power to achieve this purpose. Section 2 will merge this objective with corporate responsibilities.

Section 2: Transformative Corporate Social Responsibility approach (4.2)

Section 2 will present the transformative CSR approach, particularly reflecting how directors' duties are widened to achieve substantive stakeholder protection mentioned in the new

[38] ibid at 85
[39] ibid at 85
[40] Beate Sjåfjell and Mark B. Taylor, 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' [2015] University of Oslo Faculty of Law Legal Studies Research Paper Series 1 at 26.

corporate purpose. Transformative CSR will play the role in opening a pathway to 'invite' LGBT protection in corporate governance.

4.2.A. The brief understanding of corporate social responsibility

Corporate Social Responsibility or social responsibility has been discussed in many international corporate governance codes and guidelines. The Renewed Strategy 2011-14 in European Commission stipulated the definition of CSR. CSR encompasses the company with 'the responsibility of enterprises for their impacts on society'.[41] It continues to stipulate that 'to fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations'. [42] From the EU Strategy, CSR can be understood as the social responsibility of the company to consider many social imperatives or perspectives of people which may be relevant with the company or corporate activity. In 2023, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the OECD Guidelines) listed some examples of social imperatives, including but not limited to 'health, safety and labour'.[43] From the OECD Guidelines, the company [enterprise] should 'contribute to economic, environmental and social progress' to achieve 'sustainable corporate development'.[44] The EU Strategy also presents the sustainable corporate purpose that the company should 'maximise the creation of shared value for their owners/shareholders and for their other stakeholders and society at large' but also address 'the possible adverse impacts' in relation to different social imperatives in the wider society. According to Lawrence Mitchell, corporate responsibility should be focused on 'investing for the future' but also 'caring that profits are made responsibly and morally' for the business and society.[45]

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[41]EU Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681> at 5 (Accessed on 20th July 2022).
[42] ibid at 6.
[43] OECD iLibrary (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct < https://mneguidelines.oecd.org/mneguidelines/#:~:text=The%202023%20edition%20of%20the,National%20Contact%20Points%20for%20Responsible > (Accessed on 2nd May 2024) at 14.
[44] Ibid at 14.
[45] Lawrence Mitchell, *Corporate Irresponsibility: America's Newest Export* (Yale University Press, 2001) at 3.

In my thesis, CSR is defined as corporate 'social duties',[46] substantively tackling[47] disturbance on stakeholder's social and financial interests, which is provoked by corporate activities; it has the ultimate aim to preserve human interests and rights in the wider society. CSR is a promising approach to realising the new corporate purpose: it can advance the position of substantive stakeholder protection and make corporate governance go further than shareholder primacy.

4.2.B. The elements of CSR

4.2.B.1. Social imperatives

CSR attempts to address social imperatives on which a company can have adverse effects through corporate activities in society. The social imperatives are associated with stakeholders' human needs, claims and interests in the society. According to Scherer and others, the scope of 'social imperatives' which can be affected by corporate activity seems to be wide:

> This includes but is not limited to, corporate contributions to **different areas of governance**, such as public health, education, public infrastructure, the enforcement of social and environmental standards along supply chains or the fight against global warming, corruption, discrimination or inequality…[48]

On this basis, different social imperatives suggest that corporate responsibility should contribute to protecting a wide range of relevant interests or needs of stakeholders. In other words, CSR delivers that corporate governance should treat stakeholders as actual humans/people in society.

Tackling social imperatives is reinforced by the classical theoretical framework *The Pyramid of Corporate Social Responsibility* by Archie B. Carroll. According to Carroll, corporate responsibility can be developed into a pyramid of four perspectives, including 'the economic,

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[46] Tom Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) at 534 to 535.
[47] See (n 41) A renewed EU strategy at 6: 'tackling' includes 'preventing and mitigating'.
[48] Andreas G. Scherer, Andreas Rasche, Guido Palazzo, & Andre Spicer, 'Managing for political corporate social responsibility: New challenges and directions for PCSR 2.0' [2016] Journal of Management Studies, 53(3), 273 at 276.

legal, ethical, and discretionary expectations that society has of organisations at a given point in time'.[49] The 'ethical responsibility' can be adopted as the theoretical underpinning to reinforce the consideration of social imperatives in my CSR definition.

The ethical responsibilities of CSR concept are summarised as 'embracing newly emerging values and norms society expects business to meet, even though such values and norms may reflect a higher standard of performance than that currently required by law'.[50] Carroll argued that 'it is important to perform in a manner consistent with expectations of societal mores and ethical norms' as well as 'to prevent ethical norms from being compromised in order to achieve corporate goals.'[51] He interpreted the 'ethical' term into the 'moral rights' of other stakeholders, including 'consumers, employees and local community', as being 'just and fair'.[52] This ethical responsibilities of CSR suggest internalising stakeholders' different rights required by law into corporate governance, aiming to meet stakeholders' different social imperatives.

Learning from Carroll, stakeholder's interests should be understood as further than only financial/economic interests; CSR requires directors to show the ethics of care to stakeholders: paying attention to stakeholders' physical and mental concerns and alleviating their sufferings caused by corporate activities. This sense of 'care' is reinforced by other commentators when discussing CSR. According to Epstein, CSR concerns '*specific issues or problems* which (by some normative standard) have beneficial rather than adverse effects upon pertinent corporate stakeholders'.[53] According to Frederick, the 'specific issues or problems' are associated with many social imperatives of people, including but not limited to 'environmental pollution, employment discrimination, consumer abuses, employee health and safety, quality of work life, deterioration of urban life, and questionable/abusiveness practices of multinational corporations'.[54] The UN's Sustainable Development Goals (SDG) can reflect a

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[49] Archie B. Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' [1991] Business Horizons 39 at 40.
[50] ibid at 41
[51] ibid at 41 and 42
[52] ibid at 41.
[53] Edwin M. Epstein, 'The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness'[1987] California Management Review 29, 99 at 104.
[54] William C. Frederick, *Corporation Be Good: The Story of Corporate Social Responsibility* (IN: Dog Ear Publishing, 2006) at 58

number of social imperatives of people as the practical example, including but not limited to good health and well-being, quality education, gender equality, decent work and economic growth.[55]

The emphasis on stakeholders' social imperatives leads CSR to the contemporary notion: when the company practices social responsibility, the company should consider the 'social and environmental concerns' as tackling the social imperatives to ultimately preserve human rights and interests as the 'end goal'.[56] In other words, CSR plays a role in making people's life better; it ensures that no one's interests are missing in corporate governance. Thus, CSR should pay attention to LGBT stakeholders' interests and work towards minimising harms to LGBT people in corporate life.

4.2.B.2. The discussion of 'stakeholders'

The 'stakeholders' or 'other stakeholders' are the focal groups in CSR discussion. As was discussed, Carroll argued that CSR is emphasised on the moral rights of other (non-shareholding) stakeholders. Jones defined CSR as a corporate obligation to 'constituent groups in society other than stockholders/shareholders'.[57] He continued that 'the obligation is a broad one, extending beyond the traditional duty to shareholders to other societal groups such as customers, employees, suppliers, and neighbouring communities'.[58]

Nonetheless, 'other stakeholders' seem to have no common definition in corporate literature. From shareholder primacy, the nexus of contracts suggests that 'other stakeholders' are associated with contracting groups or participants who are involved in the corporate activity.

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[55] United Nations Department of Economic and Social Affairs, the 17 Sustainable Development Goals (SDGs) < https://sdgs.un.org/goals > (Accessed on 20th July, 2022)
[56] See (n 46) Tom Campbell at 551 to 558; Janet Dine, *Companies, International Trade and Human Rights* (CUP, 2005) at 223 and 226 to 228; Halina Ward, 'Corporate social responsibility in law and policy' in Nina Boeger, Rachel Murray and Charlotte Villiers (eds), *Perspective on Corporate Social Responsibility* (Edward Elgar, 2008) at 9 to 11; Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' [2015] Journal of Human Rights 14 237 at 239; Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practice Across Government, Law and Business* (Edward Elgar, 2010) at 35 to 37.
[57] Thomas M. Jones, 'Corporate Social Responsibility Revisited, Redefined' [1980] California Management Review 59 at 59 to 60.
[58] ibid at 59 to 60.

From the new corporate purpose discussion, Triple Bottom Line in relation to 'social bottom line' mentioned the 'human capital', which suggests that other stakeholders are people who can contribute to the corporate development. Hillman and Keim argued that other stakeholders 'bear some form of risk as a result of having invested some form of capital, human or financial, something of value, in a firm'. [59] Thus, corporate participants or constituents, who can affect corporate development, are other stakeholders.[60]

Furthermore, to combine with social foundation and planetary boundaries theories, those people, who may not contribute to the corporate activity but are affected by the corporate activity or the company, still fall into the category of other stakeholders in my discussion. Carroll defined 'stakeholders' into three categories, including 'those who have ownership, those who have a right or claim on the corporation (and this could be legal or moral), and those who assert an interest in the outcome of the corporation's business.[61] People whose rights are affected by the company (e.g. the right to adequate living standard) are rights-holders of the company.[62]

Thus, I would define 'other stakeholders' from the wider perspective: other stakeholders are not only the certain group of people who can be affected or affect the corporate activity but also people who can be affected by the company in the wider society. The focal groups/other stakeholders of the CSR include internal stakeholders and external stakeholders. [63] This

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[59]Amy J. Hillman, Gerald D. Keim, 'Shareholder value, stakeholder management, and social issues: What's the bottom line?' [2001] 22, 125 at 126.

[60] E.g. cases, such as *Hutton v West Cork Railway Company* (1883) 23 Ch. D. 654 and *Parke v Daily News Ltd* [1962] Ch 927, show that employees are stakeholders who can contribute to corporate profits and long-term value of the company.

[61]Ann Buchholtz and Archie B. Carroll, *Business & Society: Ethics and Stakeholder Management* (South Western ,1989) at 56 to 57.

[62] E.g. in cases like *Winkworth v. Edward Baron Development Co Ltd* [1986] 1 WLR 1512, creditors' interests are protected over shareholders' interests when a company is at verge of insolvency. Creditors are examples of showing that stakeholders' interests can be affected by corporate entity development; in Chapter 3, I have discussed many environmental degradation and corporate governance in Section 4. The people in the local society who were affected by corporate activities are certainly rights-holders or stakeholders to the company.

[63] This internal and external stakeholders are reflected in the s.172 of CA 2006. When endorsing 'environment' and 'local communities', s.172 suggests entailing external stakeholders in UK Company law.

definition introduces LGBT people, including LGBT employees/customers but also LGBT people in UK society, as stakeholders to companies.

4.2.C Transformative CSR approach: beyond CSR for business case

4.2.C.1. Ameliorative CSR nature

CSR can be divided into two categories: ameliorative CSR and transformative CSR.[64] Ameliorative CSR can be interpreted as 'business case' for CSR, which means that corporate social responsibility is adopted to increase the corporate value or shareholder wealth maximisation.[65] Ameliorative CSR is similar to shareholder primacy that utilises other stakeholders' interests consideration as the 'means' or 'instrument' to generate profits to shareholders' wealth. Ameliorative CSR can be merely focused on the profit-maximisation in corporate governance. From the description, ameliorative CSR can be only emphasised on achieving the corporate value generation and shareholders' interests maximisation by building up the 'good' relationships with different other stakeholders. Although shareholder primacy does not include any social duty or responsibility, it seems that the company can still adopt ameliorative CSR to aim for maximising corporate profits, as was argued by Milton Friedman in Chapter 3 (Section 1). According to McBarnet, CSR becomes the public relations for 'good business' and is driven by market and profits.[66] Bakan argued that the 'business case' makes CSR become a tool to do good for the business or profits and there seems to be no space to ' avoid causing harm to people and the environment, or to work to advance the public good in ways that are unrelated to their own self-interest'.[67] Ameliorative CSR can lead to the situation in which corporate responsibility plays 'too strong' an economic role for profits-

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[64] Uchechukwu Nwoke, Collins Chikodi Ajibo & Timothy Okechukwu Umahi, 'Neoliberal Shareholder Value and the Re-Privatization of Corporations: The Disengagement of "Transformative" Corporate Social Responsibility?, INT'l J.L. & MGMT. [2018] 60 1354 at 1356 to 1357.

[65] Archie B. Carroll, 'A History of Corporate Social Responsibility: Concepts and Practices' in Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald S. Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP ,2008) at 41 to 42; Paddy Ireland and Renginee G. Pillay, 'Corporate Social Responsibility in a Neoliberal Age' in Peter Utting and Jose C. Marques (eds) '*Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development*?' (Springer, 2009) at 78.

[66] See (n 46) Doreen McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law at 17

[67] Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004)48 and 98.

orientation, including shareholders' interests, but plays 'too weak' a role for concerns over social imperatives, including environmental degradation and human rights issues.[68] This so-called CSR or 'sustainable relationships' does not fulfil the new corporate purpose. In fact, ameliorative CSR cannot achieve to take stakeholder protection as a substantive goal in the new corporate objective.

4.2.C.2. Transformative CSR approach and profit-sacrificing nature

In my thesis, I would argue that CSR should be understood in the sense of transformative CSR. Transformative CSR is seen as the substantive 'social duty/accountability' practice of the company which contributes to preserving the social imperatives of people or other stakeholders in the wider society. Transformative CSR disengages with the notion 'market as the driver for corporate responsibility'. According to Pillay, CSR 'has been promoted as a key mechanism for tempering corporate power and shaping corporate behaviour in ways that will contribute to sustainable development'.[69] The transformative CSR approach conveys profit-sacrificing nature, which is contrasted from CSR for profit-maximisation (ameliorative CSR).

The significance of the transformative CSR approach is that directors need to 'slow down' some profits generation and safeguard stakeholders' interests when there is potential of posing threat to stakeholders, including internal stakeholders and external stakeholders, in corporate activities and wider society. Transformative CSR plays a role in preventing the circumstance where stakeholder protection is merely used in an instrumental way to promote profit-generation and shareholder wealth creation. This approach intends to take the stakeholder protection in the new corporate purpose very seriously. For instance, Sjåfjell argued that the agency theory can be widened from 'principals – shareholders' to 'principals – the company, shareholders and other stakeholders in wider society'.[70] She attempted to argue that the agents of the company should have more than one principal group on the basis

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[68] Cynthia A. Williams, 'Corporate Social Responsibility and Corporate Governance' in Jeffrey N. Gordon & Wolf-Georg Ringe (Eds), Oxford Handbook of Corporate Law and Governance (OUP, 2018) at 4.

[69] Renginee Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development the Case of Mauritius* (Routledge Publishing, 2015) at 261.

[70] Beate Sjåfjell, 'Redefining Agency Theory to Internalize Environmental Product Externalities. A tentative proposal based on life- cycle thinking' [2017] 1 at 10 to 11.

of the new corporate purpose.[71] From the redefined agency relationship, I share with Sjåfjell's viewpoint and argue that corporate responsibility can be divided into profits responsibility and social responsibility.

The profits-generation responsibility is associated with two agency relationships, including the corporate entity and shareholders. First, the directors (agents) intend to address the interests of the corporate entity as the principal.[72] As was discussed in Section 1, the interest of the corporate entity is emphasised on the perspective of long-term value creation for the company. The corporate responsibility ensures the long-term survival and economic growth of the corporate entity in society. This is only emphasised on generating profits for the separate corporate entity from its shareholders.

Secondly, in this profits-generation responsibility, directors intend to address the interests of shareholders.[73] Although shareholders are not the only principal groups, there is no indication that shareholders' interests should be neglected. In the orthodox agency theory, corporate responsibility is seen as aggregating much money as possible to cater to shareholders' interests, including long-term or short-term/quick monetary desires.[74] It seems that there is no 'entity interest' in the orthodox agency theory. In contrast to it, the new corporate purpose suggests that the shareholder wealth generation does exist but cannot be interchangeable with the long-term value creation of the entity. According to Sjåfjell, the legitimate interests of the shareholders (whoever they are) are based on the assumption that the company is run well in a sustainable, long-term perspective and it provides for returns to shareholders based on the profit of the company.[75] This intends to argue that shareholders' interests should be subject to the entity interests in corporate responsibility. Both shareholders and the entity have the common area of interests in profits generation. The shareholders on a general

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[71] ibid at 16 to 17.
[72] Beate Sjåfjell, 'Sustainability and Law and Economics: An Interdisciplinary Redefinition of Agency Theory' in Beate Sjåfjell, Roseanne Russell and Maja van der Velden (eds), *Interdisciplinary Research for Sustainable Business: Perspectives of Women Business Scholars* (Springer, in print 2022) at 15. (Not yet published)
[73] ibid at 16
[74] Linn Anker-Sørensen, 'Financial Engineering as an Additional Veil for the Corporate Group' [2016] University of Oslo Faculty of Law Legal Studies Research Paper Series 13, 158 at 166.
[75] See (n 72) at 17

analytical level must be 'fictional shareholders',[76] where shareholders are mainly investors and they hold the interests to the increased financial performance of the entity (but do not own all of profits). The economic interests of shareholders and the entity are vested in corporate responsibility.

Moreover, the redefined agency theory reinforces introducing transformative CSR approach to widen the corporate responsibility to address other stakeholders' social imperatives in the wider society. The third agency relationship in the redefined agency theory is between the directors and the contractual stakeholders to the company.[77] This agency relationship can be considered as protecting interests of different stakeholders who can affect the corporate activity. This redefined agency relationship deals with economic interests, such as creditors and bondholders, but also the social imperatives of other stakeholders, such as work environment and conditions. According to Novitz, with the global economy leading to an increase in migration, including to find employment or just to survive, migrant workers' particular vulnerability requires recognition based on dangers of exploitation and abuse of human rights at work.[78] Transformative CSR will ensure that human rights of participants, such as employees/workers, are well protected.

As argued before, contractual participants are not the only groups of other stakeholders. The fourth agency relationship is between the directors and the stakeholders/people and environment in the wider society.[79] How to ensure that corporate decision-makers act thoughtfully and appropriately as agents for people and the environment in the wider society as principals is arguably the most pervasive and crucial issue of modern corporate law.[80] Transformative CSR will also ensure that a company plays a role in benefiting people's life in society.

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[76] Gregory Scott Crespi, 'Maximizing the Wealth of Fictional Shareholders: Which Fiction Should Directors Embrace' J. CORP. L. [2007] 32, 381 at 387.
[77] See (n 72) at 18
[78] Tonia Novitz, 'Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks' in Diamond Ashiagbor (ed) Re-Imagining Labour Law for Development Informal Work in the Global North and South (Hart Publishing, 2018) at 196 to 198.
[79] See (n 72) at 19
[80] Ibid

Profits-generation responsibility and transformative CSR are both included in corporate responsibility. I would argue that there is the symmetry between the two types of responsibilities. It is reinforced by commentators that the social responsibility to the wider society needs to be taken seriously as profits responsibility.[81] From shareholder primacy, shareholders are empowered to influence the corporate management for their interests through shareholder involvement and monitoring.[82] From the new corporate purpose, although profits generation for the entity and shareholders is a key responsibility, transformative CSR is no longer subject to the profits-generation responsibility. In fact, in order to ensure corporate activities within in planetary boundaries and social foundation, transformative CSR facilitates directors to involve stakeholder in decision-making and work towards providing a good corporate environment/culture where stakeholders can fulfil their interests; this aims to sufficiently protect stakeholders as actual rights-holders, rather than pursue profits-generation. For instance, Taylor argued that there is potential in the international trend of lawsuits against parent companies and lead companies of global value chains.[83] Another example is that in a study undertaken for the European Parliament's Sub-Committee on Human Rights in 2019, recommendations were made to revise European procedural rules to make it accessible and clear in which cases alleged victims (stakeholders) of human rights violations may be brought against European parent companies.[84] Those corporate social litigation rules suggest that modern corporate governance regulatory frameworks are seriously embodying transformative CSR and promoting stakeholder protection.

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[81] Beate Sjåfjell, 'Sustainable Value Creation Within Planetary Boundaries— Reforming Corporate Purpose and Duties of the Corporate Board' [2020] University of Oslo Faculty of Law Legal Studies Research Paper Series 1 at 14; Iain MacNeil, Irene-marié Esser, 'From a Financial to an Entity Model of ESG' [2022] European Business Organization Law Review 9 at 31 and 32.

[82] Stephen Bottomley, *The Responsible Shareholder* (EE, 2021) at 37 to 39. (Shareholders can exercise their voting rights to influence corporate management for their interests)

[83] Mark B. Taylor, 'Litigating Sustainability - towards a taxonomy of counter corporate litigation' [2020] University of Oslo Faculty of Law Legal Studies Research Paper Series at 33.

[84] the European Parliament, Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries 2019 at 107 to 115. <www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf> (accessed on 19 July 2022)

4.2.D. Transformative CSR approach, European and UK corporate governance law

4.2.D.1. Transformative CSR and EU Corporate Governance legal developments

The new corporate purpose and transformative CSR approach have been reflected in EU corporate governance legal developments. In 2020, the EU Commission published the Sustainable Corporate Governance Initiative:

> The initiative aims to ensure that sustainability is further embedded into the corporate governance framework with a view to align better the long-term interests of management, **shareholders**, **stakeholders and society**. It aims at improving the framework to **incentivise corporate boards to integrate properly stakeholder interests**, sustainability risks, dependencies, opportunities and adverse impacts into strategies, decisions and oversight. It would serve the following specific objectives: help companies' directors to **establish longer-term time horizons in corporate decision-making** and withstand short-term pressures, strengthen the resilience and long-term performance of companies through sustainable business models and help reducing adverse impacts.[85]

Under the initiative, corporate purpose means going beyond shareholder primacy or profit-maximisation but include the interests of shareholders, other stakeholders in society, and the longevity of the corporate entity. It conveys a more progressive corporate governance model (than the UK): stakeholders' interests are no longer subject to shareholders' interests in directors' power and duties. According to Mähönen, the EU Initiative reflects the sustainable value creation within the planetary boundaries, redefining 'the interests of company' for all people in society.[86] Furthermore, the new corporate purpose embodied in this EU initiative encourages transformative CSR in corporate governance regulatory frameworks. In the extracted text, the EU initiative points out protecting stakeholders as a substantive task in decision-making; this aligns with the equal level of importance between shareholders and other stakeholders in the eyes of directors, as conveyed by the transformative CSR approach.

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[85] EU Commission (2020), EU Sustainable Corporate Governance Initiative < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en > (Accessed on the 5th May 2024)

[86] Jukka Mähönen, 'Shareholder Activism: A Driver or an Obstacle to Sustainable Value Creation?' in Charlotte Villiers, Beate Sjåfjell and Georgina Tsagas (eds), *Sustainable Value Creation in the European Union* (CUP, 2022) at 180.

According to Fannon and Boland, the EU initiative represents a significant step that the European-style CSR movement has made; it can be 'praised for both its responsiveness to the evolving nature of the corporation and its recognition of the corporation's diverse constituent groups(stakeholders)',[87] positively impacting how directors should distribute the fiduciary duties and responsibilities in corporate governance.[88] The reforms of corporate governance codes in European countries show the evidence that the EU initiative introduced the transformative CSR approach in regulating directors' responsibilities. In the Austrian Code of Corporate Governance 2023, it is provided with the aim to establish a system of management and control of companies that is accountable to 'creating sustainable, long-term value', serving the needs of all parties whose well-being depends on the success of the enterprise.[89] In the French Corporate Governance Code 2022, it is provided with the role of the board to act in the 'corporate interest', promoting 'long- term value creation by considering the social and environmental aspects of its activities'.[90] The German Corporate Governance Code 20222 highlights 'the obligation of Management Boards and Supervisory Boards to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders)' in order to ensure 'the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests)'.[91] These codes after the EU

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[87] Irene Lynch Fannon and Michael James Boland, 'The Corporation and the EU Social Market Economy: A Renewed Commitment' in Charlotte Villiers, Beate Sjåfjell and Georgina Tsagas (eds), *Sustainable Value Creation in the European Union* (CUP, 2022) at 75 to 76.

[88] As Sjåfjell and Johnston argued, the EU Initiative can have impact on shifting the nature of fiduciary duty from only financial consideration to environmental consideration, which can be extend to both human rights and environmental impacts on stakeholders in society. See Andrew Johnston and Beate Sjåfjell, 'The EU's Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar, 2020) at 405.

[89] Austrian Working Group for Corporate Governance, Austrian Code of Corporate Governance (2023)<https://www.corporate-governance.at/uploads/u/corpgov/files/code/corporate-governance-code-012023.pdf >at 9>

[90] AFEP, Corporate Governance Code of Listed Corporations (2022)< https://www.ecgi.global/sites/default/files/codes/documents/2022_code-afep-medef-version-de-decembre-2022_english.pdf > at 8

[91] Regierungskommission Deutscher Corporate Governance Kodex, German Corporate Governance Code (2022) <https://www.dcgk.de//files/dcgk/usercontent/en/download/code/220627_German_Corporate_Governance_Code_2022.pdf > at 2.

initiative demonstrate directors' 'new accountability' prescribed by the transformative CSR approach – stakeholders' interests must be taken on board.

The embodiment of the new corporate purpose and transformative CSR in those corporate governance codes can encourage changes in company law. In the context of EU corporate governance, professor Beate Sjåfjell, as a key commentator for EU company law, proposed that *sustainable value creation within planetary boundaries* should be defined as an overarching purpose for European companies (or more broadly 'undertakings') in a new chapter of the EU Company Law Directive of 2017.[92] According to her explanation, the overarching purpose should be understood as creating values for the undertaking/corporate entity, while protecting the interests of shareholders and stakeholders in a wider society, which resonates with the new corporate purpose as argued before. She (and Tsagas) further proposed that there should be legislative reform on the core directors' duties in EU company law, ensuring that directors are obligated to contribute to the overarching corporate purpose in corporate governance.[93] Professor Sjåfjell's proposal reinforced my transformative CSR approach in directors' duties – the new corporate purpose needs to be manifested as in mandatory directors' duties in law. Her proposals in changes of EU company law are welcomed by many other legal commentators. In 2023, a number of corporate commentators, including herself, formulated a proposal for a reformed EU Corporate Governance in law. In this proposal, one key component is a properly formulated corporate purpose in company laws: 'A corporate purpose is the expression of the means by which a business can contribute solutions to societal and environmental problems. Corporate purpose should create value for both shareholders and stakeholders.'[94] This echoes professor Sjåfjell's overarching corporate

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[92] Beate Sjåfjell and Georgina Tsagas, 'Integrating Sustainable Value Creation in Corporate Governance: Company Law, Corporate Governance Codes and the Constitution of the Company' in Charlotte Villiers, Beate Sjåfjell and Georgina Tsagas (eds), *Sustainable Value Creation in the European Union* (CUP, 2022) at 220.
[93] Ibid at 221 and 222.

[94] Bruno Deffains, Xavier Dieux, Laurence Dors, Rodolphe Durand, Martin Fischer, Daniel Hurstel, Jukka t Mähönen, Colin Mayer, Renate Meyer, Anne-Christin Mittwoch, Guido Palazzo, Markus Scholz, Beate Sjåfjell, Jaap w. Winter, Rupert Younger, 'A European Corporate Governance Model: Integrating Corporate Purpose into Practice for A Better Society' [2023] Governance Centre for Firm's Sustainability (Paris) 1 at 14. While the formulated corporate purpose was not clearly located in EU company law, the commentators said that the proposed corporate governance principles are aligned with the prevailing company laws applied throughout Europe. [at 8] From this, we can find that the proposal

purpose. Another key component in this proposal is to increase the importance of the boards: 'company law should clarify that the duty of the board is to promote the interests of the company…in such a way that creates sustainable value and contributes to mitigating pressures on planetary boundaries'.[95] This reinforces professor Sjåfjell's argument in relation to locating the overarching corporate purpose in directors' legal obligations in company law.

4.2.D.2. European impacts on future UK Corporate Governance legal changes

The changes for embodying the new corporate purpose and transformative CSR concepts in European jurisdictions shed lights on reforming corporate purpose and directors' duties in UK corporate governance law. In 2018 to 2019, the Future of the Corporation Programme in British Academy, which was led by Professor Colin Mayer, generated a series of reports and intended to redefine the meanings of corporate purpose and directors' duties in UK corporate governance. According to the report Principles for Purposeful Business, a corporate purpose is the expression of the means by which a business can contribute solutions to not only shareholders' interests but also stakeholders' interests, addressing societal and environmental problems.[96] As UK corporate governance is considerably driven by shareholder primacy (as argued in Chapter 3), the programme laid more emphasis on redefining corporate purpose from the perspectives of stakeholder protection. This report recommended that UK Company law should require directors to articulate a purpose statement at the core of a company's articles of incorporation; this purpose statement should identify how the company will address social and environmental problems to bring about societal goals.[97] Furthermore, according to this report, in order to embody and achieve the corporate purpose statement, there was another recommendation on the reformulation of the s.172 of the Companies Act 2006: 'directors of companies must establish their company purposes, act in a way they consider most likely to promote the fulfilment of their purposes, and have regard to the

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is provided for the whole legal systems of corporate governance throughout Europe, including corporate laws and governance codes.

[95] Ibid at 14 to 15.
[96] British Academy (2019), Principles for Purposeful Business: How to Deliver the Framework for the Future of the Corporation < https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf > at 16.
[97] Ibid at 16 to 17.

consequences of any decision on the interests of shareholders and stakeholders in the firm'.[98] Similar to the proposals in European jurisdictions, the recommended corporate purpose by British Academy reinforces the new theoretical corporate purpose presented in Section 1; the recommended reformulation on the s.172 duty reinforces the transformative CSR approach – reshaping directors' duties in law to achieve the corporate purpose. Thus, proposed mechanisms and developments in European Corporate Governance law will inspire future specific proposals on UK Corporate Governance law followed by the British Academy's research.

Nevertheless, positive changes on UK Company law will not happen overnight. As witnessed in s.172 (1), the listed stakeholders are not given with legal standing; the only group which can have a right to bring proceedings in the case of an alleged breach of the s.172 duty are shareholders. As Rühmkorf argued that, with lacking teeth in terms of the enforcement of the interests of stakeholders, the practical effects of s.172 for the promotion of CSR are limited.[99] Likewise, Keay argued that 'there is certainly an enforcement problem with the provision'.[100] Also, as argued in Chapter 3 (Section 2), the s.172 duty was originally intended to require directors to promote the success of the company for both shareholders and stakeholders,[101] which could make it difficult to reformulate the duty in company law. In order to accelerate the progress of embodying the new corporate purpose in company law, European Commission drafted Corporate Sustainability Due Diligence Directive (CSDDD). The CSDDD draft introduces a new obligation for companies to consider their impacts on human rights and environment,

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[98] Ibid at 20

[99] Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chain* (EE, 2015) 1 at 49 to 50.

[100] Andrew Keay, The Duty to Promote the Success of the Company: Is it Fit for Purpose? [2010] University of Leeds School of Law, Centre for Business Law and Practice Working Paper, Available at SSRN < https://ssrn.com/abstract=1662411 > 1 at 36.

[101] For instance, commentators, such as Eva Micheler, argued that it would be wrong to conclude that directors are the agents of the shareholders in UK Company law. See Eva Micheler, *Company Law: A Real Entity Theory* (OUP, 2021) at 126. In *BTI 2014 LLC v Sequana SA*, Lady Arden explained the original aim of the s.172 duty – shareholders are not given absolute priority over stakeholders; when directors promote the success of the company for shareholders, it does not mean that they should entirely neglect other stakeholders' interests [2022] 3 W.L.R. 709 at paragraphs [332] and [386] (In fact, the s.172 does not work in this way, as argued in Chapter 3, Section 4).

aligning their business practice with international human rights law and environmental law.[102] Professor Sjåfjell said that 'law, by its very nature, must of course be interdisciplinary'.[103] EU Commission attempts to introduce an interdisciplinary legislation, embodying human rights and environment law in regulating corporate governance and practices. According to Neely and McCorquodale, the CSDDD shows the intention of including directors' duties as part of legislation on human rights and environmental due diligence.[104] Rather than immediately change company law, the Commission can be understood as introducing an interdisciplinary due diligence law (proposal), which reflects the new corporate purpose and transformative CSR discussion in this chapter, to gradually shift EU Corporate Governance law towards the ideal model as proposed. Learning from this process, rather than directly change the s.172 duty, I will model on this interdisciplinary due diligence duty and manifest the transformative CSR approach as a LGBT due diligence process (proposal) to address expressive harm to LGBT people, echoing the new corporate purpose. Following from the enforcement issues from s.172, I would introduce stakeholders to participate in the due diligence process to strengthen corporate compliance but also to introduce potential remedies. The proposal will be discussed in later chapters.

4.2.E. Provisional conclusion

CSR is a contested concept. My thesis is focused on transformative CSR: it conveys the key message that profit-generation needs to be sacrificed for the purpose of safeguarding stakeholders' interests in directors' duties. The approach well embodies and structures different perspectives of the new corporate purpose in corporate responsibilities: stakeholders' interests protection, including internal and external stakeholders, should never been subject to entity's interests and shareholder wealth creation, as evidenced in European Corporate Governance changes. In UK law, the transformative CSR approach can reinforce directors' duties moving towards and/or even beyond the original aim of the Enlightened Shareholder Value principle – an inclusive duty to shape the role of corporate governance in

[102] See (n 94) at 13.
[103] Beate Sjåfjell, 'Interdisciplinarising Legal Theory: Towards a Reconceptualisation of Business Law' [2020] University of Oslo Faculty of Law Legal Studies Research Paper Series 1 at 21.
[104] Robert McCorquodale & Stuart Neely, 'Directors duties and human rights impacts: a comparative approach' [2022] Journal of Corporate Law Studies 605 at 637.

mutually benefiting business and society at large. Transformative CSR should be a powerful theoretical approach to project progressive corporate governance in law.

Section 3: The social status of the company – foundation for the Transformative CSR approach (4.3)

To engage with corporate literature, this section attempts to argue for the *social status* of a company, providing the foundation for the transformative CSR approach in directors' duties. This section intends to weave transformative CSR with the social entity discussion in corporate developments, including legal and theoretical aspects.

4.3.A. The departure of the company from its shareholders – an independent entity

4.3.A.1. The Independent status

The company is an *independent* entity in society. The Real Entity theorist Otto von Gierke characterised a company a 'living organism' and 'a real person, with body and members and a will of its own'.[105] If companies really exist, company law should recognise a company as an independent entity and supply corporate personality.[106] In the UK, *Salomon v Salomon & Co Ltd* is a landmark[107] case for corporate legal personality and reinforced the independent status of a company. In the lower court, Vaughan Williams J held that the company was an agent for Mr Salomon.[108] The Court of Appeal observed that Aaron Salomon had set up the company in a 'mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act 1862'.[109] Lindley LJ held

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[105] FW Maitland, Introduction to Otto Gierke, (trans FW Maitland) Political Theory of the Middle Age (CUP 1900, reprinted Thoemmes Press in 1996) xxvi; Joshua S Getzler, 'Frederic William Maitland—Trust and Corporation' (2016) 35 University of Queensland Law Journal 171; David Gindis, 'From Fictions and Aggregates to Real Entities in the Theory of the Firm' [2009] Journal of Institutional Economics 25 at 37 to 45.
[106] John Lowry and Arad Reisberg, *Pettet's Company Law: Company Law and Corporate Finance* (4th edn, Pearson 2012) at 58.
[107] *Salomon v Salomon* [1896] AC 22; *Salomon* did not establish or create legal personality. The corporate legal personality had been recognised before *Salomon*, see the examples of case law: *Case of Sutton's Hospital* (1612) 77 ER 960; *Bligh v Brent* [1837] 160 ER 397, 408 ('[T]he individual members of a corporation are quite as distinct from the metaphysical body called "the corporation," as any others of his Majesty's subjects are.').
[108] Ibid 22.
[109] Ibid 37, 43, 44.

that six of the seven members 'were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done'.[110]

However, the House of Lords did not agree with the judges in the lower courts. The law required that a certain number of individuals need to participate in the formation process. But the law did not mean that all individuals have to make any other contribution, and it did not matter that six of the seven could be characterised as 'dummies' of the dominant shareholder.[111] In this case, there were 'seven actual living persons' who participated in setting up the company. Lord Halsbury stated that 'I am simply here dealing with the provisions of the statute and it seems to me to be essential to the artificial creation that the law should recognise only that *artificial existence*—quite apart from the motives or conduct of individual corporators'.[112] Also, Lord Macnaghten stated that:

> The company is at law **a different person altogether from the subscribers to the memorandum**; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, **the company is not in law the agent of the subscribers or trustee for them**.[113]

On this basis, a company is an independent entity from its shareholders under UK Company law. In *Prest v Petrodel* [114]Lord Neuberger endorsed the statement by Lord Halsbury LC where he said that a 'legally incorporated' company must be treated 'like any other independent person with its rights and liabilities appropriated to itself . . . whatever may have been the ideas or schemes of those who brought it into existence'.[115] This independent status, which

[110] Ibid 31.
[111] Lord Herschell stated that 'the statute . . . certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes'. Ibid at 45 to 46.
[112] Ibid at 30.
[113] Ibid at 51.
[114] [2013] 2 AC 415
[115] Ibid [66]

arises from the corporate legal personality in *Salomon*, is robust and can be described as an unyielding rock on which company law is constructed.[116]

The independent status makes it possible for a company to act autonomously.[117] According to Arthur Machen, a basic proposition of modern companies is that the company is an entity; it is deemed as a person.[118] In terms of the 'person', Salmond argued that 'persons are the substances of which rights and duties are the attributes'.[119] This personhood implies that a company is able to carry out business activities autonomously and interacts with other corporate entities or human individuals. As Watson noted, a legal person the company has the ability to enter into contracts and own property.[120] She continued that an artificial legal person comes into existence and legal capacity and accompanying rights and duties are resulting attributes.[121] The independent status of corporate entity, arising from legal personality, is the fundamental step from which to depart corporate objective and directors' duties required from shareholder primacy in corporate governance law.[122]

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[116] To look at the veil-lifting case law, the result is that, except in cases of fraud or sham or where the company is a mere facade, the corporate veil cannot be lifted. This shows the difficulty or reluctance of law to disregard the corporate legal personality. The difficulty to lift the corporate veil can encourage the practice of corporate autonomy in commercial activities. See examples: *Trustor AB v Smallbone* (No 2,) [2001] 1 WLR 1177 [23]; *Ben Hashem v Al Shayif* [2009] 1 FLR 115 [159], [160] and [163]; *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5 [128] and [145]; *Prest v Petrodel Resources Limited and others* [2013] UKSC 34 [106]; S. Ottolenghi, 'From Peeping behind the Corporate Veil, to Ignoring It Completely' [1990] The Modern Law Review 338 at 352; Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) at 74.

[117] Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) at 46.

[118] AW Machen, 'Corporate Personality' (1911) 24 Harvard Law Review 253, 258

[119] JW Salmond, Jurisprudence, or, The Theory of the Law, 2nd edn (Stevens and Haynes, 1907) 275.

[120] Susan Watson, 'Can the modern corporation operate sustainably?' in Beate Sjåfjell, Carol Liao and others (eds), *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene* (EE, 2022) at 199.

[121] Ibid; this is also supported by Lord Sumption SCJ in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 that 'their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them.'[8]

[122] For instance, in *Adams v Cape Industries Plc* [1990] 1 Ch. 544, the Court of Appeal rejected the single economic unit theory and restated the separate legal personality from *Salomon*. The Court of Appeal failed to make the parent company liable to the tort creditors of its subsidiaries on the basis of the veil-lifting doctrine. This leaves out a number of tort claims (e.g. health and safety issues) as a result of activities in multinational corporations. From the corporate legal personality, while the company is able to act autonomously, it has not reached the social entity nature to provide transformative CSR duty. See Geoffrey Tweeddale & Laurie Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950-2004' [2007] Enterprise Soc.(Oxford Journal) 268 at 268; See also Johnathan Hardman 'Looking beyond separate legal personality: How many titles have Rangers won?' [2022] Juridical Review 1 at 13; John Dewey, 'The Historic

4.3.A.2. The complete separation of the company from its shareholders

The independent status signifies the complete separation of the company from its shareholders.[123] In 1930s, Berle and Means in the seminal work *The Modern Corporation and Private Property* argued that the company, especially the public company, is featured with the separation of ownership and control principle. The separation principle unravels the 'ownership' of the company from two perspectives. First, the separation principle is emphasised that managerial power shifted from shareholder control to the delegated managerial power to corporate managers who 'held a small or even negligible ownership stake' in the company.[124] Berle and Means pointed out that shareholders have surrendered the right to control the corporate entity:

> In its new aspect the corporation is a means whereby the wealth of innumerable individuals has been concentrated into huge aggregates and whereby **control** over this wealth **has been surrendered** to a unified direction…The surrender of control over their wealth by investors has effectively broken the old property relationships… The separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear.[125]

The separation of ownership and control describes the internal governance structure of corporations by which a large degree of distance or 'separation' has emerged over time between the ownership of shareholders and control of directors and senior managers in a company. The directors and senior managers exercise day-to-day control in relation to the affairs of the corporation; they are responsible for the main operational and strategic decisions affecting the corporation. Individual shareholders, on the other hand, had very little (if any) involvement in the day-to-day affairs of the corporation, particularly in large

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Background of Corporate Legal Personality' [1926] The Yale Law Journal 655 at 661; Allan Hutchinson, 'Salomon Redux: The Moralities of Business' [2012] Seattle University Law Review 1109 at 1125 to 1133 (The separate legal personality does not tell us what rights and duties a company has to social impacts or society)

[123] Paddy Ireland, 'Limited liability, shareholder rights and the problem of corporate irresponsibility' [2010] Cambridge Journal of Economics 837 at 848.

[124] Berle and Means, *The Modern Corporation and Private Property* (Routledge, 1932) at 89.

[125] Ibid at 2 and 6.

corporations where there are an enormous number of shareholders, with each holding only a fraction of shares, and therefore at best capable of very little influence. According to Berle and Means, the surrender of control of shareholders made a shift to a state of passivity in which they are 'practically powerless through their own efforts to affect the underlying property'.[126] Thus, the separation principle inevitably produces a situation of 'shareholder passivity',[127] where managerial power is delegated to corporate directors and shareholders are mainly investors.[128]

Secondly, the separation principle is emphasised that shareholders' interest is not the ultimate objective of corporate governance. In a private property sense, a company can be considered as a legal device to maximise shareholders' wealth. However, in a corporate form, shareholders' interest should no longer be an exchangeable term with corporate interest. Berle and Means argued that:

> As a result, we have reached a condition in which the individual interest of the shareholder is definitely made **subservient** to the will of a controlling group of managers even though the capital of the enterprise is made up out of the aggregated contributions of perhaps many thousands of individuals. The legal doctrine that the judgement of the directors must prevail as to the **best interest of the enterprise**, is in fact tantamount to saying that in any given instance the **interest of the individual may be sacrificed** to the economic exigencies of the enterprise as a whole, the interpretation of the board of directors as to what constitutes an economic exigency being practically final.[129]

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[126] Ibid at 66

[127] James McConvill, 'The separation of ownership and control under a happiness- based theory of the corporation' [2005] Comp. Law. 26 (2) 35 at 36 to 37.

[128] Berle and Means are mainly focused on large public companies. In small private companies, shareholders can have much involvement in corporate decision-making because a shareholder can act as a director in a one-man company in UK Company law. Nevertheless, this does not erode the independent status of a company nor imply that the company is still a private property to shareholders. See in *Lee v Lee's Air Farming Ltd* [1961] A.C. 12 (1960), a person can be a shareholder but also a director in an one-man company, but this still reaffirms that the company is an intendent entity from its shareholders. [13] Also see Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) at 41to 42.

[129] See (n 124) at 277 and 278.

Since the company is a separate entity, the corporate profits should be oriented to the enterprise as a whole and should not aim to maximise shareholders' wealth. Thus, shareholders 'may become merely recipient of the wages of capital'.[130]

Nonetheless, shareholders' contribution cannot be neglected and shareholders' interests still need to be secured. Berle and Means argued that shareholders were still those who 'supplied the capital' to the company and they are entitled to receiving distribution which combined with an increase in the market value, either by repayment from the corporation or by the resale of their security to someone else.[131] Shareholders merely hold the indirect proprietary interests to the company: they own the shares and they have the rights to the revenues.[132]

The shareholders/members are the capital providers who own their shares and have the rights attached thereto as provided under the articles of association and the law.[133] From the separation principle, it can be implied that directors may have opportunities and exercise the managerial powers to engage in forms of behaviour which may not be in the shareholders' best interests.[134] Therefore, the corporate objective does not merely represent shareholders' interests under an independent entity in corporate literate and legal developments.[135]

The separation of ownership and control theory provides the foundation for the entity's interests and shareholders' interests in the new corporate purpose, as argued in Section 1. This also reinforces the change of corporate responsibility in law: profits-generation responsibility and further transformative CSR.

4.3.B. Transformative CSR and independent social entity

4.3.B.1. CSR prompted by the social entity

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[130] Ibid at 3.
[131] Ibid at 281
[132] Paddy Ireland, 'Corporate Schizophrenia: The Corporation as a Separate Legal Person and an Object of Property' [2016] University of Bristol Law School 1 at 7.
[133] Muhammad Zubair Abbasi, 'Legal analysis of agency theory: an inquiry into the nature of corporation' [2009] Int. J.L.M 51(6) 401 at 406
[134] Blanaid Clarke, 'Corporate responsibility in light of the separation of ownership and control'[1997] D.U.L.J 50 at 51.
[135] E.g. *Percival v Wright* [1902] 2 Ch. 421

The independent legal entity status is the foundation that allows us to develop the transformative CSR approach in corporate governance. According to Berle and Means, other people, such as workers and customers, have an interest and 'a measure of power' over the company.[136] The corporate decision-making should benefit other stakeholders who are essential to the existence of corporate enterprise and this should be regarded as part of the enterprise.[137] The corporate responsibility is widened:

> ….the "control" of the great corporations should develop into a purely *neutral technocracy*, balancing **a variety of claims by various groups** in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.[138]

The separation of ownership and control had placed the community in a position to demand that the modern corporations serve the interests of all society. The separation principle indicates the change of the role of the board – the board shifted the role from 'operating in shareholders' sole interest' to 'eliminating the sole interest of shareholders' to further 'protecting shareholders and community', which attempts to include corporate social responsibility in corporate responsibility and governance. According to Ireland, the 'socially responsible corporation' based on the legal entity attempted to change the circumstance that shareholders' interests have the predominant position in corporate governance and to add other interests of people in the wider society as the key agenda in corporate responsibility and purpose.[139] Moore and Reberioux argued that since the company is an independent institution, the managerial power 'is exercised on behalf of the company's constituents: shareholders, certainly, but also workers and, even further, the communities in which these companies thrive'.[140] The separate legal entity can be argued to provide the company with a

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[136] See (n 124) Berle and Means at 120
[137] Ibid at 124
[138] Ibid at 312
[139] See (n 65) Paddy Ireland, Renginee G. Pillay, 'Corporate Social Responsibility in a Neoliberal' at 89; also see Gunther Teubner, 'Corporate Fiduciary Duties and Their Beneficiaries. A Functional Approach to the Legal Institutionalisation of Corporate Responsibility,' in K.J. Hopt and G. Teubner (eds.), *Corporate Governance and Directors' Liabilities* (Walter de Gruyter 1985) at 149-177 (social pressure on the company and prompts transformative CSR approach)
[140] Marc T. Moore & Antoine Rebérioux, 'Revitalizing the institutional roots of Anglo- American corporate governance'[2011] Economy and Society 84 at 95; also see Lilian Moncrieff, 'Creabimus!' Creatively Re-Thinking The Corporation And The Social Contract' [2023] European Law Open 914

'role of society' to consider the wider interests. According to Deakin, the company itself as a 'collectively managed resources' can aid the understanding of the role 'in generating the conditions for social and environmental sustainability'.[141] Thus, Berle's separate legal entity suggests that the company has an independent role in promoting 'economic relations' and furthering 'social cohesion' in society;[142] a company is a social entity which encapsulates transformative CSR in corporate governance.

4.3.B.2. Neutral technocracy: initiating CSR development

The 'neutral technocracy' approach indicates the initial stage of CSR development in corporate governance. Berle and Means argued that:

> You cannot abandon emphasis on "the view that business corporations exist for the sole purpose of making profits **for their stockholders** " until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else[143]

Berle's CSR approach (neutral technocracy) was possible to cause a shareholder primacy concern. Salim argued that Berle's approach can lead to the circumstance where shareholders are primary beneficiaries in directors' duties and the company is a contractual firm for shareholders.[144] This shareholder primacy concern could be seen in the Enlightened Shareholder Value principle in s.172 of the Companies Act 2006. While Berle's approach

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(Walter Rathenau argued for the social contract between the company and society, which affirms the social entity and embodiment of public interests in corporate responsibilities) at 939 to 942.

[141] Simon Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise'[2012] QUEEN's L.J. 339 at 376.

[142] Jason Russell, Andrew Smith and Kevin D. Tennent, 'Adolf Berle's Critique of US Corporate Interests in the Caribbean Basin' in William A. Pettigrew · David Chan Smith (eds), *A History of Socially Responsible Business, c.1600–1950* (Palgrave Studies, 2017) at 258.

[143] Adolf A. Berle Jr., 'For Whom Corporate Managers are Trustees: A Note' [1932] 45 Harv L Rev 1365 at 1367

[144] Mohammad Rizal Salim, 'Company law reform in Malaysia: the role and duties of directors' [2009] International Company and Commercial Law Review 142 at 144; See also Klaas Vanneste, 'Decoupling economic rights from voting rights: a threat to the traditional corporate governance paradigm' [2014] European Business Organisation Review 59 at 62; Chrispas Nyombi, Tom Mortimer, Rhidian Lewis and Georgios Zouridakis, 'Shareholder primacy and stakeholders' interests in the aftermath of a takeover: a review of empirical evidence' [2015] International Business Law Journal 161 at 168; William W. Bratton, Michael L. Wachter, 'Tracking Berle's Footsteps: The Trail of the Modern Corporation's Last Chapter, 33 Seattle' [2010] U. L. REV. 849 at 855. A number of commentators attempted to interpret Berle's approach as a shareholder primacy model.

delivered the impact to the UK law that other stakeholders' interests should be protected, his approach could convey that other stakeholders' interests are only protected as instruments for corporate profits for shareholders' wealth promotion in the ESV principle.[145]

Nevertheless, it is incorrect to argue that 'neutral technocracy' was intentionally endorsed for shareholder primacy. In fact, Berle (and Means) intended to widen corporate purpose for other stakeholders but endorsed a shareholder-oriented model. He said that:

> The shareholder who now has a primary property right over residual income after expenses are met, may ultimately be conceived of as **having an equal participation with a number of other claimants**. Or he may emerge, still with a primary property right over residual income, but **subordinated** to a number of claims by labour, by customers and patrons, by the community and the like, which cut down that residue.[146]

Berle and Means set out a compelling case for operating the modern company as a social entity that intends to work out a convincing system of community obligations for societal interests (without being subject to shareholders' interests).[147] But Berle held the worry about the untrammelled corporate power in management. In Chapter 3 (Section 1), I found Berle's concern that 'relatively unbridled scope of corporate management' had enabled a "seizure of power without recognition of responsibility'.[148] Berle explained that 'when the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute'.[149] This can trigger the possibility that directors take zero responsibility for shareholders, the company and other stakeholders, but exercise the managerial power to fulfil their interests. Thus, Berle's proposition was emphasised that shareholder wealth should be the only

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[145] Lee Roach, 'The legal model of the company and the Company Law Review' [2005] Company Lawyer 98 at 101 (Roach argued that Berle's shareholder primacy view was supported by the view of CLRSG)
[146] See (n 143) Berle, 'For Whom Corporate Managers are Trustees: A Note' at 1372
[147] Susan Watson, *The Making of the Company* (Bloombury, 2022) at 251 and 252.
[148] See (n 143) Berle 1366-1367 and 1370.
[149] Ibid 1367.

fiduciary duty of managers and should be vested in corporate governance and responsibility.[150]

From the discussion, we can find that Berle's intention is to limit corporate power for both shareholder wealth creation but also stakeholder protection. Stewart reinforced my view that Berle's approach was intended to be adopted as an 'interim measure' to limit the managerial power.[151] Ireland argued that Berle did not object to the worthy of other stakeholder's interests nor object to the job of protecting other stakeholders.[152] Due to the untrammelled power, Berle did not think that there were any other effective mechanism in place for ensuring that directors would effectively take account of relevant stakeholders' interests.[153] According to Yan, Berle's CSR set out the attractive stakeholder protection purpose but the guidelines about how it was done was questionable.[154] While Berle's approach needs to be improved, Berle's CSR should not be seen as developing an ameliorative CSR for business case purpose and shareholders' wealth. Grantham argued that Berle's CSR still implies maintaining the company for a range of interests beside shareholders' interests.[155] Commentators, such as Barnes[156] and Marshall & Ramsay,[157] reinforced that Berle's CSR attempts to change the role of directors to tackle a wide range of stakeholders' interests beyond shareholder exclusivity. Therefore, the 'neutral technocracy' does locate the progress of transformative CSR in directors' duties as well as a social entity (company).

4.3.B.3. Berle-Dodd Debate: further transformative CSR development

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[150] See (n 69) Renginee Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – The Case of Mauritius* at 74.
[151] Fenner Stewart, 'Berle's Conception of Shareholder Primacy: A Forgotten Perspective For Reconsideration During the Rise of Finance' [2011] Seattle University Law Review 1457 at 1743.
[152] Paddy Ireland, 'Back to the future? Adolf Berle, the Law Commission and directors' duties' [1999] Company Lawyer 203 at 207.
[153] Ibid.
[154] Min Yan, 'Why not stakeholder theory?' [2013] Company Lawyer 148 at 152.
[155] Ross B. Grantham, 'The doctrinal basis of the rights of company shareholders' [1998]Cambridge Law Journal 554 at 568.
[156] Victoria Barnes, 'Shareholder primacy and managerial control in Anglo-American corporate governance' [2020] Company Lawyer 43 at 48.
[157] Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' [2009] Legal Studies Research Paper 1 at 4 and 5.

In Berle-Dodd debate [158] Dodd's argument reinforces CSR moving towards a more transformative direction. In *For Whom Are Corporate Managers Trustees,* Dodd argued:

> Business - which is the **economic organisation of society** - is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the proprietary rights of its owners are thereby curtailed.[159]

Dodd primarily identified the company as an 'economic organisation' more than a traditional property belonging to its shareholders. The 'economic organisation of society' means that the company is a separate entity *in society*. From Dodd, to identify the status of the company is very crucial because it would determine the corporate social purpose and responsibility. Because of locating the company in society, he argued that while the legal control (by Berle and Means) was desirable to 'provide stockholders with greater protection against self-seeking managers', it was not desirable to 'give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholder'.[160] Since the company is an independent entity engaging with people's life, directors' duties should be oriented to the entity status and effectively protect other stakeholders who can be affected by the entity. Dodd argued that:

> If…we are undergoing a substantial change in our public opinion with regard to the obligations of business to the community, it is natural to expect that **this change of opinion will have some effect upon the attitude of those who manage business**.

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[158] In 1931 and 1932, Berle and E. Merrick Dodd started a debate about shareholder vs stakeholder governance in directors' duties. After *Harvard Law Review* journal, Berle was known as the original defender of shareholder primacy. In response to this, Dodd argued that the company is a social institution and corporate governance plays a role in fulfilling social service. See Marc T. Moore and Antoine Rebérioux, 'Corporate Power in the Public Eye: Reassessing the Implications of Berle's Public Consensus Theory' [2010] Seattle University Law Review 1 at 2 to 3; Joseph L. Weiner, 'The Berle-Dodd Dialogue on the Concept of the Corporation' [1964] Columbia Law Review 1458 at 1459 to 1460.
[159] E. Merrick Dodd, Jr, 'For Whom Are Corporate Managers Trustees?' [1932] Harvard Law Review 1145 at1162
[160] ibid at 1147 to 1148

> The view that those who manage our business corporations **should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders,** is thus advanced today by persons whose position in the business world is such as to give them great power of influencing both business opinion and public opinion generally.[161]

On this basis, while Dodd was aware of the self-serving interest, the significant difference from Berle is that a CSR approach should not be a compromise to a shareholder prioritisation approach. The separate corporate entity is an economic institution in society which should seriously fulfil social obligations as well as the private interests of profit generation for the entity and shareholders. This seems to guide directors to regard other stakeholders at the equal importance level of profits and shareholders' interests in corporate responsibilities.

By 1954, Berle had overcome his misgivings concerning a wider range of corporate social responsibilities in the legal context:

> In 1954 (*The 20th Century Capitalist Revolution*), I conceded that Professor Dodd had won the argument: modern directors are not limited to running business enterprise for maximum profit, but are in fact and recognised in law as administrators of a community system.[162]

This outcome of Berle-Dodd debate reiterates that the company should be seen as a social entity rather than a simple commercial entity. Shareholder wealth orientation encountered re-consideration in corporate governance and responsibility literature after Berle-Dodd debate. Chayes argued that a shareholder's relation to the company is rendered highly abstract and formal, quite limited in scope and readily reducible to monetary terms'.[163] Their interest would be protected if the financial information is available, fraud issues are prevented and the market is maintained where their shares can be exchanged.[164] He concluded that that shareholders are ultimately conceived of as having an *equal participation* with stakeholders

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[161] Ibid at 1153 and 1156
[162] Forward in Edward S. Mason (ed), *The Corporation in Modern Society* (Harvard University Press, 1961) xii
[163] Abram Chayes, 'The Modern Corporation and the Rule of Law' in Edward S. Mason (ed), *The Corporation in Modern Society* (Harvard University Press, 1961) at 39 to 40.
[164] Ibid at 40

and they are no more affected than other stakeholders.[165] Berle-Dodd debate has an impact on transcending Berle's original 'neutral technocracy' in directors' responsibilities and furthering CSR towards a more transformative direction in a social entity.

4.3.B.4. Corporate citizenship theory: underpinning transformative CSR

The philosophical corporate citizenship theory conveys that an independent entity shifts to a social entity which provides foundation for the new corporate purpose and transformative CSR. The 'citizenship' term is taken from the political philosophy and originally focused on the scope of 'individual citizenship'. Citizenship is usually associated with an individual's rights and responsibilities/duties. For Aristotle, being a citizen is basically to have 'the right to participate in the public life of the state, which was more in the line of a duty and a responsibility to look after the interest of the community'.[166] The 'individual citizenship' concept encompasses that a citizen (adult) needs to be treated as an independent person who possess his own rights and responsibilities in society.

Evolving from the 'individual citizenship 'concept, the company can be considered to have 'citizenship' features too. It was stated by Solomon that:

> …the corporation itself is a **citizen**, a member of the larger community and inconceivable without it...Corporations like individuals are part and parcel of the communities that created them, and the responsibilities they bear are not the products of argument or implicit contracts, but intrinsic to their very existence as social entities..[167]

Similar to human citizen, corporate citizenship provides the company with an independent role who has rights and responsibilities in society. This reinforces the separation of ownership and control principle by Berle and Means: the company has the pronouns 'it' rather than 'they' as an aggregation of its shareholders or a private property.

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[165] ibid at 40-41; Paddy Ireland, 'Back to the future? Adolf Berle, the Law Commission and directors' duties' [1999] Company Lawyer 203 at 207

[166] Erik Erisksen, and Jarle Weigård 'The End of Citizenship?' in C. McKinnon and I. Hampsher-Monk (eds.), *The Demands of Citizenship London* (Continuum, 2000) at 15.

[167] Robert C. Solomon, *Ethics and Excellence: Cooperation and Integrity in Business* (New York: Oxford University Press, 1992) at 184.

Moreover, the corporate citizenship theory implies that the separate legal entity encapsulates social responsibilities/tasks to society, which is similar to Dodd's argument. To look back at Aristotle's definition on 'individual citizenship', an individual needs to take the responsibility for their behaviours in society by not interfering with other peoples' rights. This social characteristic of citizenship also applies to the company's citizenship. To combine with Solomon's statement, corporate citizenship theory regards a company as the independent social entity/person and argues that corporate governance bears accountability to people in society. Carroll discussed the 'good citizenship' and argued that the corporate citizenship should 'reflect society's expectations that business will engage in social activities'.[168] This can suggest that the company should play a vital role in 'actively engaging in acts or programs to promote human welfare or goodwill' when the company possess the citizenship in society.[169] In the Aristotelian tradition, companies are seen as 'an integral part of society and for this reason they ought to contribute to the common good of society, first of all to the [human] community where companies are operating, as good citizenship'.[170] It was reinforced by other commentators that the company should have the responsibility to cater to social expectations, including dealings with external affairs and acting in the interests of other stakeholders in society.[171] Thus, the corporate citizenship theory can demonstrate that the company is a social entity and should participate in securing a 'good society'.

The role of corporate citizenship in furthering transformative CSR in directors' duties is reflected in the communitarian corporate governance discussion. The communitarian corporate citizenship view provides that the corporate entity operates in the human society/community in which other people simultaneously develop their living modes or

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[168] Archie B. Carroll, 'Managing Ethically with Global Stakeholders: A Present and Future Challenge'[2004] Academy of Management Executive, 18(2) at 114 to 120.
[169] See (n 52) Archie B. Carroll 'The Pyramid of Corporate Social Responsibility [1991] at 39 to 48.
[170] Domènec Melé, 'Corporate Social Responsibility Theories' in Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald S. Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP, 2008) at 22.
[171] E.g. Jeanne M. Logsdon and Donna J. Wood 'Business Citizenship: From Domestic to Global Level of Analysis' [2002]Business Ethics Quarterly, 12(2), 155 at 155 to 156; Sandra Waddock, 'Integrity and mindfulness: foundations of corporate citizenship' in Jörg Andriof and Malcolm McIntosh (eds), *Perspective on Corporate Citizenship* (Routledge, 2001) at 36 to 37.

activities.[172] To combine my discussion above and the communitarian viewpoint, the company or corporate activity shares the social arena with other individuals; it is possible that the corporate activity could have a negative impact on other individuals' claims or interests. Thus, corporate governance should contribute to preventing and mitigating negative corporate impacts on people's rights in society.

Also, corporate activities involve building up contractual relations between the company and the wider society; the corporate development cannot be detached from other individuals or stakeholders in the wider society. According to the communitarian view, a corporate entity can be seen as 'a combination of the community's resources [which] takes on an existence and identity separate from individuals'.[173] The corporate development needs resources from different groups, such as customers and employees, to sustain its existence in society. According to Millon, the company is born in the society and it certainly inherits benefits of life from people in society.[174] He continued that the company owes responsibilities to other individuals in social contractual relations.[175] The communitarian corporate citizenship suggests that a company, as a 'person', develops social contractual relations with the society and has the social responsibility to other stakeholders in society beyond just the economic interest.[176] The recognition of the role of corporate citizenship supports a substantive 'social agenda' in corporate governance, encouraging directors when making business decisions to consider a range of interests including those of the environment and people in society.[177]

The corporate citizenship theory has been included in legal practice. For instance, the King IV Report 2016, the corporate governance code in South Africa, added the concept of corporate citizenship. It stipulates that:

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[172] Donna J. Wood and Jeanne M. Logsdon, 'Theorising Business Citizenship' Jörg Andriof and Malcolm McIntosh (eds), *Perspective on Corporate Citizenship* (Routledge, 2001) at 96.
[173] ibid at 96.
[174] David Millon, 'Communitarians, contractarians, and the crisis in corporate law' [1993] Washington and Lee Law Review 1373 at 1378.
[175] Ibid at 1378.
[176] David Millon, 'Theories of the Corporation', DUKE L.J. 201 [1990] 201 at 217; Paddy Ireland, 'Corporations and citizenship' [1997] Monthly Review Foundation 1 at 4 to 5.
[177] Lynn Buckley, 'The foundations of governance: implications of entity theory for directors' duties and corporate sustainability' [2022] Journal of Management and Governance 29 at 43.

> The 'good corporate citizenship' is the recognition that an organisation[company] is **an integral part of the broader society** in which it operates, affording the organisation standing as a juristic person in that society with rights but also responsibilities and obligations. It is also the recognition that the broader society is the licensor of the organisation[company][178]

This is considered as the practical evidence to witness that the company should fulfil the corporate citizenship by taking the social responsibility to other stakeholders in the wider society. Also, the role of a corporate entity in society is acknowledged as a good citizen in *BCE Inc. v 1976 Debentureholders* where the Supreme Court emphasised:

> In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not con-fined to, the need to treat affected stake-holders in a fair manner, commensurate with the corporation's duties as **a responsible corporate citizen**.[179]

The introduction of this corporate citizenship philosophy in corporate governance legal frameworks confirms that the independent social entity status can locate the transformative CSR approach in directors' fiduciary duties, further protecting LGBT people.

4.3.C. Provisional Conclusion

The transformative CSR approach interfaces with the social status of the company in corporate developments. As Deakin argued, the company is 'ownless' and it is a business enterprise or a 'commons' which is associated with a 'common-pool resources' in society, including human and financial resources.[180] In the discussion of Berle, Means and Dodd, the company is deemed as a social entity providing foundation to promote transformative CSR. The social entity, which derives from the corporate citizenship, impacts on CSR development nowadays. Building on this theoretical development, the transformative CSR approach will manifest substantive stakeholder protection as a mandatory obligation encapsulating various specific

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[178] King IV Report on Corporate Governance for South Africa < https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf > (Accessed on 21st July) at 11
[179] (2008). 3 SCR 560 para.82
[180] See (n 141) Deakin, The Corporation as Commons at 367 and 368.

duties in corporate governance, including environmental protection, gender equality and LGBT dignity protection in UK law.

Conclusion

This chapter has provided the transformative CSR theoretical approach which can challenge shareholder primacy and profit-maximisation in corporate governance. First, this chapter presented the new corporate purpose, embodying entity' interests, shareholder wealth and stakeholder protection. Looking back at Chapter 3 (Section 2), the new corporate purpose echoes 'interests of the company' stipulated in the UK pre-existing case law judgments. Secondly, grounding on the new corporate purpose, this chapter presented the transformative CSR theoretical approach, offering the profit-sacrificing approach and reiterating that stakeholder protection, including internal and external stakeholders, is no longer subject to profit and shareholder wealth creation. Looking back at Chapter 3 (Section 3), this transformative CSR theoretical approach can shift directors' duties from shareholder primacy effects towards but also beyond the inclusiveness nature in UK Corporate Governance law.

Following the changes occurred in European corporate governance models, the transformative CSR theoretical approach would create mandatory social obligations in the UK corporate governance legal system. This chapter combined social entity theoretical perspectives with the nature of the company in law – the company should be a social entity which creates foundation for transformative CSR approach. The social status of the company affirms that social changes or obligations emanating from the transformative CSR theoretical approach can substantively protect stakeholders' interests rather than treat stakeholders as a means for profit-maximisation (ameliorative CSR). Under this approach, stakeholders are treated as actual human beings with a wider range of social imperatives than financial interests, including LGBT people's interests. The social status and social responsibilities developments, such as neutral technocracy, Berle-Dodd debate, corporate citizenship theory, feature the transformative CSR theoretical approach with 'substantive', 'social' and 'mandatory'. The transformative CSR theoretical approach would guide and encapsulate wider social responsibilities/obligations in UK Corporate Governance law, including LGBT protection.

It is concluded that transformative CSR is the key theoretical approach to leading changes on UK Corporate Governance law, widening the meaning of directors' duties and reinforcing embodiment of LGBT dignity protection 'lessons' in directors' duties to address LGBT expressive harm. Next Chapter will introduce radical feminist 'care and compassion' principle to more specifically reinforce the role of transformative CSR in proposing the due diligence process to LGBT dignity protection in UK Corporate Governance law.

Chapter 5: Radical feminist 'care and compassion' principle – reinforcing transformative CSR to tackle LGBT expressive harm

Introduction

As I argued in Chapter 3 and 4, the transformative Corporate Social Responsibility (CSR) theoretical approach can prompt changes in UK Corporate Governance law in order to substantively protect stakeholders/people's interests, including the governance changes to tackle the expressive harm to LGBT people. In this Chapter, I will introduce the radical feminist 'care and compassion' principle; it will strengthen the role of transformative CSR in tackling this LGBT dignity protection issue in corporate life.

There is a variety of feminist strands, but the common objective is to ensure that women are entitled to human dignity as men in all aspects of life. Social justice feminism is associated with the movement of working-and middle-class activists in the late nineteenth and early twentieth centuries. [1] Social justice feminism is focused on protecting women workers/employees, including working hours reduction, working conditions and minimum wage improvement in law reform.[2] In the 1960s, liberal feminist commentators argued for granting women exactly the same rights as men and the dismantling of wrong beliefs in relation to the nature of women in law.[3] In the 1980s, radical feminism – much discussed by

[1] John McGuire, 'From the courts to the state legislatures: social justice feminism, labor legislation, and the 1920s' [2004] Labour History 225 at 225 to 256.

[2] E.g., in *Muller v. Oregon* 208 U.S. 412 (1908), social justice feminists defended the statute that restricted the hours of working women in certain industries and the Court upheld the statute. This can be seen as the early success of social justice feminism in legal development. See Kristin Kalsem & Verna L. Williams, 'Social Justice Feminism'[2010] UCLA Women's Law Journal 131 at 152.

[3] For instance, liberal feminist discussions had an impact on women's equal protection in Nigerian jurisdiction, such as *Mofekwu vs Ajikeme* [2000] 5 NWLR 403, where the Court of Appeal held that a female child could inherit from the deceased father's estate equally a male child; s.29 of the Constitution of the Federal Republic of Nigeria 1999 recognises married women ('full age') as citizens equally as men. See Emeke Chegwe, 'A gender critique of liberal feminism and its impact on Nigerian law' [2014] International Journal of Discrimination and the Law 66 at 70; Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, 2000) at 253.

Catharine A. MacKinnon[4] - focused on addressing the issue of men's superiority over women in depth, including 'oppression', 'dominance', 'violence' and 'subordination' in legal developments.[5]

Feminist discussions can shed lights on affording LGBT dignity protection in law. According to Catharine MacKinnon, there are harms of communication which can cause 'mental intimidation' to racial minorities (i.e., black women) and actualise subordination of those people's human status.[6] If radical feminist critiques focus on tackling expressive harm in terms of living identities and interests (e.g. gender and race), why would the critiques not be transplanted to tackle expressive harm to LGBT people?

Section 1 aims to weave the original feminist 'care and compassion' principle into the transformative CSR approach, aiming to enhance LGBT protection in corporate governance law. Both the feminist principle and the transformative CSR theoretical approach share the common position that profit-maximisation creates a hierarchy in corporate governance and subordinates stakeholders to shareholders. The 'care and compassion' principle reiterates protecting stakeholders' interests as human interests and rights, which echoes protection of stakeholders' social imperatives in the transformative CSR approach. Section 1 presents as an example of women's non-discrimination protection discussion in corporate governance and suggests that transformative CSR can enhance LGBT tolerance by internalising non-discrimination. This LGBT non-discrimination protection example indicates that the feminist 'care and compassion' principle can strengthen corporate responsibility to progressively protect LGBT dignity. The non-discrimination certainly is not the end of LGBT dignity protection; section 2 and 3 will go further than LGBT non-discrimination in corporate governance.

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[4] E.g. Catharine A. Mackinnon, *Toward A Feminist Theory Of The State* (Harvard University Press, 1989)

[5] E.g. in *Aydin v Turkey* [1996] ECHR 68, ECtHR said that rape (sexual violence to women) amounts to torture in breach of Article 3 under ECHR. Radical feminist discussions had an impact on protecting women's dignified life in law. See Clare McGlynn, 'Rape, torture and the European Convention on Human Rights' [2009] I.C.L.Q. 565 at 573.

[6] Catharine A MacKinnon, *Only Words* (Harvard University Press, 1996) at 45 to 57; Catharine A. MacKinnon, 'Weaponizing The First Amendment: An Equality Reading' [2020] Virginia Law Review 1223 at 1227.

Section 2 attempts to integrate radical feminist critiques with the 'care and compassion' principle, looking at overturning female subordination. Learning from challenging corporate male superiority, Section 2 intends to demonstrate that radical feminist perspectives play a role in challenging corporate heterosexual and cisgender superiority/normativity culture. The radical feminist 'care and compassion' principle reinforces the transformative CSR approach, addressing LGBT expressive harm (beyond non-discrimination). LGBT board diversity mechanism will be utilised as the example of weaving radical feminist principle into transformative CSR. Section 3 goes on to argue how the radical feminist 'care and compassion' principle has an impact on delivering corporate governance changes to tackle LGBT expressive harm. This section presents a discussion about the 'difference' method argued by MacKinnon, and its impact on LGBT dignity respect. The 'difference' method delivers a numbers of tenets, including challenging corporate power, going beyond equal treatment and developing a specific duty. The radical feminist 'difference' method provides specific guidance for the transformative CSR approach, manifesting governance changes to truly care for LGBT people's dignity in corporate life.

Section 1: Connecting the original feminist 'care and compassion' principle and transformative CSR (5.1)

Section 1 will build up the connection between the original feminist 'care and compassion' principle with transformative CSR and LGBT stakeholder protection. It will examine two questions: why the feminist 'care and compassion' principle is valuable to transformative CSR in LGBT protection (5.1.A); how this feminist principle impacts transformative CSR approach in LGBT legal protection (5.1. B).

5.1.A. Why is the feminist 'care and compassion' principle valuable?

In feminism and corporate discourse, a number of commentators, in particular Charlotte Villiers, argued to embody the 'care and compassion' principle (from social and relational feminism) in challenging corporate power and responsibility. I would argue that the feminist 'care and compassion' principle is in harmony with the transformative CSR approach, substantively safeguarding stakeholder's interests.

5.1.A.1. The objective of the feminist 'care and compassion' principle

This feminist principle aims to tackle the hierarchical structure in companies, which prioritises profit-maximisation over broader goals and possibilities in corporate governance.[7] As argued by feminist commentators, the sole or primary purpose of a 'new organisation' (a traditional company) is economic.[8] The feminist commentators argued that management in corporate structures appears to objectify workers, separate the people who live with them (in local communities), and resist seeing human problems in organisations, including ignoring the facts of life (e.g. sexuality, emotionality and procreation).[9] This constitutes the 'chain of command and hierarchy', which is recognised as 'limiting organisational responsiveness and damaging individuals largely'.[10] This hierarchical structure echoes the shareholder primacy approach in corporate governance – harms to individuals/stakeholders are allowed to perpetuate. Looking back at the Enlightened Shareholder Value in the UK law, the way that other stakeholders are taken into consideration mainly for the purpose of corporate profits and shareholder value creation does reflect this hierarchy.

5.1.A.2. Transformative CSR, the 'care and compassion' principle, and shared objectives

Transformative CSR shares the objective of the 'care and compassion' principle. As argued in Chapter 4, transformative CSR entails a radical reconceptualisation of the nature of corporate power and responsibility, and an explicit rejection of shareholder primacy. According to Pillay and Ireland, transformative CSR intends to change the ideological belief that it is perfectly legitimate to subordinate other stakeholders' interests to shareholder wealth creation.[11] To integrate with feminist discussion above, transformative CSR encompasses directors' duties and power to tackle the hierarchy and provide sufficient protection to other stakeholders' interests. Kathleen Ferguson commented on corporate responsibility, and argued that 'certain social acts are established and maintained, certain social objects are valued, certain languages

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[7] Charlotte Villiers, 'Corporate Governance, Responsibility and Compassion: Why we should Care' in Nina Boeger and Charlotte Villiers, *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Bloomsbury, 2018) at 152.
[8] Barbara Bird & Candida Brush, 'A Gendered Perspective on Organizational Creation' [2002] Entrepreneurship Theory and Practice 41 at 41.
[9] Ibid 46.
[10] Ibid 45 to 46.
[11] Paddy Ireland and Renginee G. Pillay, 'Corporate Social Responsibility in a Neoliberal Age' in Peter Utting and Jose C. Marques (eds) '*Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development*?' (Springer, 2009) 77 at 84.

are spoken, certain types of behaviour are required, and certain motivations are encouraged'.[12] Ferguson's view attempts to challenge the hierarchical corporate power in exclusively promoting shareholder wealth.[13] Both the feminist 'care and compassion' principle and the transformative CSR approach have the intention of challenging the profit-maximisation approach in corporate responsibility in law.

Similarly, as Wendy Brown noted, corporate power can be applied through 'an abstract, universal, 'politically neutral' discourse of efficiency, rules, roles and procedures'.[14] From this feminist perspective, corporate directors can fail to act as real 'neutral technocrats',[15] and there is a lot missing in corporate responsibility. As Lahey and Salter argued, the absent element in corporate responsibility is an ethical structure that is capable of challenging domination of profit-maximisation in the corporate cultural hierarchy.[16] The objective of widening corporate responsibility in the feminist 'care and compassion' principle is echoed by the transformative CSR approach.

Following the shared objective, I would argue that there is potential of embodying feminist 'care and compassion' principle in transformative CSR. According to Villiers, this 'care and compassion' principle can develop more socially responsible corporate behaviours – combining profit motivation with care and compassion motivation in directors' duties.[17] The feminist principle indicates that there should be substantive social duties/obligations imposed on corporate directors in governance.

The ethics of care reflects the meaning of transformative CSR. As argued in Chapter 4, the company is an independent entity which is associated with people in society. In feminist discussion, a company 'must be the advancement of the social good as well as the

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[12] Kathleen A. Lahey & Sarah W. Salter, 'Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism' [1985] Osgoode Hall Law Journal 543 at 554.
[13] Ibid
[14] Wendy Brown, 'Challenging Bureaucracy (book review)' [1994] Old City Publishing 16 at 16.
[15] As discussed in Chapter 4 (Section 3), Berle and Means discussed that directors should act as neutral technocrats to protect the interests of both shareholders and stakeholders in the book The Modern Corporation and Private Property (1932)
[16] See (n 12) at 555
[17] See (n 7)Villiers at 158.

enhancement of corporate and individual profit'.[18] The 'profit motivation' and 'care and compassion motivation' ought to be pursued at the same level in corporate purpose and governance.[19] Carol Gilligan identified the concept of care coming from 'an initial concern with survival to a focus on goodness and finally to a reflective understanding of care as the most adequate guide to the resolution of conflicts in human relationships'[20] Joan Tronto explained the 'care' that 'humans pay attention to one another, take responsibility for one another, engage in physical processes of care giving, and respond to those who have received care'.[21] The ethics of care emphasises that directors should exercise power and provide care to other stakeholders, as highlighted by the transformative CSR approach.

The ethics of care is combined with compassion in feminist and corporate discussion. According to Jennifer George, compassion 'is more than just responding to the suffering of others; it also reflects making decisions and behaving in ways that reflect care and concern for others'.[22] George's viewpoint suggested that compassion is expressing care and concerns and alleviating sufferings for others.[23] The notion that 'compassion at a societal level'[24] brings connection between care and compassion with transformative CSR: the feminist 'care and compassion' is embodied in the transformative CSR approach. The 'care and compassion' principle suggests that transformative CSR should be focused on tackling social (and environmental) concerns which can cause sufferings to stakeholders, including but not limited to income inequality, layoffs of millions of workers, and diminishing pensions, health insurance provisions, and safety nets for average and poor workers and their families.[25] In corporate discussions, the feminist 'care and compassion' principle reiterates the social status of the company in life. The feminist principle suggests that corporate responsibility should play a role

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[18] Ronnie Cohen, 'Feminist Thought and Corporate Law: It's Time To Find Our Way Up From The Bottom (Line)' [1993] The American University Journal of Gender, Social Policy & the Law 1 at 23; See (n 7) Villiers at 156.
[19] See (n 7) Villiers at 156.
[20] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 2003) at 105
[21] Joan Tronto, 'Care as a Basis for Radical Political Judgments' [2003] Hypatia 141 at 142.
[22] Jennifer M. George, 'Compassion and Capitalism: Implications for Organizational Studies' [2014] Journal of Management 5 at 7.
[23] Ibid at 8.
[24] Ibid at 10.
[25] Ibid at 9.

in advancing social goodness. Therefore, the feminist 'care and compassion' principle does make a contribution to modernising a corporate governance legal framework.

5.1.A.3. The feminist 'care and compassion' principle and human interests/rights

The feminist principle 'care and compassion' significantly highlights the role of transformative CSR in protecting stakeholders as actual human beings. As Sims and Mea argued, in the corporate sphere, people are not just one element/human capital for corporate production; they – *humans* – are the purpose.[26] To my mind, the feminist principle not only interprets the role of transformative CSR in overturning stakeholder's subordination, but it also recognises stakeholders' human needs and interests, as in the discussion of stakeholders' social imperatives in Chapter 4.

As Villiers noted, the 'care and compassion' principle urges directors to care about stakeholders' needs – rely on empathetic dispositions and practice to fulfil their needs.[27] These needs of stakeholders are certainly more than just economic/financial interests. Villiers argued that compassion is oriented towards building up *emotional connection* between one and other people in the community, aiming to address the emotional sufferings.[28]

Following Professor Villiers' discussion, I think that stakeholders are not only the roles they play in corporate activities for business efficiency, such as employees or customers, but also stakeholders are essentially themselves (e.g. women, LGBT and black/Chinese). When advancing social goodness or stakeholder protection, transformative CSR should play a role in protecting stakeholders' human lives. The core mission for that a company must simultaneously concentrate on is to be aware of *social needs* when it comes into existence.[29]

As argued by Bird and Brush as well as Villiers, stakeholders are human beings with their 'private aspects', including emotion, gender, sexual orientation, race and family issues.[30] For

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[26]William J. Mea, Ronald R. Sims, 'Human Dignity-Centred Business Ethics: A Conceptual Framework for Business Leaders' [2019] Journal of Business Ethics 53 at 55.
[27] See (n 7) Villiers at 156.
[28] Ibid 156.
[29] Kenneth Goodpaster, 'Human Dignity and the Common Good: The Institutional Insight' [2017] Business and Society Review 27 at 33 to 35.
[30] See (n 8) Bird and Brush at 46; See (n 7) Villiers at 156.

female employees or customers, their imperatives, such as prohibiting sexual harassment and violence, fall under the protection by transformative CSR; for LGBT stakeholders, imperatives, such as non-discrimination, zero intolerance and harassment, are what transformative CSR ought to address. The 'care and compassion' principle weaved into the transformative CSR approach underpins the role of corporate governance in progressively 'advancing' stakeholders towards dignified beings – fully and equally human – when associating with corporate activities. In the 'sustainable value creation within the planetary boundaries' theory, as I discussed in Chapter 4, directors should protect natural environment; the ultimate objective of environmental protection is to provide a safe place for human life development (humanity), including LGBT people. Therefore, the embodiment of the 'care and compassion' principle can be argued to lay significant emphasis on transformative CSR to protect LGBT people's interests and rights in corporate areas.

5.1.B. How does the feminist 'care and compassion' principle impact on transformative CSR in legal practice?

5.1.B.1. Transformative CSR, care and compassion principle, and internalisation

Following the feminist principle, the transformative CSR approach needs to guide corporate governance to internalise legal guidance from other relevant areas of law (such as employment law, equality law, and human rights law), protecting LGBT people/stakeholders in corporate life.

This internalisation indication arises from applying the 'care and compassion' principle to women's protection in corporate life. According to Testy, the feminist 'care and compassion' principle is focused on providing 'equality and human flourishing' for women in corporate activities.[31] This 'equality and human flourishing' echoes dignity philosophy – a woman possesses the 'equal high-ranking status' in all aspects of life and society. Testy continued that the 'care and compassion' principle has the 'connectedness' when it is engaged with corporate responsibility, which means that 'corporate law project should connect to progressive work in

[31] Kellye Y. Testy, 'Capitalism And Freedom--For Whom? Feminist Legal Theory And Progressive Corporate Law' [2004] law And Contemporary Problems 87 at 98 and 99.

the fields of labour, environmental, pension and benefits, tax, banking, international law, and human rights within law'.[32]

This argument is reinforced by corporate sustainability lawyers too. As argued in Chapter 4, Professor Beate Sjåfjell redefined the 'agency relationship', proposing to internalise 'people and environment and society' as a key principle in directors' agendas. She argued that:

> …how to internalise the social, environmental, and societal impacts of business into corporate decision-making, in other words, how to ensure that corporate decision-makers act thoughtfully and appropriately as agents for people and the environment that the corporation impacts on as principals is arguably the most pervasive and crucial issue of modern corporate law….[33]

On this basis, while protection of people/stakeholders is vested in other areas of law, following from the feminist 'care and compassion' principle, the transformative CSR approach nudges corporate governance law to absorb legal protection 'lessons' from other areas of law, truly protecting stakeholders as human.

5.1.B.2. Gender protection and transformative CSR (example)

Gender protection, as an example, shows that transformative CSR (underpinned by the feminist 'care and compassion' principle) has potentials for providing LGBT rights protection in corporate governance. To reflect on the 'care and compassion' principle, Lauren McCarthy put forward a 'gendered-CSR' approach, looking at the possibilities and constraints regarding gender equality in various context.[34]

This 'gendered-CSR' can be located in directors' duties. For instance, Russell linked labour law with corporate practice. She argued that a few vital areas in labour law, including definition of work, social security protections for those currently performing unpaid labour, and high-

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[32] Ibid 100 and 101.
[33] Beate Sjåfjell, 'Sustainability and Law and Economics: An Interdisciplinary Redefinition of Agency Theory' in Beate Sjåfjell, Roseanne Russell and Maja Van der Velden(eds), *Interdisciplinary Research for Sustainable Business: Perspectives of Women Business Scholars* (Springer, 2023) 99
[34] Lauren McCarthy, "There is no time for rest": Gendered CSR, sustainable development and the unpaid care work governance gap' [2018] Business Ethics: A Eur Rev. 337 at 338.

quality and affordable childcare, need to be added into corporate practice and culture.[35] This shows that the feminist 'care and compassion' principle reinforces widening directors' duties by internalising other areas of law, aiming to enhance human rights protection of female stakeholders. Also, Russell looked at connection between corporate governance and Equality law. According to Russell, aspects of sexism (including discriminatory treatments) are 'social sufferings' to women. [36] As she noted, corporate governance needs to engage anti-discrimination rulings in CSR agendas and provide equal opportunities for female employees.[37] Learning from gender protection in transformative CSR, the feminist 'care and compassion' principle would promote internalising Equality law rulings in directors' duties in order to enhance LGBT protection. [38]

5.1.C. Provisional Conclusion

The main conclusion is that the feminist 'care and compassion' principle can successfully connect transformative CSR, corporate governance and LGBT interests protection. First, the feminist principle plays a role in reinforcing the role of transformative CSR in corporate governance. It reiterates that transformative CSR should guide corporate directors' duties to take stakeholder protection as a substantive goal of corporate governance; directors should protect stakeholders as human. Secondly, the feminist principle furthers the internalisation concept in the transformative CSR approach; directors' obligations should internalise other areas of law (e.g. human rights and anti-discrimination law) to substantively protect LGBT rights.

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[35] Roseanne Russell, 'The problem with selling gender equality as business innovation' in Beate Sjafjell, Carol Liao and Aikaterini Argyrou (eds), *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene* (Edward Elgar, 2022) 81 and 83.
[36] Roseanne Russell, 'Companies and Unconscious Bias: A Case Study on the Need for Interdisciplinary Scholarship' in Beate Sjåfjell, Roseanne Russell and Maja Van der Velden(eds), *Interdisciplinary Research for Sustainable Business: Perspectives of Women Business Scholars* (Springer, 2023) at 184.
[37] Ibid at 183 and 184; Also see Grietje Baars and Andre Spicer, *The Corporation: A Critical, Multi-Disciplinary Handbook* (Cambridge University Press, 2017) at 2.
[38] Carol Liao, 'Power and Gender Imperative in Corporate Law', in Beate Sjåfjell and Irene Lynch Fannon, *Creating Corporate Sustainability: Gender as an Agent for Change* (CUP, 2018) at 293. According to Liao, the example of embodying anti-discrimination responsibilities is a way of promoting a more interconnected and multidimensional understanding of lived existence in corporate governance, including sexual orientation and gender identities.

While the feminist 'care and compassion' principle does not directly stipulate the goal of human dignity protection, to recognise stakeholders as human beings with human rights does imply that everyone, regardless of gender and sexual orientation, is entitled to human dignity. Building on this feminist 'care and compassion', the next two sections will weave the radical feminist 'care and compassion' principle into transformative CSR approach in order to more directly challenge heterosexual superiority and LGBT expressive harm.

Section 2: Radical feminist 'care and compassion' principle and transformative CSR (5.2)

Section 2 will present the 'care and compassion' principle underpinned by radical feminist critiques. The core of radical feminist critiques is to challenge (male) superiority/dominance, which has an impact on challenging heterosexual (and cisgender) superiority. First, this section will interrogate corporate culture from the perspective of superiority: from corporate masculism culture to corporate heterosexual superiority culture (5.2.A.); secondly, this section will analyse corporate masculism/heterosexual superiority in radical feminism discourse. It will lay the argument on why radical feminism can tackle corporate heterosexual superiority culture and strengthen transformative CSR in LGBT dignity protection (5.2.B.)(5.2.C.).

5.2.A. From corporate masculism culture to corporate heterosexual superiority culture

5.2.A.1. Corporate masculism culture

Corporate culture calls for participation of radical feminism in transformative CSR interpretation. The corporate masculism culture is emphasised on male superior power in corporate or business operation. Lahey and Salter, who were radical feminists, argued that a company is a 'male-defined and male-dominated' institution.[39] For them, masculism (male-dominance) is interpreted as 'the distinctly male discourse of power'[40], which means that men tend to dominate corporate operation.[41] As argued in Section 1, corporate hierarchical culture

[39] See (n 12)Lahey and Salter: Corporate Law in Legal Theory at 546 and 547.
[40] Ibid 554.
[41] Ibid 550; According to empirical studies carried out by OECD in 2021, women are underrepresented in Science, Technology, Engineering and Mathematics (STEM) industries due to the hostile culture to women (but not to men), which provides the evidence that male-dominance culture does exist in

illustrates the prioritisation of profit-maximisation. Lahey and Salter critiqued the idea that the goal of the legal form (company) was to achieve efficiency and dominance.[42] They described the company as 'a perfection of the masculinist version of self-existence as property, separation of accountability and enjoyment, abstract rules as justice, domination as ownership'.[43] This is understood as maximisation of 'man's' resources.[44] Thus, corporate law reflects 'masculist' values of capitalism and dominance.[45]

Likewise, Cohen argued that corporate law showed the 'male bias'.[46] According to Cohen, liberal theory defines 'man' in his natural state as a self-interested individual.[47] She critiqued that this liberal theory functioned the role of corporate law to maximise profits for men but to exclude values associated with women, such as recognising the social nature of women and ethics of care.[48] Corporate activity and law always seemed to be men, this corporate masculism culture can lead to women's subordination.[49] According to Wylie, this corporate masculism culture can cause 'hierarchical pyramid structure of an organization' that 'makes it difficult for women to make lateral or upward moves in the organisation'.[50] This could perpetuate sexism – subordinating women's status and power in corporate structure. The subordination does not only happen to organisational arrangements, such as job segregation,[51] but also to neglect women's different needs from those of men,[52] and impose

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corporate and industrial life. OECD, *Joining Forces for Gender Equality: What is Holding us Back?* (2023)< https://doi-org.proxy.lib.strath.ac.uk/10.1787/67d48024-en > (Accessed on 13th November, 2023) at

[42] Ibid 554

[43] Ibid 555

[44] Veronica Wylie, 'Challenging the Corporate Law Tradition: A Socialist Feminist Critique' [1999] 1 at 19.

[45] Katherine H. Hall, 'Starting from Silence: The Future of Feminist Analysis of Corporate Law' [1994] Corp & Bus LJ 149 at 152.

[46] See (n 18) Cohen: Feminist Thought and Corporate Law at 11.

[47] ibid 22.

[48] Ibid 11, 22 to 23.

[49] Peta Spender, 'Women and the Epistemology of Corporations Law' [1995] Legal Education Review 195 at 195: she justified that 'self-interested male' is the basic premise of corporate law and this caused quantifiable harm to women.

[50] See (n 44) Wylie at 23.

[51] See (n 44) Wylie at 23: when there is a steep hierarchy with a profusion of job titles that attach social distinction to them, women end up at the lower end)

[52] See (n 12)Lahey and Salter: Corporate Law in Legal Theory at 547.

limitations on their intellectual endeavours and emotions.[53] Overall, the corporate masculism culture results in the circumstances in which women are treated as lesser human in corporate activities.

5.2.A.2. Corporate heterosexual superiority culture

I argue that corporate heterosexual superiority is a derivative of corporate masculism culture. In radical feminism and corporate discourse, corporate masculism culture led to women's subordination but also to (indirect) LGBT subordination in corporate life. Both women and LGBT people can have the social suffering that their different needs or imperatives (from straight and cisgender men) cannot be realised and their human dignity cannot be effectively protected. As Davies noted, female subordination provided a root of heterosexual superiority (heteronormative).[54] This viewpoint has been engaged in corporate discussion. For instance, Joan Ackers argued that the silence of sexual orientation 'may have historical roots in the development of large, all-male organizations that are the primary locations of societal power'.[55] She noted that male heterosexual superiority plays an important role in legitimising corporate power.[56] This corporate masculism set heterosexuality as a norm, creating suppression of other sexuality groups in organisations and further creating the 'conceptual exclusion of the body as a concrete living whole'.[57] Bagust also noted that men's historical control was over 'women's labour power by excluding women from access to certain productive resources (such as prestigious, highly paid jobs) and restricting women's sexuality'.[58] Therefore, LGBT and women are similarly deemed as 'second-class' citizens under a corporate masculism/heterosexuality superiority culture.

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[53] Barbara Ann White, 'Feminist Foundations for the Law of Business: One Law and Economics Scholar's Survey and (Re)view' [1999] UCLA Women's Law Journal 39 at 46.
[54] Edward Burlton Davies, *Third Wave Feminism and Transgender: Strength through Diversity* (Routledge, 2018) at 108
[55] Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' [1990] Gender and Society 139 at 151.
[56] Ibid 153.
[57] Ibid 151.
[58] Joanne Bagust, 'Keeping Gender on the Agenda: Theorising the Systemic Barriers to Women Lawyers in Corporate Legal Practice' [2014]Griffith Law Review137 at 156; In 2023, a research about gender pay issues in OECD countries found that gender wage pay tends to me narrower but still remain significantly wide. See (n 47) at 171.

I would argue that this corporate masculism/heterosexual superiority is not well addressed by UK Corporate Governance law. The corporate masculism has the impact of 'the creeping advance of issues such as efficiency, new methods of production and wage labour into previously subsistence level agricultural economies'.[59] This culture neglects the role of the company as a social existence, including 'destruction of local environments through product construction, relocation or ecological damage and the availability of access to technology almost anywhere in the world'.[60] The masculism culture conveyed the implications that the private world of capital is more important than public interests.[61] This has led to the critiques over the existing corporate governance law in the UK, as discussed in Chapter 3 – directors' duties are primarily focused on profit-maximisation, neglecting gender protection.

Furthermore, this corporate masculism culture effect creates space for heterosexual superiority. While the existing UK corporate legal frameworks have no direct restrictions on LGBT interests, corporate governance law does not play a role in prohibiting intolerance to LGBT people. Facing up to a number of LGBT expressive harm cases (as discussed in Chapter 2), the existing corporate governance seems too busy with shareholder primacy to take proactive actions in tackling expressive harm to LGBT people. Therefore, radical feminist critiques (in terms of overturning subordination/oppression) should be introduced to play a role in addressing corporate masculism/heterosexual superiority culture.

5.2.B. Corporate masculism culture and radical feminism

Radical feminist critiques argued that male superiority can cause exclusion of women's social imperatives/needs in society, in particular the needs which almost exclusively belong to women (and not men). Male superiority implies that male needs or living ways are the ultimate benchmark of a 'dignified' life. This is reinforced by Professor Catharine MacKinnon. She argued that:

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[59] Sally Wheeler, 'An Alternative Voice In and Around Corporate Governance' [2002] University of New South Wales law journal 556 at 559.
[60] Ibid at 559.
[61] Ibid at 559.

> In male supremacist societies, the **male standpoint dominates** civil society in the form of the **objective standard**-that standpoint…dominates in the world. Under its aegis, men dominate women and children, three-quarters of the world. Family and kinship rules and sexual mores guarantee reproductive ownership and sexual access and control to men as a group. Hierarchies among men are ordered on the basis of race and class, stratifying women as well…. Male supremacist jurisprudence erects qualities valued from the male point of view as standards for the proper and actual relation between life and law.[62]

Following this, radical feminism aims to challenge the patriarchal vision that claims to promote 'equality for all' based on its hierarchical structure and emphasises the disempowerment of individuals, especially women.[63]

What lies behind male superiority is male superior power – this male power can be interpreted from the development of private property in family context. Friedrich Engels, in his work *The Origin of the Family, Private Property and the State*, laid the argument that private property and wealth led to male superior power in family. According to Engels, with the rise of property ownership and wealth in men's hands, men's position in family became more important than women's, marking the development of the 'father right'.[64] He said that:

> Once it had passed into the private possession of families…it was the man's part to obtain food and the instruments of labour necessary for the purpose. He therefore also **owned** the instruments of labour, and in the event of husband and wife separating, he took them with him…the man was also the **owner of** the new source of subsistence, the cattle, and later of the new instruments of labour, and the slaves[65]

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[62] Catharine A. Mackinnon, *Toward A Feminist Theory Of The State* (Harvard University Press, 1989) 1 at 237 and 238.

[63] See (n 18) Cohen: Feminist Thought and Corporate Law at 45.

[64] Friedrich Engels, *The Origin of the Family, Private Property and the State* (Penguin UK, 2010) at 177; In the 2023 OECD research, one reason that gender pay remains wide is the unequal distribution of unpaid work: Women do much more cooking, cleaning, looking after the elderly, and childcare than men, which, in turn, limits both the time women can spend in paid work and their possibilities to make career progression, which has negative implications for their pay, particularly in jobs with inflexible work hours. This wide gap echoes the 'father right' in radical feminist critiques. See OECD (n 47) at 172 to 173.

[65] Ibid at 116 and 117.

Following this, men took command in family and this led to 'the world historical defeat of the female sex'.[66] Engel's conclusion, which said that 'the woman was degraded and reduced to servitude; she became the slave of his lust and a mere instrument for the production of children'.[67] This strong sense of 'ownership' held by men plays a vital role in bringing about social 'male-dominant' standards, which has been critiqued by radical feminist commentators. This leads to subordinating women's human dignity to men's in social life.

This male superior power in a family context was expanded to other aspects of social life, according to radical feminism. As MacKinnon noted, through Engel's family system, male workers become compliant workers, coming to accept exploitation in the workplace because of the necessity of supporting a family and the compensations of (for them) the private sphere.[68] This social relation encouraged protection for male workers, including health and safety, wage system and labour. The protection mainly echoed what male workers needed. According to MacKinnon, male superiority/power behind those male-oriented standards could neglect differences between men and women in terms of body, mind and behaviours in life.[69] It suggested that situated gender differences could be used by male superiority to produce deprivations to women.[70] MacKinnon argued that examples, such as lack of protection on pregnancy and sexual violence, were considered as something of doctrinal embarrassment in historical developments.[71] Judy Wajcman, in *Feminism Confronts Technology,* argued that:

> ..The traditional conception of technology is heavily weighted against women. We tend to think about technology in terms of industrial machinery and cars, for example, ignoring other technologies that affect most aspects of everyday life. The very definition of technology, in other words, has a **male bias**. This emphasis on technologies **dominated by men** conspires in turn to **diminish the significance of women's technologies**, such as horticulture, cooking and childcare, and so reproduces the stereotype of women as technologically ignorant and incapable[72]

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[66] Ibid at 119.
[67] Ibid at 119.
[68] See (n 62) MacKinnon at 67.
[69] Ibid at 219.
[70] Ibid at 220.
[71] Ibid at 220.
[72] Judy Wajcman, *Feminism Confronts Technology* (Polity Press, 1991) at 137.

Learning from these radical feminist critiques, male superiority/power seemed to be expanded from family context to labour and employment aspects, including corporate and organisational institutions, towards all aspects of society. This 'male bias' results in excluding women's interest and rights from society, thereby disturbing women's human dignity in life. This male superior power discussion echoes corporate masculism literature. It suggests that the corporate masculist power could manipulate the role of corporate law and lead to such deprivations of women, including sexual violence and harassment in workplace. Under this corporate masculism culture, women cannot develop a dignified life as equally as men's when women are associated with corporate activities. Thus, radical feminist critiques on male superiority/power provide opposition to corporate masculism culture.

5.2.C. Corporate heterosexual superiority and radical feminism

5.2.C.1. Male superiority and heterosexual superiority

Following corporate masculism culture, I argue that radical feminism plays a role in critiquing corporate heterosexual superiority culture. According to radical feminism, male superiority shows favour to heterosexual orientation and relationships. As Andrea Dworkin noted, male superior power determined what sexual relationships are like.[73] Similar to Professor MacKinnon, Dworkin acknowledged the existence of male superior power in society and said that men had the power of owning in life.[74] She specifically focused on the ownership and sexual life. She said that: 'a man's (husband) ownership of his wife licenses whatever he wishes to do to her: her body belongs to him to use for his own sexual release, to beat, to impregnate'.[75] From Dworkin, men's ownership of private property and wealth means the sexual maturity – the power to control women's sexual relationships.

Dworkin's approach was reinforced by Professor MacKinnon when discussing heterosexual relationships in radical feminism. MacKinnon argued that heterosexuality has institutionalised male sexual dominance and female sexual submission in society.[76] She continued to argue that:

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[73] Andrea Dworkin, *Pornography: Men possessing women* (London: Women's Press, 1981) at 22.
[74] Ibid at 19.
[75] Ibid at 19.
[76] See (n 62) at 113.

> Male dominance is sexual… [in a male superior approach]"woman" is defined **by what male desire requires for arousal and satisfaction** and is socially tautologous with "female sexuality" and "the female sex." In the permissible ways a woman can be treated, the ways that are socially considered not violations but appropriate to her nature, one finds the particulars of **male sexual interests and requirements**.[77]

On this basis, a sexual relationship was a form of power in radical feminist critiques.[78] Learning from radical feminism discourse, heterosexual orientation favoured by male superiority has caused a sexualised hierarchy between men and women, consequently exacerbating women's subordination in social life: women were not allowed to have any different sexual life (e.g., homosexual life) other than heterosexuality in order to fulfil male superior power.

5.2.C.2. Heterosexual superiority, radical feminist critiques and LGBT dignity

Through the lens of private life, radical feminism found that heterosexual superiority gives rise to oppressions or exclusion on LGBT people's interests. According to radical feminist critiques, heterosexuality or a heterosexual relationship has been deemed as ignoring lesbian women's sexual needs.[79] The radical/lesbian feminist Adrienne Rich, in her seminal work *Compulsory Heterosexuality and Lesbian Existence*, critiqued that heterosexuality was presumed to be the sexual preference for most of women and the existence of lesbian women and their needs were not tolerated in society. [80] As Rich noted, heterosexuality reflected male superiority, controlling women's real sexual orientation for the purpose of male interests and needs.[81] It seems to radical feminists that heterosexuality is compulsory to women. Likewise, Kathleen Gough argued that male superiority included the power to deny women's sexual orientation, excluding lesbian interests in private life.[82] The product of male superiority – heterosexual superiority – does have a nasty impact on lesbians' human dignity respect: lesbians cannot unfold their human needs (by condition status) in human society. Furthermore, this oppression on lesbians could be extended to other aspects of life, such as employment. As

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[77] See (n 62)127 and 131.
[78] See (n 62) 113.
[79] See (n 73) Andrea Dworkin at 205 to 208.
[80] Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence' [1980] University of Chicago Press Journals 631 at 633 and 649.
[81] Ibid at 634.
[82] Kathleen Gough, 'The Origin of the Family' [1971] Journal of Marriage and Family 760 at 768.

Rich argued, denial of lesbian sexual orientation made a lesbian woman stay in 'closet' not only in private life but also at work.[83] Therefore, lesbians cannot be truly who they are in society under the influence of heterosexual superiority.

The heterosexual superiority makes heterosexuality as a norm, creating negative impacts on other sexual and gender minorities. The radical feminist critiques on lesbian life exclusion can also shed light on gay men's homosexual life exclusion. This male superiority deemed male homosexuals as disreputable; Dworkin explained that:

> …it is deemed inappropriate for a man to relate to another man as an object, the only sexual response possible in the male sexual system as it now stands. A man must function as the human centre of a chattel-oriented sensibility…He must not reduce himself to the level of women, for instance, by becoming an object for another man. This degrades the whole male sex, which is inappropriate.[84]

Accordingly, male superiority does not provide a more privileged place in society for gay (men) life than lesbian life in society. In order to reinforce the unfettered male superior power, radical feminist critiques suggested, heterosexuality was seen (by male superiority) as superior to non-heterosexual life.

The radical feminist critiques above have significant impacts on following queer feminism development, encouraging feminist authors to critique heterosexual superiority/normativity in order to promote LGBT life tolerance. Similar to male superiority, heterosexual superiority is critiqued by feminist/queer commentators as objecting to life variance, except a 'straight, (adult) male and cisgender' life. According to Rubin, LGBT sexual life was viewed as 'unmodulated horrors incapable of involving affection, love, free choice, kindness, or transcendence'.[85] She critiqued that the oppression which resulted from the lack of sexual variance – the sexual morality 'grant[ed] virtue to the dominant groups, and relegates vice to

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[83] Rich at 642; according to the research from British Sociological Association in 2021, lesbians have low satisfaction at work because of potential negative impacts on them after revealing sexual orientation, such as discrimination. < https://www.britsoc.co.uk/media-centre/press-releases/2021/february/lesbians-and-bisexual-people-are-less-satisfied-at-work-than-their-heterosexual-co-workers-says-research/ > (Accessed on 13th November, 2023)

[84] See (n 73) at 104.

[85] Gayle S. Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Gayle S. Rubin (ed), Deviations: A Gayle Rubin Reader (Duke University Press, 2011) 143 at 153 and 170.

the underprivileged [LGBT people]'.[86] Similar to Rubin, Wittig critiqued that heterosexual superiority led to a heterosexual society. She argued that: 'for heterosexual society is the society which not only oppresses lesbians and gay men, it oppresses many different/others....'.[87] To promote sexual variance, Judith Butler argued against 'normativising' heterosexuality – In order to preserve a homosexual identity-position (and other sexual and gender identities), we must reject any implications of heterosexual superiority.[88]

These radical feminist critiques also invited feminists to expand life variance in queer theory, including encouraging tolerance of transgender life.[89] For instance, Judith Halberstam critiqued heterosexual superiority implications and argued that not all beings participate in the normativity of heterosexual scheduling practices.[90] Halberstam supported sexual and gender variance/pluralism, and implied that people are allowed to lead a heterosexual but also homosexual/bisexual and transgender life, contradicting 'universalising discourses of identity and politics'.[91] Halberstam's approach demonstrated the importance of being a dignified being (as truly who they are). This echoes Butler's approach:

> …The human is differentially produced…What is most important is to cease legislating for all lives what is livable only for some, and similarly, to refrain from proscribing for all lives what is unlivable for some. **The differences in position and desire set the limits to universalizability as an ethical reflex**… There are humans…who live and breathe in the interstices of this binary relation, showing that it is not exhaustive; it is not necessary.[92]

Butler's approach looks at livable life and unlivable life. From my interpretation, a livable life is not determined by a 'universalizability' concept (heterosexual superiority) but dependent on different human needs and desires. Sharon Cowan argued that: to become a man or a

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[86] Ibid at 153.
[87] Monique Wittig, *The Straight Mind And Other Essays* (Beacon Press, 2002) 1 at 29.
[88] Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge, 1993) 1 at 112 to 113.
[89] In radical feminism, there is contesting debate about gender identity – absolute binary gender or non-binary gender. The aim of the discussion is not to get involved in this gender identity debate. Instead, it is focused on *transgender living ways* tolerance in radical feminism discussions.
[90] Judith Halberstam, 'Intersections Between Feminist and Queer Theory' in Diane Richardson, Janice McLaughlin & Mark E. Casey, *Intersections Between Feminist and Queer Theory* (Palgrave MacMillan, 2006) 1 at 104.
[91] Ibid at 105.
[92] Judith Butler, *Undoing Gender* (New York: Psychology Press, 2004) 1 at 1,8 and 65.

woman is to become human.[93] To be a LGBT person, including non-heterosexual but also transgender, is to become human and should have a (livable/dignified) human life too.

Therefore, radical feminist critiques have made significant contributions to increasing tolerance of LGBT life. These critiques over heterosexual superiority are not limited to private life aspects but also are extended to corporate aspects, including employment and service provision areas. The radical feminist critiques (and the critiques following these) are powerful interpretive tenets to be embodied, in order to guide transformative CSR, ensuring that directors overturn the corporate heterosexual superiority culture and provide human dignity respect for LGBT people.

5.2.D. The LGBT board diversity example and transformative CSR with radical feminist principle

5.2.D.1. Radical feminism, board gender diversity mechanisms, and human dignity

Radical feminist discussions encourage board gender diversity mechanisms, as the manifestation of transformative CSR approach, in corporate governance law. As MacKinnon argued, the distribution of power between men and women is a key to addressing male superiority culture in society. According to MacKinnon, male superiority is at root a question hierarchy, 'which—as power succeeds in constructing social perception and social reality—derivatively becomes a categorical distinction, a difference'.[94] She argued to maintain equal social power for women in life.[95] To embody this radical feminist discussion in corporate governance law, Lahey and Salter argued for an approach to decentralising decision-making processes; for gender protection, the key component is to flatten hierarchies and invite women to participate in formal authority in response to male superiority culture.[96] Similarly, to co-opt feminist discussions to address corporate male superiority culture, Cohen argued that women's participation should be companied with 'a wide distribution of authority and

[93] Sharon Cowan, 'We Walk Among You: Trans Identity Politics Goes to the Movies' [2009] Canadian Journal of Women and the Law 91 at 116.
[94] Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (HUP, 1987) at 40.
[95] Ibid at 45.
[96] Kathleen A. Lahey and Sarah W. Salter, 'Corporate Law in Legal Theory and Legal Scholarship: From Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism Classicism to Feminism' [1985] Osgoode Hall Law Journal 543 at 548, 570 and 571.

responsibility', making a contribution to 'a fundamental change in the nature of powerful institutions'.[97] This empowerment of women introduces board gender diversity mechanisms in corporate governance.

Furthermore, corporate board gender diversity can contribute to securing women's equal high-ranking status in society. As Professor Villiers argued, from the European perspective, board gender diversity echoes equal treatments/opportunities between men and women required by equality rulings in ECHR and the EU Charter of Fundamental Human Rights.[98] The balanced board between men and women echoes the equality rulings in companies and can be helpful to alleviate the stereotypical 'glass ceiling' effect to women. As explained by Kamalnath and Masselot, the 'glass ceiling' effect is referred as a barrier to exclude female candidates or senior candidates from being considered for board positions.[99] Certainly, this 'glass ceiling' effect is deemed as discrimination to women. Kamalnath and Masselot continued to argue that the balanced board can lift this discriminatory barrier in corporate life and ensure that women are equally able to access promotions as men.[100] With board gender diversity, equality rulings can be furthered in corporate decision-making to challenge more potential discriminatory issues for women. As the 'equality of all' culture is featured in a board, directors are more possible to pay attention to eradicating negative practices that can affect women's rights. Moreover, as Choudhury, as companies are part of society, the balanced power distribution between men and women in corporate boards will deliver the message of a 'just distribution of power, resources, participation and influence' between men and women in society.[101]

An example is the Greek Association of Women Entrepreneurs (SEGE). The SEGE is a non-governmental organisation addressed by women who are active in business, including the

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[97] See (n 18) Cohen, 'Feminist Thought and Corporate Law' at 36.
[98] Charlotte Villiers, 'Achieving Gender Balance in the Boardroom: Is It Time for Legislative Action in the UK' [2010] Legal Stud. 533 at 545.
[99] Akshaya Kamalnath and Annick Masselot, 'Corporate board gender diversity in the shadow of the controlling shareholder—an Indian perspective' [2019] Oxford University Commonwealth Law Journal 179 at 182.
[100] Ibid at 182.
[101] Barnali Choudhury, 'New Rationales for Women on Boards' [2014] Oxford University Press 511 at 519.

board of directors.[102] It plays a role in providing professional support for women, including but not limited to networking and accessing information, counselling, training, coaching mentoring.[103] From the service provision, we can learn that the board of directors have strong care to women's rights and developments in business life. This can be an analogy to a balanced board in other companies: the balanced number of female directors, who have strong care to women's rights, can exercise the distributed authority to address relevant violations of women's rights in companies. Also, the SEGE, which is featured with women's empowerment, can encourage more gender balance and respect to women's dignity in other aspects of society.[104]

5.2.D.2. Impacts of board gender diversity on LGBT board diversity

If board gender diversity can be helpful to address male superiority, it can be a model to suggest LGBT board diversity in companies to address heterosexual superiority. LGBT people could encounter similar issues as women. Similar to the 'glass ceiling' effect, LGBT people can encounter 'lavender ceiling', referred as the barrier to exclude LGBT employees from the board position.[105]LGBT board diversity would contribute to addressing this discriminatory aspect and protecting LGBT people's dignity. As reinforced by the non-governmental organisation Out & Equal, LGBT leaders, who are featured with visibility (as opposed to closet) as representatives, would be helpful to address bias and barriers on the basis of LGBT identities in companies.[106] This suggests that LGBT representatives/leaders can exercise the distributed power to address expressive harm to LGBT people in corporate activities. Therefore, the radical feminist discussions provide a theoretical foundation for developing LGBT board diversity mechanisms in corporate governance law, as a manifestation of transformative CSR approach in LGBT dignity protection.

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[102] The SEGE's Official Website < https://sege.gr/en/our-profile/ > (Accessed on the 1st May 2024)
[103] Ibid
[104] Charlotte Villiers and Roseanne Russell, 'The Role of Women in Stimulating New Types of Value Creation' in Charlotte Villiers, Beate Sjåfjell and Georgina Tsagas (eds), *Sustainable Value Creation in the European Union* (CUP, 2022) at 296.
[105] This is the webpage for the NGO Out & Equal, which provides information about 'glass-ceiling' and 'lavender ceiling'< https://outandequal.org/eliminating-the-lavender-ceiling-once-and-for-all/ > (Accessed on the 1st May 2024)
[106] Ibid

One potential example is Directive (EU) 2022/2381(Women on Boards).[107] In Article 1, the Directive aims 'to achieve a more balanced representation of women and men among the directors of listed companies by establishing effective measures that aim to accelerate progress towards gender balance'. Also, in Article 5, the Directive stipulated the objectives that:

> Member States shall ensure that listed companies are subject to either of the following objectives, to be reached by 30 June 2026:
>
> (a) members of the underrepresented sex hold at least 40 % of non-executive director positions;
>
> (b) members of the underrepresented sex hold at least 33 % of all director positions, including both executive and non-executive directors

This can be an example to develop a LGBT board diversity regulation that embodies the radical feminist discussions and transformative CSR for LGBT protection. Under this model, the board would be featured with the culture of non-discrimination for LGBT people. This would encourage LGBT representatives/directors to address all relevant LGBT dignity issues, including expressive harm, in corporate activities. While there is a wide range of debate about the nature of legislative quota mechanisms, we cannot neglect that this Directive is set out as an equality law-based corporate governance mechanism.[108] Following this model, it would introduce LGBT protection from equality law into corporate governance law.

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[107] Directive 2022/2381 on Improving the gender balance among directors of listed companies and related measures (EU)
< https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2381 > (Accessed on the 1st May 2024)

[108] For board diversity discussion, there are criticisms over quota legislations, such as tokenism or 'box-ticking' activities. This discussion intends not to be addressed in this thesis because LGBT board diversity is not the final proposal. Apart from the criticisms, a number of commentators argued for the embodiment of equality law in the Directive and here the examples: Ranjit Dhindsa, 'Women in the boardroom: driving change at the top' [2023] New Law Journal 21 at 21; Hanne S. Birkmose, 'Improving the Gender Balance Among Directors of Listed Companies in the EU' [2023] ECFR 167 at 197; See (n 104)Villiers and Russell, 'The Role of Women in Stimulating New Types of Value Creation' [2022] (this piece was published before the enactment of the Directive but the commentators reinforced the equality law-based concept); Albertine Veldman, 'Gender Quota for Corporate Directors: a Task for the European Union? The Revival of the Directive on Gender Balanced Company Boards' [2023] Utrecht Law Review 44 at 47 to 49.

5.2.E. Provisional Conclusion

The main conclusion is that the radical feminist 'care and compassion' principle ought to be introduced; it provides interpretive reinforcement for transformative CSR in enhancing LGBT dignity protection. In radical feminism critiques, male superiority provides the source of 'male heterosexual superiority' and prompts cisgender heterosexual life as a normative bias. In response to corporate masculism/heterosexual superiority culture, radical feminist critiques insert the essential goal of human dignity protection in the feminist 'care and compassion' principle. Followed by the radical feminist 'care and compassion' principle, the transformative CSR approach would be more empowered to prompt changes in corporate governance legal systems, as the potential example LGBT board diversity mechanism. In fact, this thesis emphasises more on the changes of directors' duties and obligations in addressing LGBT expressive harm. Section 3 will look at how radical feminist 'care and compassion' reinforces transformative CSR in shaping directors' obligations to improve LGBT tolerance in UK Corporate Governance law.

Section 3: The 'difference' method in radical feminism and potential changes in corporate governance (5.3)

5.3.A. The 'difference' method in radical feminism

The 'difference' method by Catharine MacKinnon intends to include people's different interests or needs which are currently neglected by male and heterosexual superiority. As discussed above, male superiority created the so-called dignified life standard on the basis male needs, judging women's vital differences as deviations. [109] Following radical feminism, if an individual's interests are different from the interests of a 'straight and cisgender man', that individual's interests would be deemed as deviants and likely to be ignored. This includes LGBT people and their lives. Thus, I think that the 'difference' method reminds us to include those people's interests in society and life, who have been historically excluded or neglected by the

[109] Catharine A. Mackinnon, *Sexual Harassment of Working Women A Case of Sex Discrimination* (Yale University, 1979) 1 at 119.

normatively biased 'male heterosexual superiority' mode. In other words, the 'difference' method reflects how radical feminism contributes to respecting LGBT human dignity.

According to Professor MacKinnon, this 'difference' method attempted to address the experiences which almost happened to women exclusively but have been silenced out by male and heterosexual superiority.[110] This method lays emphasis on women's sex differences. As Mackinnon noted, the 'difference' method looks at the real difference between male and female, including social and biological needs or imperatives.[111] The method indicates that law should play a role in perceiving and including women's social existence and unique/different imperatives in circumstances: women's differences are no longer perceived as deviances, women's needs are equal to men's needs. This radical feminist method suggests that 'care and compassion' to women should be focused on substantively tolerating women as true humans – women are no longer be compared with men; women deserve their own equal and independent high-ranking status (human dignity) in society.

Following the example of women's dignity, the 'difference' method can make a contribution to strengthening 'care and compassion' towards LGBT tolerance by including LGBT 'differences' in corporate life too. The 'difference' method can facilitate corporate governance to include and pay attention to LGBT people's needs or interests even though they have different interests from heterosexual and cisgender people. In an expressive harm context, corporate governance should perceive that LGBT-critical expressions and manifestations can differently be detrimental to LGBT people's dignity (but not to heterosexual and cisgender people) and make efforts to address the expressive disregard. The significant impact of the 'difference' method is that corporate governance would go further than the normatively heterosexual and cisgender biased standard; it underlines that corporate governance needs to be changed to deliver the 'true care' to respecting LGBT people's dignity protection (beyond just non-discrimination).

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[110] See (n 94) MacKinnon, *Feminism Unmodified: Discourses on Life and Law* at 41.
[111] Ibid 121.

5.3.B. How is the 'difference' method engaged with transformative CSR in LGBT dignity?

5.3.B.1. Challenging corporate power in heterosexual superiority

The 'difference' method can strengthen LGBT dignity 'care and compassion' by challenging corporate responsibility. The method plays a role in challenging the 'moral order' of male superiority upon which corporate culture depends (corporate masculism culture).[112] It means that corporate responsibility should not be constrained by male/heterosexual superiority. Lahey and Salter provided the radical feminist critiques in corporate governance:

> [This] alternate discourse is...founded upon both **women's sense of identity** through connection, and not through separation and fragmentation, and **women's sense of justice as being achieved through an ethic of responsibility**, not through an ethic of rules, rights and entitlements[113]

On this basis, when corporate governance delivers care and compassion to women, gender differences on the basis of women's identity should be taken seriously by corporate responsibility. Lahey and Salter's discussion indicates the role of the 'difference' method in corporate responsibility: the true care towards women's rights is grounded on 'caring' women with human dignity respect.

The 'difference' method can also play a role in challenging corporate heterosexual superior power. Michel Foucault, in *The History of Sexuality*, put forward a theoretical framework on power and sexuality theoretical framework, which can interpret the role of director's power and duties in LGBT protection. In the theory, he explained that:

> …power must be understood in the first instance as the **multiplicity of force relations** immanent in the sphere in which they operate and which constitute their own organization…as the support which these force relations find in one another, thus forming a chain or a system…power is everywhere…[114]

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[112] See (n 12) Lahey and Salter: Corporate Law in Legal Theory at 555.
[113] Ibid 556.
[114] Michel Foucault, *The History of Sexuality* (Pantheon Books New York, 1978) 1 at 92 and 93.

The understanding of power is similar to director's power in dealing a wide range of relations, including shareholder wealth, stakeholder's interests and environmental protection, in corporate governance system. Furthermore, Foucault said that:

> …**homosexuality** began to speak in its own behalf, to demand that **its legitimacy or "naturality" be acknowledged**… We **must not expect** the discourses on sex to tell us…what ideology—**dominant or dominated**—they represent… it is a question of orienting ourselves to a conception of power which **replaces the privilege of the law** with the viewpoint of the objective…[115]

From my interpretation, this echoes the 'difference' method in radical feminism. Power does not play a role in securing the ideology of dominance and reinforcing heterosexual superiority from the historical developments. In fact, power is applied to reverse privileges of heterosexual superiority[116] and to make a contribution to 'naturalising' homosexuality in society. The power and sexuality relation opposes a 'male heterosexual superiority' standard in any form or exercise of power enforcement or exercise. In terms of sexuality, Foucault challenged the power exercise regarding homosexuality subordination.

In a corporate context, the 'difference' method can challenge directors' power when preserving a heterosexual superiority culture. Following from Lahey, Salter and Foucault, a 'difference' method encourages corporate power and responsibility to look at LGBT identities and interests, rather than merely compare them with heterosexual and cisgender people's needs. Following the 'difference' method, corporate power and responsibility should be imposed to limit social stigmas which perceive LGBT people as 'second-class' citizens, echoing the true 'care and compassion' to LGBT people that arises in the feminist approach. This method conveys tolerance to LGBT people in corporate life – LGBT people are allowed to be different from others but also under dignity respect. The 'care and compassion' to LGBT human dignity is what transformative CSR should be focused on corporate responsibility and governance law: shifting away from 'equal but separate' to 'equal and different'.

5.3.B.2. Beyond equal treatment

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[115] Ibid 101 and 102.
[116] Rosemary Auchmuty, 'Feminist Approaches to Sexuality and Law Scholarship' [2015] Legal Information Management 4 at 5.

The 'difference' method encourages corporate responsibility to go beyond equal treatment when internalising other areas of law in corporate governance. The 'difference' method echoes the other regulatory law internalisation tenet in the feminist 'care and compassion' principle, as discussed in Section 1. According to MacKinnon, the lack of perceiving women's differences led to determining women's subordination to men in all social spheres.[117] The radical feminist 'care and compassion' principle implies that corporate governance needs to perceive LGBT people's different needs or interests and internalise external regulatory 'lessons' beyond non-discrimination.

In examples regarding women's dignity, the 'difference' method has facilitated various areas of law to go beyond equal treatment level but to show 'care and compassion' to what women actually need on the basis of their identities. For instance, Chen argued that MacKinnon's difference method has been a 'feminist invention', which has become instrumental in equality law and rape law.[118] This 'feminist invention' is reflected in the UK jurisdiction too. Prohibition on sexual harassment in the Equality Act 2010[119] and prohibition on sexual violence/assaults and rape in Sexual Offences Acts[120] are examples of echoing MacKinnon's 'difference' method to recognising women's substantive needs and overturning women's subordination.[121] This development has been reflected in corporate literature. For instance, Grosser and Tyler engaged with radical feminism, arguing for an embodiment of women's sexual violence and harassment issues into CSR and corporate governance.[122] This suggests that corporate responsibility goes beyond equal treatment and makes a contribution to substantively protecting women's human dignity: address women's needs or interests which do not usually happen to men. As White commented, radical feminism in corporate law would end male

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[117] See (n 109) Mackinnon: Sexual Harassment of Working Women at 121 to 122.
[118] Chao-ju Chen, 'Catharine A. MacKinnon and equality theory' in Robyn West and Cynthia G. Bowman (eds), *Research Handbook on Feminist Jurisprudence* (EE, 2019) 44 at 53 to 57 (She discussed the example case law *Barnes v. Costle* F.2d 983 (D.C. Cir. 1977) (US) to show internalisation of the different approach in sexual harassment law.)
[119] Section 26 of the Equality Act 2010.
[120] Section 1 to Section 3 of Sexual Offences Act 2003; Section 1 to Section 3 of Sexual Offences (Scotland) Act 2009.
[121] While the legal requirements refer to male and female victims in sexual harassments and violence, these can be still utilised and focused as the example of showing significant progress about overturning female subordination in historical developments.
[122] Kate Grosser, Meagan Tyler, 'Sexual Harassment, Sexual Violence and CSR: Radical Feminist Theory and a Human Rights Perspective' [2022] Journal of Business Ethics 217 at 225.

superiority and make corporate care responsibilities look at issues other than discrimination.[123] The 'difference' method widens the options of corporate governance when learning lessons from other areas of law.

Underpinned by the 'difference' method, corporate governance could be suggested to borrow 'lessons' from other areas of law to address detriment which 'differently' happens to LGBT people from heterosexual and cisgender people. In Chapter 2 (Section 4), I identified major lessons from UK Equality law: prohibiting the LGBT-critical content in expressions/manifestations (content-based approach) and requiring individual speakers to afford responsibility for the consequence of expressive harm to LGBT people. These lessons are focused on LGBT 'care and compassion' by mitigating LGBT-critical content to tackle expressive harm. This focus is reinforced in radical feminist discussion too.

For instance, Professor MacKinnon criticised (male-female) pornography and argued that pornography highlights the implications of women's subordination.[124] MacKinnon engaged the 'difference' method and identified the potential harm to women in pornography, including sexual abuse to women.[125] While pornography is not mostly produced in the form of verbal expressions, it is deemed as expressing the ideology of male superiority in radical feminism.[126] Similar to LGBT expressive harm, pornography (from the perspective radical feminism) could deliver expressive harm to women – invisibly harming women's dignity. To tackle adverse impacts on women, MacKinnon argued for restricting pornography.[127] This can be seen as an

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[123] See (n 53) White: Feminist foundation for law of business at 55; This indicates that radical feminism can assist corporate responsibilities to look at some unique sufferings for women, such as sexual violence and harassment, as MacKinnon argued. The specific radical feminist approach will be discussed later.

[124] Catharine A MacKinnon, 'Pornography: Not A Moral Issue' [1991]Women's Studies International Forum 63 at 64 and 66.

[125] See (n 62) Mackinnon, *Toward A Feminist Theory Of The State* at 113.

[126] Mary Anne Franks, 'Beyond 'Free Speech for the White Man': feminism and the First Amendment' in Cynthia Bowman & Robin West (eds), *Research Handbook on Feminist Jurisprudence* (Elgar's Legal Theory Research Encyclopedia Series, 2018) (pornography simply demonstrates the power of pornography as speech… along with other forms of harmful speech [381])

[127] See (n 94) MacKinnon: Feminism Unmodified at 212 to 213; The pornography analysis followed from radical feminism studies. In fact, regulation of pornography is very contesting in feminism literature. This analysis does not attempt to engage the debate about whether or not pornography should be banned or allowed. It only aims to utilise pornography as an example to build up the connection between radical feminism and LGBT expressive harm.

example of reinforcing the content-based approach when addressing LGBT expressive harm, as discussed in Chapter 2 (Section 4).

The pornography example shows that directors need to identify and restrict the LGBT-critical content in expressions and manifestations in corporate activities; the content can cause subordination of LGBT people. Furthermore, engaging with the 'difference' method can suggest that the law needs to internalise individual speaker's responsibility in directors' duties to challenge heterosexual superiority. This means that directors take measures to require the individual speakers to take responsibility for the expressive harm consequences, including sanctions on employees. Learning from the 'difference' method, the radical feminist 'care and compassion' principle can be used to strengthen corporate social responsibility to protect LGBT human dignity in society; the radical feminist principle can be considered as a connection between corporate governance law and LGBT protection lessons, thereby transcending LGBT non-discrimination.

5.3.C. The significances of weaving the 'difference' method with transformative CSR

5.3.C.1. sameness vs difference

The 'difference' method plays a significant role in transcending the original 'care and compassion' principle in transformative CSR and corporate governance. In Section 1, the original 'care and compassion' principle has been suggested to equal treatment. This original feminist principle can certainly progress transformative CSR development in LGBT dignity protection. Nevertheless, the principle seems to be difficult to directly guide transformative CSR in addressing expressive harm to LGBT people. In radical feminism, Professor MacKinnon compared 'sameness' and 'difference' methods. The 'sameness' method echoes the non-discriminatory treatment in relation to the original feminist principle. MacKinnon explained that the 'sameness' method looks at 'gender neutrality' between men and women, indicating that women are treated same as men.[128] In LGBT protection, it looks at sexual orientation neutrality and gender neutrality. While radical feminism philosophy does not object to the 'sameness' method, the philosophy does point out its shortage: MacKinnon expressed the

[128] See (n 62)*Towards a Feminist Theory* at 219.

concern that the sameness standard fails to notice women have 'real differences' from men.[129] With the radical feminist 'difference' method, Addison argued that corporate governance would fundamentally crack the patriarchal culture which subordinates women in the corporate employment area.[130] Considered through the lens of human dignity between men and women, the 'difference' method can fix the concern which cannot be protected by sameness standards.

This concern can be also felt within LGBT protection. The sameness standard can neglect LGBT differences and LGBT people's imperatives or interests in legal protection. From *Ladele* to *Ashers* to *Page*, UK courts never went beyond the proportional balance and fails to examine LGBT people's real different needs in the case scenarios. The sameness method, which seems to be embodied in the UK courts, looks at material harm consequences, in particular discrimination. In *Ashers*, the sameness method was applied in the scenario that there was no discrimination consequence to LGBT people and McArthurs' LGBT-critical manifestation was allowed in the corporate service. Whether or not McArthurs' manifestation could cause expressive harm and make LGBT people lose their status from the equal high rank seems to be out of the judges' hands.

The 'difference' method can make a significant change, especially when integrating into directors' duties in corporate governance. When the difference method is applied in LGBT protection, the central point of the method is to enhance tolerance of LGBT interests and life in society. Butler expanded the 'difference' method to a 'sexual and gender differences' approach. As Butler noted, sexual and gender difference goes beyond naturalising or normativising a heterosexual life; it allows transformation on the norms and accommodates differences that profoundly shape the individual profoundly.[131] According to Stevi Jackson, 'difference' needs to be focused on the vital differences of an individual, which develop imperatives or interests and affect the individual in their social and daily life.[132] The 'difference'

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[129] See (n 62) at 37.
[130] Catherine Addison, 'Radical Feminism and Androcide in Nawal El Saadawi's Woman at Point Zero' [2020] English studies in Africa 1 at 2 and 5.
[131] See (n 92)Butler, Udoing gender at 10 to 12.
[132] Stevi Jackson, 'Heterosexuality, Sexuality and Gender: Re-thinking the Intersections' in Diane Richardson, Janice McLaughlin and Mark E. Casey (eds), Intersections Between Feminist and Queer Theory (Palgrave MacMillan, 2006) at 40 to 44.

method interrogates corporate governance about whether LGBT people are treated *equally* (rather than same) as others. Unlike the sameness method, the 'difference' method can sense LGBT people's subordination and heterosexual superiority culture. In expression and manifestation contexts, the 'difference' method can perceive that LGBT people can encounter unique invisible harm from expressions/manifestations, which would not occur to heterosexual and cisgender people. Under the 'difference' method, LGBT people's vital social imperative can be protected – LGBT people's dignity is respected in corporate activities, without worry about being expressively disturbed.

5.3.C.2. A Specific Duty

The radical feminist 'difference' method is the key theory for transformative CSR to develop a LGBT dignity-based duty in corporate governance framework. Following the existing discussion about CSR and feminism, transformative CSR is mainly tasked to protect various social imperatives of stakeholders. I argue that radical feminism can specify the role of CSR in LGBT dignity protection. This would ensure that LGBT dignity is not dissolved amid the general CSR agendas.

In women's dignity protection, many commentators argued that to list women and girls with other human rights issues can reduce the attention to achieving female dignity in a CSR mechanism. The UN Guiding Principles on Business and Human Rights (UNGPs) 2011 is a CSR mechanism, providing guidance to companies about addressing human rights concerns in corporate activities.[133] While UNGPs made progress about highlighting human rights in CSR and corporate governance, they encounter criticisms from radical feminist commentators. The central criticism is focused on the mixing and generalising of women's rights with other groups of people, including indigenous people, national or ethnic, religious and linguistic minorities, children; persons with disabilities; and migrant workers and their families.[134] A radical feminist author might observe that this provision does not highlight women's subordination or women's imperatives, such as prohibiting sexual violence and harassment. Kristiansson and

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[133] The UNGPs will be discussed in detail in Chapter 6.

[134] OHCHR, United Nation Guiding Principle on Business and Human Rights < https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> (Accessed on 20th September 2023) at 14.

Götzmann argued that there is minimal attention to women's rights in implementation of UNGPs.[135] Likewise, according to Simons and Handls, UNGPs are silent on enhancing directors' accountability to highlighting and addressing women's subordination, including discrimination, violence and marginalisation.[136] They inserted the concern that the failure to recognise and address women's subordination does not expressly address shareholder primacy, nor widen directors' duties to protect women's dignity.[137] Without highlighting women's subordination issues, listing 'women's rights' with others may be merely utilised by directors as instruments to increase corporate profits and shareholder value.

This scenario might also happen in LGBT protection. Transformative CSR could produce a general corporate human rights-based duty in a corporate governance legal framework, possibly including sexual orientation and transgender aspects. But without radical feminist underpinning, the human rights-based duty emanating from transformative CSR may not highlight 'invisible' LGBT intolerance or exclusion issues nor entail relevant measures, such as failing to address expressive harm. A duty, without radical feminist 'reminder', would not effectively ensure a dignified life/environment for LGBT people in corporate contexts.

When radical feminism is introduced to CSR, LGBT dignity protection will be also flagged up. As commentators noted, combination of CSR and radical feminism can make commercial organisations (companies) reflect the feminist values of equality, community, participation and empowerment of women.[138] It suggests the 'female-centred knowledge'[139] in corporate governance, meaning that women's differences and social imperatives are seriously taken into consideration. This would generate a specific task or duty which is focused on women's dignity protection and overturning male dominance. For instance, some radical feminists have commented on the UNGPs and provided the recommendations, including detailed sex-based

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[135] Linnea Kristiansson & Nora Götzmann, 'National implementation processes for the United Nations Guiding Principles on Business and Human Rights: towards gender-responsive approaches' [2020] Australian Journal of Human Rights 93 at 94.
[136] Penelope Simons & Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' [2019] Can J Women & L 113 at 141 to 142.
[137] Ibid at 143 to 144.
[138] Kate Grosser & Jeremy Moon, 'CSR and Feminist Organization Studies: Towards an Integrated Theorization for the Analysis of Gender Issues' [2019] Journal of Business Ethics 321 at 324.
[139] Ibid at 335 to 336.

rights, and specific issues of gender, addressing more direct harm to women.[140] This also recommended flagging up the two major issues of women's dignity protection: sexual violence and sexual exploitation.[141]

These are the key lessons that can be transplanted from gender protection and added into LGBT dignity protection in CSR. First, when engaging radical feminism in CSR, we can perceive the important objective that LGBT people's human dignity should be respected; secondly, another important objective is to identify essential LGBT expressive harm which must be focused in CSR, reflecting 'LGBT-centre knowledge' in corporate governance; thirdly, the CSR approach, with the radical feminist implication (the 'difference' method), can develop specific duties and relevant measures to address expressive harm to LGBT people in corporate contexts. With radical feminism underpinning, the transformative CSR approach would manifest an independent process, which effectively places LGBT dignity protection at the heart of a corporate governance legal framework.

Conclusion

As argued in Chapter 4, the transformative CSR approach looks at widening directors' duties to protect other stakeholder's interests, introducing LGBT stakeholders/people's interests into corporate governance. The radical feminist 'care and compassion' principle plays a role in laying the emphasis on challenging heterosexual superiority in the transformative CSR approach when it comes to LGBT protection. With the radical feminist 'care and compassion' principle, transformative CSR will look at LGBT people's different needs (from heterosexual cisgender people), manifesting specific corporate governance law changes to address the expressive harm to LGBT people. The involvement of the radical feminist 'care and compassion' principle will assist corporate governance law, in particular directors' power and obligations,

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[140] Meagan Tyler, Kate Grosser and Lara Owen, 'Response to the Open Call for Input regarding the Working Group's Report on the Gender Lens to the UN Guiding Principles on Business and Human Rights' [2018]< https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Gender/RMIT_1.pdf> (Accessed on 22nd July 2023) 1 at 3 to 4.
[141] Ibid at 3.

to go beyond LGBT non-discrimination legal protection but also internalise the LGBT tolerance 'lessons' (Chapter 2).

First, the original 'care and compassion' conveys that corporate governance law should substantively protect stakeholders' interests as human rights and interests. This does strengthen the connection between transformative CSR approach and human rights protection. Secondly, going beyond the original feminist principle, radical feminist critiques highlight overturning subordination through this 'care and compassion' principle. On the one hand, the radical feminist 'care and compassion' principle echoes substantive LGBT protection beyond shareholder primacy, which illustrates the aim of widening directors' duties in corporate governance; on the other hand, the radical feminist principle reiterates human dignity protection when critiquing heterosexual superiority. Thus, the radical feminist 'care and compassion' principle ought to be woven into the transformative CSR approach in order to develop progressive corporate governance changes to tackle LGBT intolerance issues (i.e., expressive harm to LGBT people). The radical feminist 'care and compassion' principle is such a powerful bridge to link transformative CSR and LGBT dignity respect.

Thirdly, the 'difference' method in radical feminism delivers many key changes which should be internalised in corporate governance law to, provide 'care' for LGBT dignity respect. Learning from the radical feminist 'care and compassion' principle, transformative CSR approach can potentially prompt corporate governance changes with these features:

1) The changes need to challenge shareholder primacy and profit-maximisation but also heterosexual superiority. The changes can make a contribution to 'naturalising' (as opposing to excluding) LGBT interests and identities in corporate life. These changes must articulate LGBT human dignity respect as essential.

2) The changes need to go beyond equal treatment on the basis of anti-discrimination rulings. Rather than neutralising sexual orientation and gender, the changes provide what exact protection LGBT people need in corporate life – limiting LGBT-critical content in expressions/manifestations and imposing individual speakers' responsibilities so as to prevent and mitigate LGBT expressive harm.

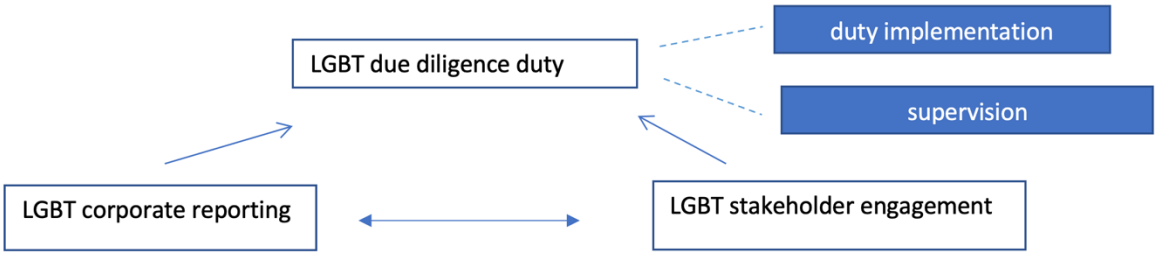
3) The changes are specifically oriented to LGBT dignity protection. Rather than be grouped with other human rights, the socially responsible changes need to be highlighted as an independent and specific process to provide true 'care and compassion' to LGBT people.

These three features, which are suggested by the transformative CSR approach (combined with the radical feminist 'care and compassion' principle), are manifested as the proposed LGBT due diligence process in UK Corporate Governance law, as will be further discussed in Chapter.

Chapter 6: LGBT due diligence process proposal in UK Corporate Governance Law

Introduction

In Chapter 3, I concluded that UK Corporate governance law is inadequate to address LGBT dignity protection. In Chapter 5, I concluded that the transformative CSR approach (combined with the radical feminist 'care and compassion' principle) promotes LGBT legal protection 'lessons' in UK Corporate Governance law and calls for regulatory changes to increase LGBT tolerance. In this chapter, I will propose an independent LGBT due diligence process in the UK corporate governance legal framework, which will aim at substantively but also specifically tackling LGBT expressive harm in corporate life. This corporate governance proposal/change seeks to achieve respecting LGBT people's human dignity in society.



This Chapter will be divided into four sections. Section 1 will present and discuss the LGBT due diligence duty. Modelling on a wide range of Human Rights Due Diligence (HRDD) legal documents, the LGBT due diligence duty is emphasised on identifying, preventing and mitigating LGBT-critical expressions and manifestations in corporate employment and service provisions in the UK. Section 2 will discuss the potential impacts of the due diligence duty from the perspective of French Duty of Vigilance law 2017. It will present the argument on why LGBT due diligence duty can contribute to due diligence implementation and why it can contribute to weakening shareholder primacy. Section 2 will also interrogate the limitations of the duty. To strengthen the effectiveness of the due diligence duty, Section 3 and 4 will present the LGBT due diligence reporting and LGBT stakeholder engagement approaches. I will make the argument on why the due diligence reporting can enhance the effectiveness of the

central duty; I will also assess how the LGBT stakeholder engagement approach can play a role in improving the due diligence reporting's quality.

Section 1: Understanding LGBT due diligence duty (6.1)

6.1.A. What does LGBT due diligence duty represent?

The LGBT due diligence process is proposed as an independent legislation in UK Corporate Governance legal system. I would propose that this process is applied to all companies, regardless of small, medium and large companies in the UK jurisdiction. The LGBT due diligence duty is the central mechanism in the due diligence process. Under this proposed statutory duty, (all) corporate directors would be required to exercise due diligence to LGBT protection within the UK territory. The 'due diligence' is interpreted as a duty of directors to identify, prevent and mitigate expressive disregard to LGBT people in corporate activities and society within the UK. Specifically, the due diligence duty would require directors to observe individual's expressions and manifestations in corporate activities. It has the objective of ensuring that LGBT people are able to be who they are and realise their life interests. With the LGBT due diligence duty, directors will contribute to a mutual tolerance culture in corporate activities and society.

6.1.A.1. Due diligence models: the source of LGBT due diligence duty

The LGBT due diligence duty is modelled on the HRDD principle from various corporate governance-related legal documents, including voluntary legal guidance and mandatory legal documents.

A. UNGPs

One model which adopts the 'due diligence' principle is the United Nations Guiding Principles on Business and Human Rights (UNGPs). The Guiding Principles are grounded in recognition of 'the role of business enterprises as specialised organs of society…required to comply with

all applicable laws and to respect human rights'.[1] It set 'standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalisation'.[2]

Under the UNGPs, companies, regardless of 'their size, sector, location, ownership and structure', are regarded as social entities which need to embody the transformative CSR approach and to address the adverse human rights impacts on other stakeholders in society. The UNGPs described the HRDD as:

> [Companies] should **cover adverse human rights impacts** that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships[3]

To 'cover adverse human rights impacts' means that companies take actions, including '*identification* of actual or potential adverse impacts;[4] to *cease, prevent, mitigate*, or *remediate* adverse impacts'.[5] The HRDD principle is summarised as the operational principle to protectively prohibit and tackle potential human rights risks and existing human rights issues in corporate governance. This serves a good model for the LGBT due diligence duty.

B. The duty of Vigilance in French law (The 2017 French law)

The French Duty of Vigilance 2017 is a mandatory model which provides the due diligence meaning. The 2017 French law places a due diligence principle on large companies.[6] The due diligence principle requires the companies to establish a 'vigilance plan' containing reasonable but adequate measures to *identify* and *prevent* human rights violations from those: corporate activities; direct/indirect subsidiaries' activities; the activities of subcontractors or suppliers

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[1] OHCHR, United Nation Guiding Principle on Business and Human Rights < https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> (Accessed on 19th April 2023)at 1.
UNGPs at 1
[2] Ibid at 1.
[3] Ibid Principle 17 (a).
[4] Ibid Principle 17.
[5] Ibid Principle 18.
[6] France's Duty of Vigilance Law < https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/ > (Accessed on 19th April 2023).

with whom there is an established commercial relationship (when these activities are related to this relationship). The 'vigilance plan' also indicates that governance solutions need to alleviate human rights risks or violations. Similar to the UNGPs, The French Duty of Vigilance 2017 summarises due diligence as 'identify, prevent and mitigate' actions.

C. The Corporate Sustainability Due Diligence Directive (CSDDD) in EU 2024

The EU CSDDD requires the companies to 'integrate sustainability into corporate governance and management systems, and framing business decisions in terms of human rights, climate and environmental impact, as well as in terms of the company's resilience in the longer term'.[7] This objective echoes the transformative CSR approach.

In order to fulfil the corporate citizenship concept, the proposal adopted the due diligence principle to implement mitigation processes for adverse human rights and environmental impacts in the value chains of the companies. The Directive stipulates in the Article 5, Article 8 and Article 9 that Member States shall ensure that companies conduct human rights and environmental due diligence following the actions (b) identifying actual or potential adverse impacts and (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end.[8] Hence, this due diligence principle is similarly described as 'taking appropriate measures with respect to identification, prevention and bringing to an end adverse impacts (mitigation)'[9] to achieve the role of the company as a social entity.

Following these due diligence legal documents, there are three features which are proposed to be internalised in the LGBT due diligence duty. First, human rights concerns are embodied in all these legal documents. This reinforces widening directors' duties – directors need to go beyond profit-maximisation approach and to protect people's human rights in corporate activities. The substantiated human rights protection can introduce LGBT rights protection in

[7] European Commission, Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 < https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html#title2> 1, at 4 and 5: the 2024 revised version said that human rights and environmental due diligence should be furthered embodied in corporate governance framework, which aligns with the meaning delivered by the quotation sourced from the earlier version.
[8] Ibid at 141, 147, and 149.
[9] ibid at 147.

corporate directors' duties (as discussed below). Secondly, all these HRDD principles embody the 'identify, prevent and mitigate' approach. This dynamic as well as proactive approach implies that corporate directors need to go beyond merely adopting some pro-human rights voluntary policies. It implies that corporate directors need to substantively take specific measures, such as assessing the risks, preventing potential harms and mitigating existing issues, in order to eliminate human rights issues in corporate activities in the present and future. Thirdly, the HRDD principle reflects the transformative CSR theoretical approach (combined with feminist 'care and compassion' principle). In terms of stakeholders' interests, the HRDD principle goes beyond the financial interests/imperatives of other stakeholders and attempts to protect more relevant social/human rights imperatives, such as employment, anti-discrimination, safety and health. This echoes the 'care and compassion' principle – treating relevant stakeholders with human rights and interests protection. Modelling on these three key features, **LGBT due diligence duty can be summarised as requiring directors to substantively identify, prevent and mitigate LGBT-critical content in expressions and manifestations in corporate operations for the purpose of respecting LGBT people's equal human status/dignity**.

6.1.A.2. LGBT due diligence in HRDD principle

The term 'human rights' in those due diligence law models provides the meaning of LGBT human rights protection. OHCHR produced a business conduct document called 'Tackling LGBTI discrimination in the private sector' to support business and companies to tackle discrimination on the ground of sexual orientation and gender identities in 2019. This is a guidance that substantiates the scope of human rights protection in HRDD in UNGPs. In the business conduct, the Office stipulated that:

> The present Standards of Conduct build on both the UN Guiding Principles and on the UN Global Compact and offers guidance to companies on how to meet their responsibility to respect everyone's rights – including, in this case, the rights of lesbian, gay, bi, trans, and intersex (LGBTI) people. Meeting this benchmark means treating LGBTI people fairly in the workplace, as well as looking at business practice up and down the supply chain to seek to ensure that discrimination is tackled at every turn. But the Standards of Conduct also take the case for corporate engagement a step further – by pointing to the many opportunities companies have to contribute to positive social change more broadly in the communities where they do business.

On this basis, HRDD principle in UNGPs encapsulates responsibilities to embody LGBT anti-discrimination in human rights protection, representing 'LGBT due diligence'.

The endorsement of LGBT anti-discrimination in UN HRDD scope reflects the dignity philosophy in Chapter 1: progressively protecting LGBT people' human dignity in our human society. In the guidance, Article 1 of Universal Declaration of Human Rights was referred and stipulated that 'all human beings are born free and equal in dignity and rights'.[10] The OHCHR further added in the guidance that businesses are expected to provide a positive environment within their organisation so that 'LGBTI employees can work with dignity and without stigma'. [11] The 'LGBT people' are not limited to employees, but also 'customers, and community members'.[12] These witness that the purpose of the guidance is to recommend companies adopting HRDD to treat LGBT people with equal access to resources and benefits as heterosexual and cisgender people in society. The UNGPs implies the importance of LGBT people's interests tolerance in corporate governance.

The LGBT due diligence needs to go beyond LGBT anti-discrimination and address more issues which can disturb LGBT people's dignity. The dignity underpinning in the UN guidance does not suggest that anti-discrimination is the end of LGBT dignity protection. As argued in Chapter 1 and 2, LGBT dignity protection in corporate life means more than anti-discrimination; a wide range of expressive disregard in corporate activities can certainly stigmatise LGBT people's human status. If UNGPs, integrated with the LGBT anti-discrimination conduct, has the objective of protecting LGBT people's dignity in corporate life, OHCHR would not oppose furthering LGBT due diligence with tackling LGBT expressive harm.

The LGBT anti-discrimination conduct under UNGPs serves as a good model to embody LGBT protection 'lessons', as argued in Chapter 2, in 'LGBT due diligence' and corporate governance. Under the existing LGBT due diligence, companies or corporate governance should conduct due diligence to identify, prevent and mitigate discrimination, harassment and violence

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[10] OHCHR (2019), Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People < https://www.unfe.org/wp-content/uploads/2017/09/UN-Standards-of-Conduct.pdf > (Accessed on 19th April 2023) at 16.
[11] ibid at 5.
[12] ibid at 5.

directed against LGBT individuals. This demonstrates that the existing LGBT due diligence embodies anti-discrimination legal requirements in corporate governance. Following this, in order to improve LGBT dignity protection, I would propose to embody the content-based approach in LGBT due diligence. Directors would be required to go beyond the material harm proportionate approach; the content-based approach would require directors to observe and limit the LGBT-critical content in expressions and manifestations/actions in corporate activities. This LGBT due diligence intends to challenge the 'extra protection' over the rights to freely express and manifest LGBT-critical views/beliefs. In the meanwhile, this due diligence does not intend to make LGBT protection absolute. The individual speakers are still entitled to freely holding but also expressing and manifesting the beliefs outside the company. All the point of this LGBT due diligence is to prevent individuals from exceeding the limits of tolerance and delivering opposition to LGBT identities and interests. In my proposal, 'LGBT due diligence' will make corporate governance participate in a deeper level of LGBT dignity protection than anti-discrimination; corporate governance will be recommended to fix the 'gap' in the existing LGBT legal protection.

6.1.B. LGBT due diligence duty elements: board supervision

6.1.B.1. Board supervision in HRDD models

To fulfil the LGBT due diligence duty, corporate directors would also be required to play a role of supervision or monitor in LGBT due diligence achievement, in particular medium and large companies. Corporate directors need to articulate and publish internal corporate policies, such as guidelines on individuals to take responsibility for their expression and manifestation in relation to LGBT protection; this will guide managers on how to achieve the LGBT due diligence goal. During the implementation, the board of directors exercise the supervision power over how junior and senior managers enforce the internal due diligence guidance and what specific actions they take to identify, prevent and mitigate expressive harm to LGBT people in corporate activities.

- Internal due diligence policies and models

This corporate policy publication requirement in the LGBT due diligence is modelled on the due diligence models. In the UNGPs, in order to fulfil the HRDD, the companies need to 'have

in place policies and processes', including 'a policy commitment to meet their responsibility to respect human rights'.[13] The UNGPs interpreted a 'policy commitment' as an internal governance 'statement' to reflect the HRDD concept. It needs to be 'publicly available and communicated internally and externally to all personnel, business partners and other relevant parties' and to set out publicly 'responsibilities, commitments, and expectations' of respecting human rights. [14] This provides the model for LGBT due diligence internal policy commitments/statements to stipulate individual speaker' responsibilities.

In the France's Duty of Vigilance Law 2017, the annual vigilance plan, which conveys the due diligence to human rights issues, can be seen as a publicly available corporate policy to fulfil the corporate due diligence (the duty of vigilance). This can be viewed as another form of a 'policy commitment' learning from UNGPs. In CSDDD, the Article7(drafted) provides that Member States 'shall ensure that companies integrate due diligence into all their corporate policies and have in place a due diligence policy', including 'a description of the company's approach' and 'a code of conduct describing rules and principles to be followed by the company's employees (and subsidiaries)'.[15] Following these models, a general duty proposal in law is not the end; internal corporate policies and measures ought to be furthered in detail in order to effectively implement the duty.

- Supervision/oversight and models

Furthermore, these models also have an impact on board due diligence supervision or oversight obligations. In UNGPs, it recommends that companies take appropriate action to develop oversight processes which enable effective responses to potential human rights adverse impacts. [16] The oversight processes indicate that directors need to monitor or supervise the management of human righter impacts based on the internal corporate policies. In CSDDD, the Article 15 provides that the companies need to 'monitor the effectiveness of the identification, prevention, mitigation, bringing to an end and minimisation of the extent

[13] See (n 1) UNGPs, Principle 16.
[14] Ibid Principle 16.
[15] Ibid at 145.
[16] See (n 1) UNGPs Principles 21 and 22.

of human rights and environmental adverse impacts'.[17] Likewise, France's Duty of Vigilance Law requires the companies to develop a system to monitor the effectiveness of measures implemented'.

Learning from these models, the due diligence duty seems to require directors to take a dynamic process: from understanding the stipulated duty to articulating specific guidelines to oversighting. This suggests that the proposal LGBT due diligence duty should not be seen as a 'window-shopping' rule; instead, directors must make best efforts to find out and eliminate LGBT expressive harm in corporate life.

6.1.B.2. Board supervision evidenced in UK Corporate Governance Law

The duty to create corporate policies and supervise the relevant management is not something new in UK Corporate Governance law. UK law can provide the basis to develop this supervision function in LGBT due diligence duty. In the Model Articles for public and private companies, the provisions stated that directors may delegate any of the powers to 'such person or committee' as they think fit.[18] In large companies, especially public companies, the board can transfer the managerial responsibilities to senior officers, such as the Chief Executive Officer and others.[19] In fact, these boards would hold the duty of supervising or monitoring management.[20] Also, the role of supervision on human rights issues is reflected in a recent UK corporate case. The significant example is *Vedanta Resources Plc v Lungowe.*[21] In this case, the plaintiffs are 1,826 Zambians, mostly farmers in the local communities, alleging that the personal injury, damage to property and loss of income, amenity and enjoyment of land due to pollution and environmental damage caused by discharges from a Zambian copper mine which was owned and operated by the company KCM. KCM (Zambia) is the subsidiary of the English parent company Vedanta. The claimants brought claims in negligence against both the subsidiary and the parent company. The claimants claimed that Vedanta set health, safety,

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[17] See (n 7) CSDDD at 174

[18] Model Articles for Private Companies and Public companies s. 5(1)(a) < https://www.gov.uk/guidance/model-articles-of-association-for-limited-companies > (Accessed on the 11th November 2022)

[19] Marc T Moore, Martin Petrin, *Corporate Governance: Law Regulation and Theory* (Palgrave, 2017) at 174 to 175.

[20] Ibid.

[21] [2020] A.C. 1045

and environmental standards that KCM was to comply with, and exercised a 'very high level of control and direction' over the subsidiary.[22] The defendants claimed that Zambia was the proper forum for the claim to be heard, which indicates that Vedanta should not be reached for the duty of care. The Supreme Court finally opened the pathway for the claimants against the UK parent company for the operations of foreign subsidiaries. In this case, Vedanta Group laid down the group guidelines about the mining activities in the management of the subsidiary. Lord Briggs stated that:

> Everything… the way in which, the parent availed itself of the opportunity to take over, intervene in, control, **supervise or advise the management of the relevant operations** (including land use) of the subsidiary…It is difficult to see why the parent's responsibility would have been diminished if the unsafe system of work, namely the manufacture of asbestos in open-sided factories, had formed part of a group-wide policy and had been applied by asbestos manufacturing subsidiaries around the world.[23]

From the key judgment, the board should not only publish a health and safety guidelines but provide proper intervention, including supervision and control, to ensure that the corporate activities and system actually work safely for other stakeholders in society. This is the legal evidence to strengthen the role of the board in supervising or monitoring how HRDD is achieved. Therefore, board supervision and oversight on LGBT due diligence practice (by directors and managers) should be successfully created in UK law.

6.1.C. LGBT due diligence elements: mandatory nature

6.1.C.1. The development from a voluntary responsibility to a legal obligation

The adoption of the mandatory nature is modelled on the HRDD legislative development in different jurisdictions. As an early corporate human rights protection document, the UNGPs was adopted by the UN Human Rights Council in 2011 as a voluntary guidance. The UNGPs views the HRDD principle as a corporate responsibility (beyond law) to respect human rights. While this responsibility recommends companies proactively tackling human rights impacts, it is not referred as a legally required social obligation to be imposed on corporate controllers,

[22] Ibid 3.
[23] Ibid at 49 and 52.

including directors and managers. In the example of a treaty, once the treaty text is adopted, it is meant to be enforced by its States parties, and typically some oversight entity is established to monitor compliance – as in the case of UN human rights treaties.[24] In fact, there is no relevant oversight entity to monitor the enforcement of the UNGPs. The UNGPs is a set of soft-law instruments to promote corporate due diligence to human rights issues.

Nevertheless, HRDD principle started to move from soft-law nature to hard-law/mandatory nature after UNGPs. Since 2015, under Ecuador's leadership, negotiations have been under way at the United Nations for the adoption of a legally binding instruments on business and human rights.[25] Current Draft Article 6 on Prevention affirms that 'States Parties shall require business enterprises to undertake HRDD', thus in practice calling for HRDD legislation.[26] Notwithstanding issues of corporate culture and voluntary approaches to corporate human rights observance, due diligence has certain important legal implications that may result in the institutionalisation through legal practice of a legally binding duty to observe human rights.[27] These witness that HRDD principle should be mandated as a legal obligation in corporate governance.

In 2017, the development of the French Duty of Vigilance Law illustrates a significant turning point regarding the regulatory nature of the HRDD principle from soft-law to mandatory regulation (hard law). The French due diligence law evolved from the UNGPs. As discussed above, the duty of vigilance (French law) encapsulates the due diligence principle to address the certain human rights impacts, which has the common ground with the UNGPs regarding 'identify, prevent and mitigate' actions. In draft of the French law, it is stated that:

> In accordance with the United Nations Guiding Principles on Business and Human Rights unanimously adopted by the United Nations Human Rights Council in June 2011…the purpose of

[24] John Gerard Ruggie, Caroline Rees, Rachel Davis, 'Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations' [2021] Business and Human Rights Journal 179 at 181.
[25] Nadia Bernaz, 'Mandatory Human Rights and Environmental Due Diligence: Trends and Lessons from Europe' [2022] Wageningen Law Series 1 at 2.
[26] Ibid 2.
[27] Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' [2012] Business Ethics Quarterly 145 at 157.

> this draft law is to introduce a vigilance obligation for parent companies and instructing companies in respect of their subsidiaries, subcontractors and suppliers[28]

This demonstrates that the HRDD principle defined by the UNGPs was interpreted by the French legislator in creating the duty of vigilance to human rights impacts. These recent HRDD legislations, including CSDDD and Dutch Mandatory HRDD Legislation 2023, witness that HRDD principle is shifting towards a mandatory duty away from the voluntary nature. The shift towards the mandatory nature has the implication that LGBT due diligence duty should be a mandatory duty in law.

6.1.C.2. Criticisms over voluntary HRDD

In UNGPs, the major concern about the HRDD principle (a voluntary guidance) is the lack of real implementation on due diligence to human rights. In 2019 the Corporate Human Rights Benchmark assessed 200 of the largest publicly traded companies in the world across four industries (agricultural products, apparel, extractives and Information and Communications Technology Manufacturing).[29] The findings of the assessment notes that:

> In aggregate, the 200 companies are paiting a distressing picture. Most companies are scoring poorly and the UN Guiding Principles on Business and Human Rights (UNGPs) are clearly not being implemented.[30]

These findings underline the limitations of complete reliance on voluntary approaches and 'soft law' regulation. Under the soft-law regulation, the companies are likely to develop inadequate corporate policies and strategies to implement the HRDD principle. Some recommended mechanisms or information in the voluntary due diligence process can be neglected by the companies. Taylor presented the example that few businesses would want to publish information about the risks of violating human rights in corporate activities and

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[28] Stéphane Brabant, Charlotte Michon, and Elsa Savourey, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance'[2017] International Review of Compliance and Business Ethics 1 at 7.

[29] Corporate Human Rights Benchmark (CHRB), '2019 Key Findings - Across sectors: Agricultural Products, Apparel, Extractives & ICT Manufacturing' <https://assets.worldbenchmarkingalliance.org/app/uploads/2021/03/CHRB2019KeyFindingsReport.pdf > (Accessed on 19th April 2023)

[30] ibid at 3.

oversight would be difficult to implement.[31] Since the HRDD is not made as a legally binding requirement, it would not lead to substantive improvements in corporate human rights protection.[32] Due to the inadequate due diligence assessments, human rights risks can be managed for merely corporate profitability.[33]

The voluntary HRDD can be used for 'business case' in corporate governance. Muchlinski argued that 'at worst it could degenerate into a 'tick-box' exercise designed for public relations purposes rather than a serious integral part of corporate decision-making'.[34] Human rights risks could be mere commercial risks – the failure to identify such risk, and to prevent and minimise it through corporate decision-making, can lead to serious and unwanted commercial consequences, particularly in relation to reputation.[35] Unless a corporate culture of concern for human rights is legally instilled into the directors, managers and other individuals of the company, due diligence could end up missing the substantive issues it is set up to discover.[36]

Against this implementation criticism, the need for a top-down approach by governments requiring (and not merely encouraging) the companies to exercise due diligence in corporate activities has been more apparent.[37] The mandatory due diligence duty can make a contribution to addressing the weaknesses resulting from the voluntary ones. Following the criticisms from the voluntary nature, LGBT due diligence duty must be proposed with the mandatory nature.

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[31]Mark B Taylor, 'The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility' [2011] Nordic Journal of Applied Ethics 9 at 26.
[32] 20 and 26.
[33] See (n 27) Muchlinski, Implementing the New UN Corporate Human Rights Framework at 156.

[34] Ibid at 156.
[35] John H. Dunning and Lundan Sarianna, *Multinational Enterprises and the Global Economy* (Edward Elgar, 2008) at 649 to 660; Wesley Cragg, 'Business Ethics and Stakeholder Theory' [2002] Business Ethics Quarterly 113 at 126
[36] See (n 27) Muchlinski at 156.

[37]Claire Bright, 'Creating A Legislative Level Playing Field In Business And Human Rights At The European Level: Is The French Law On The Duty Of Vigilance The Way Forward?' [2018] EUI Working Paper MWP 2020/01, 1 at 6.

Section 2 The impacts of the LGBT due diligence duty (6.2)

6.2.A. The positive impacts of mandatory nature

The mandatory nature, which intends to make the HRDD legally binding, can strengthen implementation of LGBT due diligence duty in UK Corporate Governance law. This positive impact is witnessed in the French law. Following the mandatory duty, the companies would need to pay special attention to ensure that the due diligence duty will be implemented in a manner that gives an influential impact on addressing human rights risks. In TotalEnergies company lawsuit, Civil Court of Nanterre affirmed that:

> the implementation of the Vigilance Plan involves the organisation (mitigation, prevention, and alert actions) and operation of the company (monitoring of measures and evaluation of their effectiveness) either by monitoring its subsidiaries or by influencing its subcontractors. The Vigilance Plan and its implementation report are thus an integral part of the company's management[38]

Rather than tick the boxes (i.e. making a vigilance plan without implementing it), the companies must comply with its obligations, including making improvements on the measures, to fulfil the due diligence duty.

There was a study conducted interrogating implementation of vigilance plans in 2019. According to the study, the main issues identified by businesses in relation to human rights risks concerned the fundamental rights of employees, such as prohibition of forced and child labour, trade union freedom and non-discrimination.[39] The study also reported that half of the companies reviewed were developing their global CSR responses to these human rights risks, such as internal audits and responsible procurement clauses, with the primary objective to monitor the corporate practices.[40] The positive impact is that the French Duty of Vigilance has had on business practices was confirmed in the report according to which the law prompted 70% of the companies to start mapping risks of adverse human rights and environmental impacts or to revise existing mappings and processes.[41] The study implied that

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[38] Maria Lancri, 'Lessons from the French Duty of Care Law on the way to a European text' [2021] ERA Forum 453 at 459.
[39] See (n 37) Bright, French Duty of Vigilance at 16.
[40] Ibid at 16
[41] Ibid at 17.

HRDD implementation can be reinforced through its mandatory nature. The study conveys that a mandatory HRDD legislation can require corporate directors to substantively and dynamically achieve human rights protection. Under a mandatory due diligence legislation, companies cannot turn a blind eye about human rights issues but must internalise human rights protection as a key corporate responsibility in governance.

The French duty of vigilance 2017 can also have an impact on change of corporate objective in French law later. In 2019, PACTE law, which stands for 'action plan for the growth and transformation of businesses', introduced a number of legal reforms in the French corporate legal frameworks.[42] The legal reforms include, *inter alia*, the corporate objective – the emergence of a company as an environmentally responsible and collaborative entity instead of a legal form with solely financial objectives.[43] The PACTE Law added a second paragraph to the Article 1833 of the French Civil Code that now states he following: 'The company shall be managed according to its corporate objective, taking into consideration the social and environmental impacts of its activity'.[44] This new French corporate objective expands the obligation of a corporate director: 'representing the interests (often financial) of direct shareholders is not enough; what is needed is to propose a new vision of the company that considers the interests of a wider group of stakeholders, including environment and society as a whole'.[45] This new French corporate objective seems to contribute to widening to include more other stakeholders' interests in directors' duties.

The duty of vigilance law 2017, as the mandatory due diligence duty, is strongly connected with this expanded corporate purpose and directors' duties. In the mandatory due diligence duty, the corporate controllers (mainly directors) are emphasised on addressing human rights and environmental issues. The human rights and environment protection can strengthen the duty of directors to address the interests of wider stakeholders in society and the social perspective of the new corporate purpose – 'social and environmental impacts of its activity'. In PACTE Law, there is no clear statutory requirement on what directors ought to do so as to

[42] Mariia Domina, 'The critical analysis of the sustainable corporate governance obligation under French law' [2022]Journal of Business Law 668 at 670.
[43] Ibid at 669 to 670.
[44] Ibid at 671
[45] Ibid at 699 to 671

fulfil the corporate purpose and their obligations yet. The duty of vigilance law provides interpretation on how directors should exercise the expanded obligations to take social and environmental impacts into consideration. In the Total lawsuit, the Civil Court of Nanterre stated that:

> the provisions of Article 1833 paragraph two of the French Civil Code, as amended by the Law of May 22, 2019, state that the company is managed in its social interest, taking into consideration the social and environmental challenges of its business. **With regard to the obligations incumbent on commercial companies under the Duty of Care Law, the development and implementation of the vigilance plan therefore directly contributes to the operation of these companies**[46]

On this basis, a HRDD legislation embodies transformative CSR in directors' duties, going beyond increasing corporate profits and shareholder primacy but widely protecting other stakeholders/people's interests and rights. Therefore, a mandatory due diligence legislation is not adopted as a mechanism for 'business case' but to enhance corporate accountability to people's human rights in a wider society.

I would argue that the LGBT due diligence duty, modelling on a mandatory human rights legislation, can require directors to weaken shareholder primacy and contribute to LGBT dignity protection. Like French law, if LGBT due diligence was mandated successfully, directors would be to identify, prevent and mitigate LGBT-critical expressions and manifestations in corporate activities, regardless of having impacts on shareholders' interests. First, the proposed duty echoes the transformative socially responsible development in UK corporate governance. The proposed LGBT due diligence duty reflects Ross Grantham's purposeful company – directors manage the business in a way that 'solves the problems of "people and planet" and to contribute to the wellbeing of society and the planet as a whole' and benefits all of the stakeholders who are 'those groups and interests affected by how the company conducts its business'.[47] As the new corporate purpose provided by British Academy in 2018 (discussed in Chapter 4, Section 2), LGBT due diligence would contribute to achieving the corporate purpose that 'a business can contribute solutions to societal and environmental

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[46] See (n 38) Lancri, French Duty of Care Law at 459.
[47] Ross Grantham, 'People, Plant, and Profits: Re-Purposing the Company' [2021] Company and Securities Law Journal 250 at 255 and 256.

problems'.[48] Learning from Petrin, the proposed LGBT due diligence duty can curtail or regulate directors' discretion (from pre-2006 existing law) and contribute to protecting the interests of shareholders and other stakeholders with equal footing.[49] As Orts argued, if corporate directors and executives are legally required to address issues, such as racism, sexism, and LGBT-phobia, it would be helpful to create a profound top-down governance system where profits for good lives and fulfilling social connections.[50] The LGBT due diligence duty proposal aligns with the suggested directors' duties reform in s.172 of the 2006 Act and corporate purpose by the British Academy, providing substantive protection to LGBT stakeholders/people.

This proposed duty does not intend to prioritise LGBT stakeholders over other stakeholders. In fact, it plays a pivotal role in highlighting the importance of LGBT people's interest and dignity in the corporate context. This proposed duty brings about more regulatory flexibility but also requires companies to take further internal measures to sufficiently absorb LGBT protection in corporate governance, progressing the social status nature of a company in legal development.

Furthermore, the mandatory LGBT due diligence duty echoes the feminist 'care and compassion' principle underpinned by radical feminist critiques. Under the proposed duty, directors would be required to prevent and mitigate LGBT-critical manifestation, such as objecting service provision to LGBT people, internalising the 'LGBT protection lessons' from cases, such as *Eweida* (*Ladele*). The duty intends to achieve the objective illustrated in radical feminist discussion – respecting LGBT people's equal human status. In cases like Ashers Baking Co, while McArthurs only attempted to reject the decoration message, their objection is based on the LGBT-critical belief and can deliver heterosexual superiority to LGBT potential

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[48] British Academy (2018), Reforming Business for the 21st Century: A Framework for the Future of the Corporation < https://www.thebritishacademy.ac.uk/documents/76/Reforming-Business-for-21st-Century-British-Academy.pdf > at 8.
[49] Martin Petrin, 'Beyond Shareholder Value: Exploring Justifications For A Broader Corporate Purpose' in Elizabeth Pollman and Robert B. Thompson (eds), *Research Handbook on Corporate Purpose and Personhood* (EE, 2021) at 21.
[50] Eric W. Orts, 'Toward a theory of plural business purposes' [2024] Journal of Corporate Law Studies 1 at 33 and 45.

customers and employees. Under the LGBT due diligence duty, directors would identify that the LGBT-critical content (i.e. opposing same-sex life) lies behind this objection and should prevent the objection which could make LGBT people feel lesser human. The service provision belongs to the commercial business in the company rather than McArthurs or anybody else. Learning from radical feminist and corporate discussion, the company is a social entity which should not cause intolerance or subordination to people's status, including women and LGBT people. As a manager/director in the company, this proposed duty would require McArthurs to prevent and mitigate any professional conducts which cause the corporate entity to have adverse impacts (i.e. intolerance) to LGBT people/stakeholders. Therefore, if the LGBT due diligence duty had been proposed before the *Ashers* case, McArthurs would have been required to prevent or mitigate their objection because their objection can cause intolerance to LGBT people.

Learning some other LGBT protection reflections, the proposed duty will contribute to making individual speakers more responsible for their expressions. Corporate directors would be able to prevent expressive harm to LGBT people by terminating the employment contract like Ms Ommoba, as discussed in Chapter 2 (Section 3). For instance, if an employee expresses anti-gay views at work and they need to work with LGBT-related jobs (e.g. serving client in ways related to LGBT human status), directors would be allowed by the due diligence duty to terminate their employment contract for the reason that they may no longer suit the job. While individuals hold the right to express their views, they need to take the responsibility for the consequences of their expressions, including apology, declaration or even unemployment in corporate activities.

It is argued that the proposed duty enables transformative CSR theoretical approach (with radical feminist critiques) to be manifested in legal practice and conveys true 'care and compassion' to LGBT people in society. The mandatory LGBT due diligence duty will not only make a difference to progressive corporate governance law in the UK but also addressing inadequate LGBT legal protection in the UK society.

6.2.B. The potential limitations of the LGBT due diligence duty proposal

The proposed duty does challenge but not *overturn* shareholder primacy in s.172 of the Companies Act 2006. This suggests that LGBT protection is still possible to be utilised as an instrument subjected to profit-maximisation and shareholder wealth creation. This is indicated in the French example. In French Duty of Vigilance law 2017, while the implementation is strong, whether or not the business case is entirely overturned is questionable. A report by French NGOs which analysed 80 vigilance plans published between March and December 2018 (first year of the application of the law) concluded that 'companies must do better'.[51] According to the report, while the companies had created the vigilance process and plans in compliance with the law, there were many flaws in relation to effectiveness. For instance, the report affirmed that many vigilance plans do not sufficiently detail the actions and measures taken by the company to prevent serious human rights and environmental harms and give a very incomplete answer to the risks identified in the mapping.[52] This suggests that there is still potential of practicing the due diligence duty for business case purpose.

According to Delalieux and Moquet, the law was defended by some people in the parliamentary debates because it can develop an approach for the companies through which they will be rewarded by the market through responsible customers or investors.[53] For Hafenbrädl and Waeger, the 'business case' ideology remains firmly rooted in people's mind and the due diligence approach can be related to the beliefs in the intrinsic effectiveness of the market.[54] Thus, it is possible that the proposed duty would not be completely detached from the ameliorative aim.

Also, under the French model, directors are given with extensive flexibility to determine how to engage the vigilance plan. Pietrancosta argued that in the cases where private and public

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[51] See (n 37) Bright, French Duty of Vigilance Law at 17.
[52] Ibid at 18.
[53] Guillaume Delalieux and Anne-Catherine Moquet, 'French law on CSR due diligence paradox The institutionalization of soft law mechanisms through the law' [2020] Society and Business Review 125 at 133.
[54] Sebastian Hafenbra¨dl and Daniel Waeger, 'Ideology And The Micro-Foundations Of Csr: Why Executives Believe In The Business Case For Csr And How This Affects Their Csr Engagements' [2017] Academy of Management Journal 1582 at 1588.

interests are not clearly aligned, whether or not they are in direct conflict, the French corporate purpose should not by itself require the subordination of corporate profit and shareholder interests for the public good.[55] As discussed above, the French corporate purpose provision is similar to s.172 of the Companies Act (UK). It is conceived as an inclusive duty rather than declaration of a pluralistic stakeholder theory, the priority is likely to remain the firm's profitability.[56] According to Segrestin and others, there is not much French case law to interpret the new objective and it calls for more future research, including whether or not the reform can offer an effective framework for responsible innovation to accomplish the agenda of human rights and environment protection.[57] Thus, there is a potential that the French corporate purpose can be interpreted as 'business case', which may not embrace the positive legal aim of the French Vigilance law or give little support to the Vigilance duty.

Learning from the French model, the LGBT due diligence duty *by itself* is possible not to move so far from 'have regard to' in s.172 of the 2006 Act. While the proposed duty is a mandatory duty that requires directors to address LGBT expressive harm, 'have regard to' in s.172, which represents much directional discretion, can inhibit directors from putting LGBT protection as the substantive obligation.[58] The effective implementation of the proposed LGBT due diligence duty does require some supportive mechanisms to strengthen the 'care and compassion' to LGBT people.

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[55] Alain Pietrancosta, 'Codification in Company Law of General CCSR Requirements: Pioneering Recent French Reforms and EU Perspectives' [2022] European Corporate Governance Institute – Law Working Paper 1 at 54.
[56] Ibid.
[57] Blanche Segrestin, Armand Hatchuel and Kevin Levillain, 'When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose' [2021] Journal of Business Ethics 1 at 11.
[58] Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' [2007] Sydney L. REV.577 at 597; Nicholas Grier, 'Directors deliver - just not very much: further reflections on section 172 of the Companies Act 2006'[2022] Juridical Review 212 at 214 (He argued that 'have regard to' allows directors to carry out something that is antithesis of substantive stakeholder protection); also see Peter Watts KC, '*Sequana* in the Supreme Court: cautious confirmation of the creditor-extension to the director's duty of loyalty' [2023] Butterworths Journal of International Banking and Financial Law 74 at 76 to 77. (He argued that duty of loyalty is a sponge and how to balance creditors' interests and shareholders' interests is determined by directors. Thus, there is no independent and direct duty to protect creditors' interests.)

Section 3 The LGBT due diligence reporting regulation (6.3)

I would propose the LGBT due diligence reporting regulation. The LGBT due diligence reporting is proposed as a mandatory requirement for all companies, including small, medium and large companies. The LGBT due diligence reporting intends to make companies answerable to the public with a number of questions in relation to protecting LGBT people in corporate activities, including what actions they have taken to prevent the risks; what they have done to address the existing matters; whether or not the process is effective; what improvements they can make in the future. Compared with the vigilance plan in French law, the proposed LGBT due diligence process would go further than only articulating internal corporate policies/measures and would require directors to reflect on how effective the measures are to enhance corporate accountability to LGBT people's rights in corporate activities.

6.3.A. The LGBT due diligence reporting and sustainability reporting

One model, which provides foundation for the LGBT due diligence reporting requirement, is the corporate sustainability reporting directive (CSRD). The 'sustainability matters' in this Directive are interpreted as 'environmental, social and human rights, and governance factors'.[59] The sustainability reporting is referred as the double materiality perspectives: the risks to the undertaking; the impacts of the undertaking to the society.[60] Under the Directive, the companies are tasked to disclose the information in relation to the human rights impacts of the corporate activities, which is connected with the due diligence principle. The Article 19a2(f) of the Directive stipulates a description of a sustainability reporting:

> (i) the due diligence process implemented by the undertaking with regard to **sustainability matters**, and, where applicable, in line with Union requirements on undertakings to conduct **a due diligence process**;
>
> (ii) the principal actual or potential adverse impacts connected with the undertaking's own operations and with its value chain, including **its products and services**, its business relationships

[59] Article1 (b) (17), European Commission (2023), EU Corporate Sustainability Reporting Directive (CSRD) (Directive/EU/2022/2464)
< https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464 > (Accessed on 2nd May, 2024).
[60] (29), CSRD.

and its supply chain, actions taken to identify and monitor those impacts, and other adverse impacts which the undertaking is required to identify pursuant to other Union requirements on undertakings to conduct a due diligence process;

(iii) **any actions** taken by the undertaking to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts, and the result of such actions'

Following this provision, a sustainability reporting requires directors to disclose how the human rights and environmental due diligence duty is implemented in corporate governance. It seems to me that the sustainability reporting means more than just reporting internal policies; it is emphasised on reporting a whole dynamic process – actions – companies take to realise human rights and environmental due diligence.

Another model on which the proposed LGBT due diligence reporting is based is The Eco-Management and Audit Scheme (EMAS) Regulations. The significance of the EMAS Regulations is that the companies are required to provide the internal review. The EMAS system is a (voluntary) environmental management tool for companies and other organisations to evaluate, report and improve their environmental performance.[61] Under the Regulation, the companies are recommended to set up procedures to assess and improve their environmental performance. The companies should conduct an environmental review, constituting an initial comprehensive analysis of direct and indirect environmental impacts, performance, management and practices related to the organisation's operations, and provide evidence of compliance with environmental law.[62] This internal review provides the overall environmental intention and direction of the organisation, as well as including a commitment to continuous improvement of environmental performance and outlining detailed (and where practical, quantifiable) objectives and targets.[63]

I would propose to transplant this internal environment review process as a mandatory internal LGBT due diligence review process in LGBT due diligence reporting. This would be

[61] European Commission, The Eco-Management and Audit Scheme(EMAS)<https://green-business.ec.europa.eu/eco-management-and-audit-scheme-emas/about-emas/how-does-emas-work_en > (Accessed on 19th April 2023).
[62] Article2/9 and 4/4
[63] Arts 2(1), (11) and (12) of EMAS Regulations.

proposed to be mandated to small, medium and large companies.[64] Modelling on the environmental review, the companies would be required to provide the LGBT protection internal review to analyse and assess the specific actions and the outcomes of the actions on the basis of the produced internal corporate policies: one central question of the review is whether or not the due diligence process has been done effectively to protect LGBT people's dignity in corporate activities; the other central question is how the companies will make improvements on implementing LGBT due diligence.

In the EMAS Regulation, the companies are recommended to 'modify the environmental policy, the environmental programme, the environmental management system, revise and update the entire environmental statement' according to the environmental review. To model on it, if the review shows inadequate measures to address LGBT expressive harm, the proposed LGBT due diligence reporting regulation would require the companies to demonstrate following revision or new measures to improve corporate performance in LGBT dignity protection. These two central questions would guide the companies to investigate and improve the performance of LGBT protection through the due diligence reporting.

[64] In the EMAS regulation, SMEs (small and medium sized enterprises) are excluded. Nevertheless, this does not mean that SMEs cannot or should not participate in the EMAS system and adopt the relevant mechanisms to address environmental issues. In a report in 2017, 17% of the small firms in the UK participated in the EMAS system, adopting reporting and internal review mechanisms. But the report also showed that small firms were ill-informed about the environmental mechanisms, including how they work and implement the mechanisms. Therefore, to strengthen the role of SMEs in LGBT protection, the LGBT due diligence reporting is proposed to mandate SMEs to report and carry out internal review on LGBT due diligence implementation. See Ruth Hillary, 'The Eco-Management and Audit Scheme, ISO 14001 and the smaller firm' in Ruth Hillary (eds), *Small and Medium-Sized Enterprises and the Environment* (Routledge, 2017) at 14 (this demonstrated the 2017 report about SMEs); Ninel Ivanova Nesheva-Kiosseva, 'Non-Financial Reporting for SMEs and the Crisis 2019-nCoV' in Neeta Baporikar (eds), *Handbook of Research on Sustaining SMEs and Entrepreneurial Innovation in the Post-COVID-19 Era* (Business Science Reference, 2021) at 271 to 274 and 276; Patrycja Krawczyk, 'Non-Financial Reporting—Standardization Options for SME Sector' [2021] Journal of Risk and Financial Management 1 at 2 to 5 (These two articles demonstrate the progressive participation of SMEs in human rights and environment protection); See also in December 2022, European Federation of Accountants and Auditors (EFAA) provided voluntary guidance 'Sustainability Reporting How SMPs Can Build the Capacity to Support SME' to recommend SMEs engaging with external accountants to enhance sustainability reporting actions on the basis of CSRD, encouraging the role of SMEs in human rights and environmental protection in society < https://efaa.com/wp-content/uploads/2023/01/EFAA-Guide-Sustainability-Reporting-SMPS-SMEs.pdf > (Accessed on10th January 2023)

The corporate performance in LGBT protection assessed in the internal review would be required to disclose in the LGBT due diligence reporting. In the EMAS regulations, the environmental performance of the companies should be reported on the basis of generic and sector-specific performance indicators focusing on key environmental areas at the process.[65] In the Environment Reporting template of the Regulations, the indicators shall give an accurate appraisal of the environmental performance.[66] Modelling on this, the LGBT due diligence reporting would keep records of the evidence about the internal review and present the relevant information in the public reporting: the assessment, the governance performance in LGBT protection, and future improvements. The internal review approach suggests the 'plan-do-check-act' dynamic process.[67]

Modelling on the two regulatory frameworks, LGBT due diligence reporting contains: 1) disclosing specific actions corresponding to the duty; 2) disclosing the internal review of LGBT due diligence as the evidence; 3) disclosing the future improvement mechanisms. Thus, the LGBT due diligence regulation has a strong self-contained nature.

6.3.B. The impacts of LGBT due diligence reporting

6.3.B.1. The contribution to enhancing the LGBT due diligence duty

I would argue that the LGBT due diligence reporting can contribute to improving the effectiveness of the due diligence implementation. The LGBT due diligence reporting, embedding specific actions, and internal review, would provide the evidence on how corporate directors implement the due diligence duty to LGBT protection. Through the evidence, people in the public, including but not limited to stakeholders, future investors and NGOs, can judge whether or not the company has effectively contributed to LGBT dignity protection in society. This proposed reporting delivers a crucial outcome that companies must actually implement this duty by taking specific measures and making improvements on internal governance in order to enhance LGBT dignity protection. This reporting ensures that

[65] Article1 (18) of EMAS Regulations.
[66] Annex IV, Environmental Reporting recommendations of EMAS Regulations.
[67] Carrie Bradshaw, 'This is a repository copy of Environmental Voice within Companies and Company Law: Environmental Management Systems (EMSs)' [2013] Working Paper (Unpublished) < https://eprints.whiterose.ac.uk/135704/> (Accessed on 19th April 2023) at 9.

corporate directors and managers go beyond *having regard* to LGBT people/stakeholders in corporate activities.

The importance of reporting is witnessed in UK law. In *Vedanta*, Lord Briggs, whilst discounting the significance of a management services agreement between parent and subsidiary, concluded: 'But I regard the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries . . . and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable' that the parent exercised the requisite degree of control over the subsidiary.[68] From his Lordship, the answer to the question whether Vedanta incurred a duty of care (due diligence) to the claimants was likely to depend upon a careful examination of materials produced on disclosure.[69]

On the basis of the case, I find that disclosure, including non-financial reporting and policies, can assume the responsibility between the company and the reported social and environmental issues. It seems to me that the disclosure expects the company to take relevant actions to fulfil the content on the disclosure. As Bradshaw argued, the sustainability reporting is no longer a 'window shopping' but needs to be fulfilled by corporate behaviours.[70] Ho argued that businesses are required to fulfil the standards or measures they claim to observe.[71] For instance, if a produced internal policy illustrates corporate human rights responsibility (e.g. employees' health and safety), corporate directors should take relevant measures to fulfil the human rights responsibility. It is arguable that disclosure builds the connection between actions and the goal in corporate governance.

In LGBT protection, the due diligence duty sets the goal for directors and managers to tackle LGBT expressive harm; the proposed due diligence reporting reflects what actions a company takes to achieve the goal, as in what measures directors and managers have taken to

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[68] [2020] A.C. 1045 at [61]
[69] Ibid at [57].
[70] Carrie Bradshaw, 'Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court' [2020] Journal of Environmental Law 139 at 148.
[71] Tara Van Ho, 'Vedanta Resources Plc and Another v. Lungowe and Others' [2020] American Journal of International Law 110 at 114.

implement this duty. The reporting reinforces that directors must exercise their discretion or subjective good faith to implement LGBT due diligence duty as an actual legal obligation rather than subject to shareholder primacy. The proposed reporting can help to reduce the chance of using LGBT protection for a business case purpose and make LGBT due diligence more effective.

Also, the reporting can encourage people in the public to engage with the implementation of LGBT due diligence duty. Since the reporting is open to the public, LGBT individuals, pro-LGBT individuals and organisations can observe how a company takes actions to promote LGBT dignity protection in corporate activities. They may have the interest to report and convey their advice about how to enhance LGBT dignity protection to the companies.

Some empirical studies suggested that the effective internalisation of the EMAS Regulations, including internal review and reporting, was motivated by many contextual external and internal factors, including the people and organisations in the public.[72] The pressure from the public can nudge the companies to make improvements on implementing LGBT due diligence duty. According to Chiu, the companies may be incentivised to re-evaluate and improve the transparency of the due diligence process in light of the pressures to make them publicly scrutable.[73] With a procedural and complex reporting, the companies would be compelled to establish more robust systems and procedures and in so doing could entail changes in real behaviour.[74]

To sum up, LGBT due diligence reporting will contribute to enhancing LGBT due diligence duty implementation. It can require directors to tell the public about what exact measures they

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[72] Niccolò Maria Todaro, Francesco Testa, Tiberio Daddi and Fabio Iraldo, 'Antecedents of environmental management system internalization: T Assessing managerial interpretations and cognitive framings of sustainability issues' [2019] Journal of Environmental Management 804 at 814; Francesco Testa, Oliver Boiral and Fabio Iraldo, 'Internalization of Environmental Practices and Institutional Complexity: Can Stakeholders Pressures Encourage Greenwashing?' [2018] Journal of Business Ethics 287 at 298

[73] Iris Chiu, 'Disclosure Regulation and Sustainability: Legislation and Governance Implications' in Beate Sjåfjell and Christopher M Bruner (eds), The Cambridge Handbook of Corporate Law, *Corporate Governance and Sustainability* (CUP, 2020) at 530: Professor Chiu's comment is based on the Non-financial Disclosure Directive on which the CSRD 2022 was modelled on.

[74] Ibid at 530 and Iris Chiu and Anna Donovan, 'A New Milestone in Corporate Regulation: Procedural Legalisation, Standards of Transnational Corporate Behaviour and Lessons from Financial Regulation and Anti-Bribery Regulation' [2017] Journal of Corporate Law Studies 427 at 427.

have taken to fulfil LGBT due diligence obligation (beyond just a business case). It can also provide the access for the public to engage or participate in corporate governance for more improvements in due diligence implementation. The participation or the engagement will be discussed in the Stakeholder Engagement section later.

6.3.B.2. The limitation of the LGBT due diligence reporting

The major limitation is a lack of external scrutinisation. While the reporting requires the internal review and the disclosure of the internal review, the whole process is carried out by the company itself. How to ensure the authenticity of the reporting can be questionable. For instance, to avoid the further interrogation from the public, a company is possible to produce a beautifully polished reporting. The content about the internal review and the specific actions is merely limited to the corporate elite – the board level (or possibly the senior managerial level). It would be difficult for individuals in the public to testify the authenticity of the reported content, such as the review outcome and the relevant evidence.

For instance, Mengual suggested that a report, which can be misleading, erroneous or incomplete, undermines the reliability of the content.[75] Emeseh and Songi inserted the concern the main difficulty with this appears to be issues of credibility of reporting which fails to critically evaluate their contents.[76] From environmental management, a sustainability reporting can be abused and used as 'greenwash' – a fundamentally flawed, subjective, manipulative and untrustworthy report which is antithesis of effective due diligence.[77] In the very subjective perspective, as MacNeil and Esser argued in an empirical study, the sustainability language does not always guarantee the sustainable objective and could exactly

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[75] Paco Mengual, 'Determining An Effective Regulatory Framework For Businesses To Report On The Environment, Climate, And Human Rights' [2022] Pace International Law Review 1 at 36 and 41,

[76] Engobo Emeseh and Ondotimi Songi , 'CSR, human rights abuse and sustainability report accountability' [2014] Int. J.L.M. 136 at 14.

[77] E.g. KPMG (2006), Carrots And Sticks For Starters: Current trends and approaches in Voluntary and Mandatory Standards for Sustainability Reportinghttps://www.carrotsandsticks.net/media/ey3jsm5o/carrots-sticks-2006.pdf > (Accessed on 19th April 2023).

be indicated as misleading marketing, greenwashing or effective reporting skills.[78] The subjective perspective – to leave everything to the company itself – can undermine the aim of the LGBT due diligence reporting. This limitation would be possible to turn the reporting into one which attracts investment and reinforces the LGBT washing under the shareholder-centric model.

Section 4 LGBT stakeholder engagement approach (6.4)

To address the limitation of the LGBT due diligence duty and reporting, I would propose to introduce the LGBT stakeholder engagement approach in the LGBT due diligence process. The stakeholder engagement approach is referred as involving or including the non-shareholding stakeholders to participate in corporate governance through a process that creates, *inter alia*, a dynamic context of interaction, dialogue and consultation, to increase compliance and render the legitimately expected outcome of a regulation.[79] On the basis of the stakeholder engagement understanding, I would propose the LGBT stakeholder engagement/involvement law as the soft-law for both large companies and SMEs to strengthen the effectiveness implementation of the mandatory LGBT due diligence duty and the LGBT due diligence reporting. The LGBT stakeholder engagement will be dismantled in these aspects:

6.4.A. The scope of 'stakeholders' in LGBT stakeholder engagement

The scope of stakeholders is defined by myself as LGBT individuals who can be potentially affected by the corporate activities (e.g. LGBT employees, customers and people in the local communities). The scope is not limited to mere LGBT people but also includes those LGBT-

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[78] Irene-Marie Esser and Iain MacNeil, 'Disclosure and engagement: stakeholder participation mechanisms' [2019] European Business Law Review 201 at 220.

[79] Alberto Alemanno, 'Stakeholder Engagement In Regulatory Policy' [2015] SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701675 > (Accessed on 19th April 2023) 1 at 7;Brett H. McDonnell, 'Stakeholder Engagement' [2022] Minnesota Legal Studies Research 1 at 1; Johanna Kujala, Sybille Sachs, Heta Leinonen, Anna Heikkinen, and Daniel Laude, 'Stakeholder Engagement: Past, Present, and Future' [2022] Business and Society 1136 at 1142; Dirk Matten & Andrew Crane, 'What is stakeholder democracy? Perspectives and issues'[2005] Business Ethics: A European Review 1 at 6;
Giacomo Manetti & Simone Toccafondi, ' The role of stakeholders in sustainability reporting assurance' [2012] Journal of Business Ethics, 363 at 365 ; Michelle Greenwood, 'Stakeholder engagement: Beyond the myth of corporate responsibility' [2007] Journal of Business Ethics, 315 at 317 to 318; Gene Rowe and Lynn J Frewer, 'A Typology of Public Engagement Mechanisms' [2005] 251 at 254,256 and 260.

related stakeholders who are not LGBT people but actively pay attention to LGBT protection enhancement. For instance, to look back at *Lee v Ashers Baking Co* scenario (hypothetically), some employees, customers and local individuals are not LGBT people but they might support that the icing message should have been ordered by the UK Supreme Court to make because LGBT people should be able to live their own lives in society, including in service provision areas. These people are identified as LGBT-related stakeholders. The LGBT-related stakeholders also include organisations who supported to enhance LGBT protection, including governmental or non-governmental organisations.

First of all, this stakeholder scope is grounded on the potentially affected LGBT individuals by the corporate activities. In the UNGPs, the 'stakeholder engagement' term was referred to connecting with the HRDD principle. The 'stakeholders' in UNGPs are referred to as 'potentially affected stakeholders'.[80] These stakeholders are rights-holders of the human rights legal frameworks[81] who are 'the people whose human rights--their lives and livelihoods and the panoply of rights that ensures they are free and equal in dignity--are potentially at risk from a company's decisions and operation'.[82] Those rights holders may be internal or external to the company, as well as close or distant from the company's headquarters.[83] Therefore, the scope of LGBT individuals should go beyond internal participants in the corporate activities, such as employees and customers, further to the relevant LGBT individuals in wider society.

The recent legal models suggest that the scope of stakeholders is wider than LGBT individuals *per se*. The CSDDD followed from the UNGPs and stipulates that: 'stakeholders' means the company's employees…and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company…'.[84] Nevertheless, the EU corporate sustainability directives have a wider scope of

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[80] See (n 1)UNGPs at 11.
[81] These legal frameworks suggest human rights protection but mention nothing about sexual orientation and gender identity protection. It only provides the concept of 'stakeholders' like the 'due diligence' concept as I discussed above.
[82] Shauna Curphey and Jared Cole, 'Stakeholder Engagement in HRDD' [2020] SRRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4178446 > 1 at 1.
[83] Ibid at 6.
[84] EU CSDDD 2024, at 133 (See n 7)

stakeholder definition than 'affected stakeholders'. In the CSRD, the stakeholder scope is indicated to expand to civil society actors, such as non-governmental organisations and social partners, and trade unions.[85] According the CSRD, civil society actors are beneficiaries of the sustainability reporting in relation to the EU due diligence process, and they may hold the interest 'to enter into dialogue with undertakings on sustainability matters [corporate accountability on social and environmental protection]'.[86] In the stakeholder engagement approach, those civil society actors can be active to interrogate corporate activities in human rights protection to enhance corporate social responsibility/accountability. Following the models, local individuals and LGBT supportive organisations (e.g. Stonewall) who hold the interest in LGBT protection in corporate activities cannot be excluded from the LGBT stakeholder engagement mechanism.[87] They need to be included in the scope of 'LGBT-related stakeholders' to participate and strengthen the LGBT effectiveness of due diligence duty and reporting.

6.4.B. The implementation of the LGBT stakeholder engagement approach

- Large companies

The LGBT stakeholder engagement proposal is modelled on the Principle D of the UK Corporate Governance Code 2024 soft law. The 2024 Code promotes a more inclusive approach to stakeholder engagement and introduces, for the first time, stakeholder engagement mechanisms. Principle D states: in order for the company to meet its responsibilities to shareholders and stakeholders, the board should ensure effective engagement with, and encourage participation from, these parties. Following this principle, the provision 5 recommends mechanisms ensuring workforce engagement in corporate governance: one or a combination of the following methods should exist in a company: (i) a

[85] See (n 59) CSRD at 5.
[86] Ibid at 5.
[87] The scope of other people and organisations who have the interest in LGBT protection should have a boundary. The meaningful stakeholder engagement in the OECD Guidelines reinforces this scope. See OECD library (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct<https://mneguidelines.oecd.org/mneguidelines/#:~:text=The%202023%20edition%20of%20the,National%20Contact%20Points%20for%20Responsible > (Accessed on 2nd May 2024) 1, at 20.

director appointed from the workforce; (ii) a formal workforce advisory panel; and (iii) a designated NED (Non-executive Director).

Modelling on this, the LGBT stakeholder engagement mechanism for large companies is proposed to create: (i) a director appointed from the LGBT qualified individuals; (ii) a formal LGBT advisory panel; and (iii) a designated LGBT non-executive director. The role of the LGBT stakeholder engagement mechanisms is focused on observing or examining the LGBT due diligence duty and the reporting implementation. For instance, the LGBT stakeholders can provide the views about whether or not the measures the company has taken are effective to tackle and mitigate expressive harm to LGBT people, advice on how directors can enhance due diligence to LGBT dignity issues and critics about the ineffective due diligence measures.

- SMEs

For SMEs, the LGBT stakeholder engagement mechanisms rely on the communication-based approach in the FRC Guidance. Communication between the workforce and the company, referred to as the 'employee voice', should be as broad as possible and involve those employees with formal contracts of employment (permanent, fixed-term and zero-hours) and other members of the workforce who are affected by the decisions of the board.[88] The Guidance suggests that the board can adopt a range of formal and informal channels to liaise with employees for workforce communication.[89]

Modelling on this, the LGBT stakeholder engagement mechanisms would recommend the board to adopt a wide range of channels to build up the communication in SMEs. Through the channels, LGBT-related stakeholders can bring up their viewpoints, comments and advice about LGBT due diligence duty and reporting affairs. The communication-based approach can welcome not only employees, customers and people in the local society but also pro-LGBT organisations.

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[88] FRC, Guidance on Board Effectiveness (January 2024) < https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/corporate-governance-code-guidance/#relations-with-stakeholders-1a5d61e5 > (Accessed on the 2nd May 2024) at para.41 to para. 48, Section 1.
[89] Ibid para. 49, Section 1.

- Comply or explain principle

The LGBT stakeholder engagement mechanisms are modelled on the 'comply-or-explain' principle. The 'comply or explain' principle was developed since Cadbury Report in 1992. In the Report, the principle was described as 'stating whether they [the companies] are complying with the Code and to give reasons for any areas of non-compliance'.[90] This principle continues in the 2024 Code. In the Code, FRC provides the explanation that 'it is the responsibility of boards to use this flexibility wisely [and of investors] and their advisers to assess differing company approaches thoughtfully'.[91] From the descriptions, the 'comply or explain' principle does not make Corporate Governance Code as a mere voluntary guidance. The 'comply or explain' principle intends to offer companies with *flexibility* to enable the governance structure to adapt to the needs of the business but also for the purpose of embracing the spirit of the governance code. [92] The flexibility attempts to avoid the circumstances in which companies simplistically adopt a recommended mechanism by 'letter' but the recommended mechanism is not effective to embrace the spirit of law. [93] The flexibility attempts to avoid this tick-box exercise, but also allows companies to adopt alternative mechanisms to embrace the spirit.

As a self-regulatory model, the LGBT stakeholder engagement approach needs to embrace the spirit of law.[94] The spirit of law can be modelled on the 2024 Code. In the 2024 Code, the spirit of law is the Principle D to meet its responsibilities for both shareholders and other

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[90] FRC, Cadbury Report (1992)< https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf >(Accessed on 19th April 2023) para.1.3

[91] Financial Reporting Council, The UK Corporate Governance Code (2024) < https://media.frc.org.uk/documents/UK_Corporate_Governance_Code_2024_kRCm5ss.pdf> (Accessed on the 2nd May, 2024) 1 (The 2024 Code was provisioned in January 2024 and will come into effect in 2025)

[92] Edwin Mujih, 'Do not simply tick the box: the effectiveness of the Corporate Governance Code 2018 in the absence of an implementation mechanism' [2021] Company Lawyer 43 at 47; Irene Marie-Esser and Iain MacNeil, 'The emergence of 'comply or explain' as a global model for corporate governance codes' [2022] European Law Business Review 1 at7.

[93]See (n 90) Cadbury Report para. 1.1.0

[94] Doreen McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law: the New Corporate Accountability' Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) at 54 (the spirit of law is emphasised on enhancing legal control and corporate accountability to reach the ultimate goal of law)

stakeholders. The 2024 Code provisioned a number of stakeholder-oriented mechanisms, including workforce engagement,[95] stakeholder participation[96] and board gender diversity,[97] for companies to consider and embrace with the spirit that a board should take responsibilities for stakeholders' interests. Modelling on this example, the spirit of law in the LGBT stakeholder engagement is that a board should engage stakeholders' participation when fulfilling the LGBT due diligence duty and the due diligence reporting requirements. With the flexibility, the board of directors can adopt the recommended mechanisms (according to their corporate sizes) or give sufficient reasons about non-compliance in the due diligence reporting, including what factors or issues limit the company from adopting the LGBT stakeholder engagement options and what alternative mechanisms they consider adopting.[98] The proposed LGBT stakeholder engagement is a 'lever' approach to accommodating all companies in terms of inviting LGBT stakeholders to participate in scrutinising the reporting and the duty implementation.

6.4.C Evaluation on the effectiveness of the LGBT stakeholder engagement approach

6.4.C.1. The positive impacts of the LGBT stakeholder engagement

In stakeholder engagement, stakeholders' voices and participation can contribute to strengthening the implementation of LGBT due diligence duty. In academic evidence, John Parkinson supported the employee participation in the boardroom (as a stakeholder engagement mechanism); he argued that the employee participation can be helpful to divert the corporate governance and responsibility from 'pursuing the single goal of increasing

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[95] Principle D of the 2024 Code
[96] Ibid
[97] Principle J of the 2024 Code
[98] The King IV Report (Corporate Governance Code in South Africa) adopted 'apply and explain' principle, which is reformulated from the 'comply or explain' principle. Learning the 'explanation' meaning in King IV Report, it is not limited to providing explanation about why companies choose not to adopt the governance mechanisms; in fact, 'explanation' helps to 'encourage organisations to see corporate governance not as an act of mindless compliance, but something will yield the results [good corporate governance] only if approached mindfully'. Thus, explanation should contain the aspect that companies explain the alternative way as a more mindful way to embrace the good governance aim. In LGBT protection, companies should explain an alternative way in which they will engage stakeholders in order to embrace the spirit of LGBT due diligence law. See Institute of Directors South Africa, 'King IV Report on Corporate Governance for South Africa' [2016] < https://www.adams.africa/wp-content/uploads/2016/11/King-IV-Report.pdf> (Accessed 1st November 2023) at 7.

shareholder wealth' to 'enforce an openminded commitment to furtherance of the interests of employees' and other groups' interests, such as people in the local community.[99] The main point of Parkinson's argument is that to engage other stakeholders' voice can contribute to fulfilling the wider social responsibility in corporate governance. LGBT stakeholders' voices can divert directors to exercise the discretion and adopt the LGBT due diligence duty and reporting obligations.

Furthermore, stakeholders' voices can contribute to enhancing the review or reflection about the duty implementation in the LGBT due diligence reporting. Lorraine Talbot argued that the stakeholder participation to advise the board of directors can enable the directors to consider a diverse range of voices from people who can be affected by the company or corporate activities other than shareholders.[100] Following that, LGBT stakeholder engagement approach can ensure that LGBT people deliver their voices, including feedback, concerns and advice, for the board to consider and reflect on their due diligence implementation. Their voices, in particular the feedback, can be a testament to whether or not the due diligence measures have been taken to protect LGBT human dignity effectively in corporate life. In the reporting, LGBT stakeholders' comments or feedback would be disclosed as part of evidence for the LGBT due diligence implementation review. The involvement of LGBT people's voices can reduce the chance of 'LGBT washing' in the LGBT due diligence reporting but make the reporting requirement as an actual self-reflective mechanism to enhance LGBT due diligence achievement.

The LGBT related concerns and views would convey the information in relation to how LGBT due diligence process should be implemented or improved by directors to cater to the LGBT interests. Kiarie argued that the stakeholder participation, where stakeholders bring different views or concerns, can nudge the directors to accommodate a wide range of interests in corporate objective and governance.[101] As Ihugba noted, the stakeholder participation can

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[99] John E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company law* (1st ed, OUP, 1993) at 396,398 and 404.
[100] Lorraine Talbot, 'Why corporations inhibit social progress: a brief review of corporations from chapter 6 'Markets, Finance and Corporations. Does Capitalism have a Future?' [2020] Review of Social Economy 130 at 137.
[101] Sarah Kiarie, 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' [2006] I.C.C.L.R. 329 at 339.

enhance the responsiveness of the directors to proactively deal with social consideration to the wider society.[102] With the presented LGBT related concerns, directors would be pushed to truly and dynamically address the risks and harm to LGBT people in corporate activities. It would reduce the possibility that corporate directors do something to simplistically fit in the standard of requirements (as opposed to embracing the purpose in law) when they fulfil the LGBT due diligence duty and reporting requirements. To respond to stakeholders' participation and involvement, directors would make substantive improvements on LGBT due diligence implementation in the future when drawing up the reporting.

The importance of this stakeholder engagement approach is witnessed in the development of EU CSDDD in academic discussion. The stakeholder engagement is actually embodied in a HRDD legislation. In French law, the vigilance plan 'shall be drafted in association with the company stakeholders involved'.[103] This embodies the participation of stakeholders, including but not limited to employees and trade unions within the company, external stakeholders, such as NGOs, consumers and local communities.[104] According to Bright, the collaboration of stakeholders in due diligence process is regarded as an effective collaborative model of regulations to sufficiently improve corporate due diligence behaviours in the long term.[105] Thus, stakeholder engagement can enhance the quality of HRDD.

The stakeholder engagement is also recommended by academics to be introduced to the CSDDD in the future. According to Sjåfjell and Mähönen, the EU due diligence process should be set out to encompass consultative processes for engagement with local communities, including indigenous peoples and other groups and persons affected by the operations and activities of the business, encompassing as relevant in the specific case, workers, subcontractors, and local or national interest groups and community representatives.[106] This

[102] Bethel Uzoma Ihugba, 'The governance of corporate social responsibility: developing an inclusive regulation framework' [2014] Int. J.L.M. 105 at 119.
[103] Article1 of French Duty of Vigilance Law 2017.
[104] See (n 36) Bright, French Duty of Vigilance Law at 10 and 11.
[105] ibid at 11
[106] Beate Sjåfjell and Jukka Mähönen, 'Corporate purpose and the misleading shareholder vs stakeholder dichotomy' [2022] Nordic & European Company Law LSN Research Paper Series 1 at 28.

reinforced the a communication-based stakeholder engagement approach, which aligns with the proposed LGBT stakeholder engagement mechanism recommended for SMEs.

Stakeholder engagement can be helpful to identify the lack of compliance and rectify the due diligence problems quickly.[107] As evidenced in the development of the UNGPs in 2020s, the future implementation intends to 'support civil society organisations working with affected stakeholders in monitoring efforts' in corporate due diligence process. [108] According to Schilling-Vacaflo and Lenschow, , the enhancement of stakeholder involvement, in particular of rightsholders and grassroots organisations, could help to make such local impacts more visible in UN HRDD principle.[109] According to McCorquodale and Nolan, the incorporation of stakeholder participation as symbolic one that is substantive and the requirement of HRDD must provide greater clarity around the scope of such consultation and participation.[110] The future legal development on stakeholder engagement from CSDDD and UNGPs seems to approve of the positive impacts of stakeholder engagement model in HRDD process. Through stakeholders' voices (e.g. feedback, concerns and advice), LGBT stakeholder engagement can be regarded as reinforcing effective legal compliance to the due diligence duty; it will help to improve the reliability of the LGBT due diligence reporting.

6.4.C.2. The limitations of LGBT stakeholder engagement

The main limitation of the stakeholder engagement approach is the soft-law based on the 'comply-or-explain' regulatory method. While the regulatory flexibility is crucial to corporate governance, [111] the 'comply-or-explain' principle can lead to ineffective stakeholder engagement. MacNeil and Esser carried out an empirical research on the 2020 annual reports of FTSE100 companies and it shows that many companies tended not to adopt the

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[107] Ibid at 28.
[108] Business and Human Rights Resource Centre (2021), UN Guiding Principles: The Next Decade < https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/un-guiding-principles-the-next-decade/ > (Accessed on 19th April 2023)
[109] Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges [page 11 and 12]
[110] Justine Nolan and Robert McCorquodale, 'The Effectiveness of HRDD for Preventing Business Human Rights Abuses' [2022] UNSWLRS 1 at 17.
[111] Iris Chiu conducted a survey on the companies and found that the regulatory flexibility is important to incentivise companies to improve social responsiveness to adopt mechanisms and enhance due diligence to human rights protection. See (n 73) *D*isclosure Regulation and Sustainability

recommended mechanisms in the UK Corporate Governance Code 2018.[112] In the study, it showed an example that:

> 36 out of 98 companies did not comply with Provision 5, but provided an explanation and opted for an alternative. Alternative workforce participation tool selected, e.g., opinion surveys, webcasts and emails, online publications via intranet, virtual employee engagements with Board, newsletter updates; Posters and leaflets, Formal reports and information updates to the Board, Speak Up and Whistleblowing Channels, open Q&A sessions[113]

From this example, it seems the corporate governance mechanisms based on the 'comply-or-explain' principle leaves too much to company's discretionary implementation and self-certification.[114] For the alternative mechanisms, it can be challenging to establish how the stakeholder engagement approach will operate in practice and what it entails.[115] In another empirical study, which interrogates stakeholder engagement mechanisms in FTSE 100 companies, MacNeil and Esser provided that very few corporate annual reports explained the mechanisms they opted for properly and it was difficult to find justification why they decided on a specific option.[116] More importantly, it often ended with no evidence of actual engagement and how it benefitted stakeholders.[117]

Following the empirical interrogation, the suggested LGBT stakeholder mechanisms would be possible to be excluded by corporate governance; companies may adopt their own alternative mechanisms which can be unclear and incapable of embracing the spirit of law. This can pose the question on whether or not LGBT-related stakeholders would be introduced and truly engaged for enhancing LGBT due diligence practice. While the stakeholder engagement is

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[112] The UK Corporate Governance Code 2024 is modelled on the 2018 Code. While the Code was revised in January 2024, the stakeholder engagement models have not been significantly changed. Therefore, the empirical study outcomes on the 2018 Code are still effective to the 2024 Code in terms of stakeholder engagement.

[113] Katarzyna Chalaczkiewicz-Ladna, Irene-marie Esser and Iain MacNeil, 'The Workforce Engagement Mechanisms in the UK: A Way Towards More Sustainable Companies? (Part 2)' [2020] European Business Law Review 1 at 10 to 11.

[114] See (n 73) Disclosure Regulation and Sustainability at 535.

[115] Katarzyna Chalaczkiewicz-Ladna, Irene-marie Esser and Iain MacNeil, 'Workforce Engagement and the UK Corporate Governance Code' [2019] European Business Law Review 1 at 21.

[116] Ibid at 21; See (n 92) Mujih, Do not simply tick the box at 47.

[117] See (n 113) at 21; Bobby V. Reddy, 'Thinking Outside the Box – Eliminating the Perniciousness of Box-Ticking in the New Corporate Governance Code' [2019] Modern Law Review 692 at 701;

acclaimed by academics in legal development, the 'comply-or-explain' principle has the potential of weakening the expected effectiveness of stakeholder engagement. To what extent adequate explanations are given is a still question in the 2018 Code and continues to remain in the 2024 Code. Too much discretion on this proposed soft-law can block LGBT-related stakeholders from actually participating in the internal review for enhancing the quality of the reporting. A stronger enforcement mechanism would be much helpful to effectively invite LGBT-related stakeholders to participate in the due diligence process.

Conclusion

In this chapter, weaving LGBT protection and corporate governance, I made the proposal to create and introduce the LGBT due diligence process in UK corporate governance. The LGBT due diligence process can make a significant contribution to enhancing LGBT dignity protection in corporate employment and service provision areas.

First, the LGBT due diligence duty can contribute to tackling expressive harm and intolerance to LGBT people in corporate employment and service provision areas. This due diligence duty reflects the radical feminist 'care and compassion' approach. Rather than subject LGBT protection to a general human rights based-duty, this proposed duty would contribute to highlighting care and compassion to LGBT people's human dignity protection as an essential task in directors' duties and the governance system. Also, this due diligence duty echoes the radical feminist 'care and compassion' principle by internalising 'LGBT protection' lessons from the law of employment and service provision case law, including UK courts and the ECtHR. This duty goes beyond equal treatment and non-discrimination; it will provide the protection that LGBT people exactly need at the moment – prevent and mitigate expressive harm – for the purpose of enhancing LGBT tolerance in corporate governance. The LGBT due diligence duty contributes to fixing the 'gap' of LGBT legal protection in the UK (Chapter 2).

Secondly, the proposed duty requires directors to take LGBT protection much more seriously than business case in corporate governance. This proposed due diligence duty contributes to challenging shareholder primacy underpinned in UK Corporate Governance law. In corporate governance, the due diligence duty imposes a 'must' on directors: directors must take measures to address LGBT expressive harm while creating shareholder wealth and corporate

profits. This echoes the 'care and compassion' principle and the transformative CSR approach – the duty contributes to challenging stakeholder protection subordination and substantively addressing people/stakeholders' imperatives, including social sufferings and intolerance. The proposed duty makes a contribution to ensuring the real and equal membership of LGBT people/stakeholders in corporate life and society.

This duty has the limitation: shareholder primacy in UK company law can be still an obstacle. While shareholder primacy would be shaken by this created stakeholder-oriented duty, the LGBT due diligence duty does not entirely overturn shareholder primacy. Directors can still rely on the s.172 (directional discretion) and take shareholders' interests promotion as the first and foremost task in corporate governance. The shareholder primacy underpinning in company law can more or less shrink the LGBT due diligence obligation.

In response to the limitation, I proposed supportive transformative CSR-related mechanisms in the LGBT due diligence process, including the mandatory reporting mechanism and the soft-law stakeholder engagement approach. Through the reporting mechanism, directors would disclose what measures they take and internal review on the aspects, including effectiveness and further improvements. In addition, LGBT stakeholder engagement would provide the flexibility for directors to introduce 'LGBT-related stakeholders' to participate in the due diligence process and provide comments. With outsider's views, corporate directors would be able to enhance accountability to LGBT protection. Both supportive mechanisms can prevent the due diligence duty from being neglected or toothless. The mechanisms contribute to securing the due diligence duty as a real obligation that directors must comply and implement for the purpose of LGBT dignity protection.

While there are some flaws, there is no doubt that LGBT due diligence process is such an innovative approach to introduce corporate governance to participate in LGBT dignity protection and therefore should be required by UK parliament. I also acknowledge that LGBT due diligence process is a good start for corporate governance to participate in LGBT dignity protection (and is not the end yet). UK Parliament needs to require more the corporate governance and law reforms, such as corporate purpose, transformative CSR embodiment, general directors' duties and stakeholder engagement, to make UK corporate governance become substantively LGBT-affirmative.

CONCLUSION

A Research question and answer

This thesis has proposed the LGBT due diligence process and answered how UK Corporate Governance law can be changed to enhance LGBT dignity protection. First and foremost, this thesis has the objective of respecting LGBT people's human dignity in society – LGBT are able to be truly and equally who they are and to fulfil their life interests in corporate activities and society. In order to achieve this objective, this thesis has adopted UK Corporate Governance law as a 'proportionate tool' which goes beyond material harm consideration and focuses on tackling LGBT expressive harm in corporate activities.

Learning from s.172 of the Companies Act 2006, there is an adoption of shareholder primacy model (profit-maximisation) in which substantive stakeholder protection is not entailed and directors are allowed to neglect expressive harm to LGBT stakeholders/people in decision-making. This will allow the LGBT-critical expressions and manifestations to exist in corporate activities and cause intolerance to LGBT stakeholders.

The proposed changes in this thesis are centralised on directors' duties and power in corporate governance. In order to impose LGBT protection obligations in directors' duties, this thesis has presented the transformative Corporate Social Responsibility theoretical approach – attempting to impose/widen legal obligations on directors to substantively safeguard stakeholders' interests during profit-generation. This theoretical approach intends to shift directors' responsibility from profit-maximisation to profit-sacrificing social responsibilities, developing a duty to tackle LGBT expressive harm.

Also, this thesis has adopted the radical feminist 'care and compassion' principle to reinforce the transformative CSR approach in LGBT tolerance enhancement. With the impacts of Pandemic, economic disruptions and COP 28, transformative CSR should be reiterated with

the meaning that directors make decisions to protect stakeholders' human lives.[1] A healthy and good stakeholders' life is not limited to imperatives, such as health, safety and equal payment; corporate governance also ought to work towards minimising the harm that subordinates stakeholder's human dignity. The radical feminist perspectives deliver the message that corporate governance should challenge heterosexual superiority and overturn LGBT people's subordination, which is internalised in the transformative CSR approach. Learning from the radical feminist 'care and compassion' principle, the true care to LGBT stakeholder protection is to respect LGBT people's dignity in corporate governance and social responsibility.

Combined with the radical feminist 'care and compassion' principle, the transformative CSR theoretical approach manifested and imposed the LGBT protection responsibility – LGBT due diligence duty – on corporate directors to identify, prevent and mitigate LGBT expressive harm. To reinforce the duty implementation, this thesis proposed the LGBT due diligence reporting regulation and the LGBT stakeholder engagement soft-law in UK Corporate Governance law. The change on the aspects, including directors' duty, non-financial reporting and stakeholder engagement, will successfully introduce UK Corporate Governance law to participate in protecting LGBT people's dignity in corporate life and society.

B Contribution to addressing LGBT expressive harm

The proposed changes make a significant contribution to filling the research gaps in addressing LGBT expressive harm and creating a mutual tolerance society. Through the proposed changes, individuals are not allowed to express or manifest LGBT-critical content through corporate activities. In other words, individuals are not allowed to pass 'disapproval' to LGBT people like *Ashers* through companies, as discussed in Chapter 2. The proposed governance mechanisms will make every individual in corporate activities take responsibilities for their expressions and the consequences of their expressions on LGBT people. Furthermore, the proposed changes

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[1] E.g. McKinsey Sustainability, COP 28: What to Expect? < https://www.mckinsey.com/capabilities/sustainability/how-we-help-clients/cop/overview > (Accessed on 3rd December, 2023) In COP 28, corporate governance is recommended to adopt climate technologies to address corporate impacts on climate risks and environment. This echoes the sustainable value creation within the planetary boundaries theory; The social status of a company means that governance needs to show 'care and compassion' to stakeholders in society.

will make a significant contribution to reducing the LGBT-phobia culture in a wider society. Cases, such as *Core Issues Trust* and *Page* (discussed in Chapter2), suggest that individuals could express LGBT-critical content through corporate activities to society in the UK. For instance, in *Page*, Mr Page, who represented NHS Trust, expressed the LGBT-critical content on a TV show. The proposed changes require directors (or managers) to prevent and mitigate expressing LGBT-critical content in those circumstances so that the expressive harm would not be delivered to LGBT people in society, such as LGBT people who were watching the TV and emotionally harmed by the expression. The proposed changes can prohibit companies from causing the adverse external impact – LGBT intolerance – in society and encouraging pushbacks on LGBT dignity legal protection. The proposed changes will shape the role of UK corporate governance in challenging heterosexual superiority culture, promoting LGBT dignity protection as a key objective in society. A company makes profits from society; a company must embody the due diligence process to respect LGBT people's human dignity in its governance structure.

The proposed process does have an impact on lessening 'free LGBT-critical speech' in society. It demonstrates that this work has made a contribution to filling the research gaps in how to strike a fair balance between freedom of expression/manifestation and other human rights. As cases discussed in Chapter 2, such as *Ngole* and *Forstater*, employees (or potential social workers) delivered LGBT-critical expressions on social media rather than in their professional conducts or employment in the organisations. Certainly, these expressions can cause LGBT expressive harm when LGBT people search on social media and encounter these expressions. As I argued in Chapter 2, considering that Mr Ngole and Ms Forstater do hold the LGBT-critical beliefs, they are possible to deliver the expressions and manifestations in corporate or organisational activities. Following the due diligence duty, directors are required to adopt internal corporate policies or guidelines in the company, where individuals are not allowed to express and manifest their beliefs or opinions involving LGBT-critical content and otherwise they would take responsibilities (e.g. apology or sanction) for the 'invisible harm' on LGBT people. First, while this duty does not directly intervene in the LGBT-critical expressions and manifestations outside the company, those guidelines or policies would allow individuals to hold the beliefs/opinions but prevent people, such as Ngole and Forstater, from 'bringing' those beliefs/opinions in the company. Secondly, this process can have an impact on

increasing people's awareness about adverse expressive impacts on LGBT people in society. The process includes strict preventative meaning, but also expresses the consequence that LGBT people will encounter harms on human dignity when they are exposed to those expressions and manifestations. This would ring the alarm to people who have no intention or awareness of causing this traumatic harm to LGBT people. Impacted by the emphasis of the expressive harm or importance of dignity in this proposal, those people, who hold the LGBT-critical beliefs/opinions, would be possible to proactively lessen the adverse impacts on LGBT people in society, such as choosing not to post the LGBT-critical messages on social media or restrict the access to the message from being delivered to many LGBT people in the public. This work also has made a contribution to filling the research gaps in improving individual speakers' responsibilities.

A company interacts with society. If we critique that corporate activities can deliver negative impacts, it can also be argued that corporate activities can be shaped to deliver positive impacts in society. The LGBT due diligence process proposal will not only elicit a company's care and compassion to LGBT protection but also indirectly empower individuals' care and compassion to LGBT people in public: individuals are not required to agree or support LGBT people, but they can show compassion with the harm to LGBT people and choose not to aggravate the sufferings. The LGBT due diligence process is a powerful mechanism to develop a society where LGBT people will have the enjoyment of true communitarian dignity protection.

C Corporate governance model and future changes

The thesis encourages more future socially responsible changes in UK Corporate Governance law. It has contributed to filling the research gaps in corporate social responsibility and purpose literature. Reflecting on corporate theories, a company should never be seen a pure private contract or device which is detached from our life and society; corporate governance law should no longer externalise social tasks or responsibilities to other regulatory areas.

First, this thesis encourages the future corporate purpose and responsibility to significantly shift towards a substantive socially responsible direction. As Professor Mayer noted, corporate

purpose is about solving problems.[2] Corporate purpose needs to be associated with 'enhancing the wellbeing and prosperity of shareholders, society and the natural world'.[3] Similarly, Choudhury and Petrin argued that corporate purpose 'would make a strong contribution toward steering corporations in the direction of a broader function that combines profit-making and problem-solving for the benefit of the public'.[4] The future corporate purpose in the UK highlights the importance of the new corporate purpose, as discussed in Chapter 4 – shareholder wealth, long-term wealth maximisation of the entity and substantive stakeholder protection ought to be embodied in corporate purpose in UK Corporate Governance law. The new corporate purpose in Chapter 4 is beneficial to the future research about challenging the singular shareholder primacy (profit-maximisation) and widening corporate purpose to stakeholders in society. Furthermore, the thesis encourages the new corporate purpose to be embodied in directors' fiduciary duties in UK Corporate Governance law in the future. As MacNeil and Esser argued, fiduciary duty is the key driver for the development of substantive stakeholder protection.[5] Ireland argued that a 'pluralist' approach, which was rejected by the Company Law Review, needs to be located in directors' fiduciary duties.[6] Reforming directors' duties indicates giving companies necessary room to consider shareholder wealth, corporate entity's interests but also the decisions that would be beneficial for stakeholders at the same time.[7] The manifestation of the transformative CSR theoretical approach in this thesis can make a contribution to locating stakeholder protection as a substantive goal, which has the equal level of importance as shareholder wealth promotion and long-term entity's interests maximisation in the future reform of directors' duties in UK Corporate Governance law. As argued in Chapter 3, s.172 of the Companies Act 2006 is certainly outdated. In 2020s, a number of commentators and organisations have been attempting to modernise corporate governance law and create a more 'socialised' company.

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[2] Colin Mayer, 'The Future of the Corporation and the Economics of Purpose' [2021] Journal of Management Studies 887 at 889.
[3] Ibid
[4] Barnali Choudhury and Martin Petrin, 'Stuck in Neutral? Reforming Corporate Purpose and Fiduciary Duties' [2023] Canadian Business Law Journal 1 at 37.
[5] Iain MacNeil and Irene-marié Esser, 'From a Financial to an Entity Model of ESG' [2022] European Business Organization Law Review 9 at 28 and 29.
[6] Paddy Ireland, 'From Lonrho to BHS: The Changing Character of Corporate Governance in Contemporary Capitalism' [2018] King's Law Journal 3 at 31
[7] See (n 4) at 38.

As argued in Chapter 4, European corporate governance changes embody the 'sustainable value creation' concept and reinforce the transformative CSR theoretical approach. These corporate governance changes play a pivotal role in supporting the shift in directors' fiduciary duties from shareholder primacy to a more transformative corporate social responsible direction in UK Company law, such as reformulation of corporate purpose and the s.172 duty proposed by British Academy. The new corporate purpose and the transformative CSR theoretical approach can accelerate these changes in UK Corporate Governance law. These future socially responsible changes in directors' fiduciary duties will reinforce LGBT due diligence duty implementation in addressing expressive harm.

Secondly, the LGBT due diligence process encourages future reform on scrutinising directors' duties in substantive stakeholder protection. The combination of LGBT reporting regulation and stakeholder engagement in the proposed LGBT due diligence process (Chapter 6) can be beneficial to develop the CSR scrutinisation mechanisms in the future. The LGBT reporting regulation suggests that the non-financial reporting requirements need to be more procedural and answer material questions, such as how effectively directors implement the duty to have regard to social and environmental impacts.[8] The combination of disclosure and stakeholder engagement model can make contribution to addressing the 'disclosure-only' obligation and the box-ticking activity concerns – more detailed evidence can be brought in the disclosure by stakeholder engagement, as discussed in Chapter 6. In corporate governance law reform, British Academy proposed the similar changes on non-financial reporting. To reinforce their proposed duty implementation, British Academy recommended that non-financial reporting needs to embody the socially responsible purpose and how directors fulfil their obligations to achieve this purpose, including outcomes and effectiveness of the duty fulfilment.[9] British Academy also recommended the stakeholder participation mechanism to monitor corporate social responsibility behaviours, including directors' duty implementation and non-financial reporting.[10] The LGBT reporting regulation and LGBT stakeholder engagement mechanisms

[8] See (n 5) at 40 and 41.
[9] British Academy (2019), *Reforming business for the 21st century: Principles for Purposeful Business* < https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/ > (Accessed on 20th September 2023) at 13.
[10] Ibid at 13, 26 and 27.

can encourage more scrutinisation reform to happen in UK Corporate Governance law, ensuring that socially responsible duties can be effectively implemented to challenge or even eliminate shareholder primacy in the future. With the future social changes, including directors' duties, non-financial reporting and stakeholder engagement, UK Corporate Governance law will provide a significantly solid foundation where more LGBT-affirmative changes happen. In other words, these future changes will shape a company as a real social entity or institution which protects LGBT human dignity.

D. Limitations and challenges

The proposed LGBT due diligence process is at an initial stage. I acknowledge that there are limitations and challenges that need to be addressed. First, while the proposal intends to address LGBT-critical content in expressions and manifestations in corporate activities, this can encounter challenges. For instance, in the Hate Crime and Public Order (Scotland) Act 2021, s. 9 intends to protect freedom of expression; the subsection (a) stipulates that behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes *discussion or criticism of matters* relating to sexual orientation and transgender identity.[11] While the new Act looks at hate crime, it could raise questions and challenges on how to address discussion/debate about LGBT identities, in particular non-binary gender identities, in companies or informal corporate events.

Secondly, the statutory principles of the due diligence duty and reporting regulation need to be enacted by a governmental department, but which governmental department should take the responsibility is uncertain.[12] Thirdly, a potential question is associated with which regulatory bodies participate in reinforcing the stakeholder engagement soft-law. Following from the UK Corporate Governance Codes, regulatory bodies, such as Financial Reporting

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[11] S.9 of Hate Crime and Public Order (Scotland) Act 2021

[12] The Human Rights and Business 2017 parliamentary report stated that 'it can be difficult to understand which Governmental department has the responsibility for the different components of the business and human rights agenda', which has not been addressed by the most recent 2024 parliament report. House of Lords; House of Commons, Human Rights and Business 2017: Promoting responsibility and ensuring accountability < https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> (Accessed on 1st May 2024) at 27; Emily Harves, 'Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill'[2023-24] House of Lords (Library Briefing) < https://researchbriefings.files.parliament.uk/documents/LLN-2024-0021/LLN-2024-0021.pdf>

Council, Chartered Governance Institute UK & Ireland, Law Societies, need to provide relevant guidance on how companies should comply with the LGBT stakeholder engagement soft-law. The guidance on LGBT stakeholder engagement can be learned from how those regulatory bodies will improve general stakeholder engagement models in UK Corporate Governance Code in the future, such as revised engagement models and the 'comply or explain' principle.

Fourthly, the proposal does not provide a liability-based enforcement. While Corporate Sustainability Due Diligence Directive entails the civil liability ruling on failure to human rights and due diligence performance and has been welcomed in academic discussion,[13] there has been no sufficient evidence on effectiveness of this ruling yet. If the proposal could model on this enforcement in the future, LGBT individuals (not limited to stakeholders), pro-LGBT individuals, and relevant non-governmental organisations would be recommended as key actors, with legal standing, to challenge failure of LGBT due diligence performance by companies;[14] directors or managers would be required/ordered to intervene in the case to make the speakers/individuals realise their responsibilities by various measures, including employment sanctions, public apologies, or declaration for not to deliver LGBT-critical expressions/manifestations.

Fifthly, the proposal does not detail remedies, but the proposed stakeholder engagement mechanism can suggest a remedy. Following from a discussion under consumer law, Rühmkorf suggested that consumers would be able to promote CSR much better if they could enforce compliance with CSR commitments through civil junctions.[15] He provided an example about this remedy in the German jurisdiction – The European Centre for Constitutional and Human Rights (ECCHR) and the Clean Clothes Campaign (CCC) initiated a complaint against retailer

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[13] E.g., Youseph Farah, Valentine Kunuji & Avidan Kent, 'Civil Liability Under Sustainability Due Diligence Legislation: A Quiet Revolution?' [2023] King's Law Journal 499 at 521; Andreas Rühmkorf, 'Towards sustainable supply chains: a critical assessment of the German Supply Chain Act' [2024] International Company and Commercial Law Review 17 at 29 (Rühmkorf critiqued on German Supply Chain law for the absence of civil liability)

[14] While CSDDD prescribes the civil liability ruling, it does not clarify the legal standing in the 2024 version. Following from *Friends of the Earth Paris and Others v. TotalEnergies SE*, legal standing under the French Duty of Vigilance Law 2017 was given to individuals, such as NGOs and affected stakeholders. See the French case < https://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/ > (Accessed 6th May 2024).

[15] Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chain* (EE, 2015) 1 at 161

LIDL for false claims that the company made about its compliance with CSR commitments.[16] Modelled on this, a potential remedy in this proposal can be given to LGBT-related stakeholders, bringing up complaints or demands that corporate directors or managers must tackle LGBT expressive harm if it happens in a company. As Rühmkorf found, because of the compliant, LIDL made a declaration to cease and desist that it would withdraw its claims about its compliance with these CSR commitments.[17] Likewise, it can be projected that this remedy would play a key role in demanding corporate governance in addressing LGBT expressive harm. However, this remedy's effectiveness relies on how successfully the proposed stakeholder engagement would work.

Lastly, there is a challenge to enact LGBT board diversity for LGBT dignity protection. Learning from shareholder primacy and LGBT Pride, LGBT board diversity is likely to be an instrument to for making 'pink money'; the elected LGBT directors can be handicapped from exercising power to address LGBT expressive harm if there is no profound LGBT protection duty. This explains why the LGBT due diligence duty proposal has been prioritised over LGBT board diversity in this thesis. The proposed mandatory obligation to address LGBT expressive harm will have the implication that LGBT directors would be empowered to identify and address LGBT expressive harm. Also, learning from homophobia and 'closet' culture in football clubs (Chapter 2), the proposed due diligence process, which encourages LGBT stakeholders to participate in corporate decision-making, would encourage more LGBT employees to leave the 'closet' and be bold to break the 'lavender ceiling' in corporate elite. Once again, introducing LGBT board diversity may depend on how the first step the LGBT due diligence process would make. Those limitations and challenges would be addressed through future legal developments, practice of this initial due diligence process, and research.

E. LGBT due diligence as an agent in societal and legal changes

This work has strengthened the sense of LGBT inclusiveness in not only corporate governance law but also future changes in UK Equality law and human rights law. The proposal contributes to sharpening expressive function of law. In contrast *303 Creative LLC v. Elenis* (Opinion of the

[16] Ibid
[17] Ibid

Court), the proposal would direct UK law towards the direction where public accommodation is increased for LGBT people in business service provisions and employment; law would create antithesis of inflicting or excluding LGBT people from life.

According to Sjåfjell, Liao and others, gender equality practices, which intend to overturn corporate male superiority culture, drive corporate governance to secure a safe and just operating space for human life, including to tackle gender issues in society.[18] Likewise, the proposed LGBT due diligence due diligence, as an agent, can drive more legal changes in other areas of law to challenge heterosexual superiority culture and LGBT intolerance in society. Ewan McGaughey, in his work *Principles of Enterprise Law* 2022, said that:

> 'All law concerns human associations, from contracts, to families, to enterprises to polities. Human associations involve power, and may create unjustified privilege, or abuse, unless the law is just. All law is social, and a corporation is one type of social institution among many.'[19]

A company is not the only social institution or entity, and there are certainly more institutions which exist, interact with and have an impact on LGBT people in society, including but not limited to sole traders, financial sectors, banks, charitable organisations, public authorities and partnerships. The changes of UK Corporate Governance law will encourage more similar LGBT-affirmative changes in other organisations and the areas of law. All law is social; all law deals with human life and interests; all law must make a contribution to protecting LGBT people's dignity.

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[18] Carol Liao, 'Power and the Gender Imperative in Corporate Law' in Beate Sjåfjell and Irene Lynch Fannon (eds), *Creating Corporate Sustainability: Gender as an Agent for Change* (CUP, 2018) at 285 to 288; Beate Sjåfjell and Irene Lynch Fannon, 'Corporate Sustainability: gender as an Agent for Change' in Beate Sjåfjell and Irene Lynch Fannon (eds), *Creating Corporate Sustainability: Gender as an Agent for Change* (CUP, 2018) at 320 to 323.

[19] Ewan McGaughey, 'Enterprise Law And The Eclipse Of Corporate Law' [2023] < SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4379144> (Accessed on 1st March 2023) at 6 and 7; Ewan McGaughey, *Principles of Enterprise Law: the Economic Constitution and Human Rights* (CUP, 2022)

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