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EXAMINATION OF THE INSTITUTIONAL AND REGULATORY FRAMEWORK FOR CORPORATE HUMAN RIGHTS ACCOUNTABILITY IN SOUTH AFRICA

ABIODUN JACOB OSUNTOGUN *

I. INTRODUCTION

In what seems to be a significant move in addressing the issue of human rights impacts of business at the international level,[1] the United Nations Human Rights Council (HRC) endorsed the Guiding Principles on Business and Human Rights (GPs) in March 2011.[2] In spite of what may be regarded as the defects in the GPs,[3] they have become widely accepted 'in the area of business and human rights as

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1 S. Deva and D. Bilchitz, 'The Human Rights Obligations of Business: A Critical Framework for the Future', in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 1, p. 1; On the history of the corporate regulatory framework at the international level leading to the endorsement of GPs see D. Surya, 'Guiding Principles on Business and Human Rights: Implications for Companies', 9 (2) *European Company Law* (2012): 101–9; D. Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?', 12 *SUR International Journal on Human Rights* (2010): 199–229; L. Backer, 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context', 9 *Santa Clara Journal International* (2011): 37–55; C. Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 10 *German Law Journal* (2003): 1065–80.

2 For a copy of the GPs see 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework', available at http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf (accessed 27 November 2014).

3 The GPs have been criticised for their voluntary nature and their inability to provide for a binding regulatory framework for corporate human rights at the international level. On these critical remarks, see J. Kamatali, 'The New Guiding Principles on Business and Human Right Contribution in Ending the Divisive Debate Over Human Rights Responsibilities of Companies: Is It Time for an ICJ Advisory Opinion?', 20 Cardozo *Journal of International and Comparative Law* (2012): 451–3.

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states, national human rights institutions, multi-stakeholder initiatives, companies, non-governmental institutions (NGOs) and academics … invoked them in various ways'.[4]

Even though the HRC has endorsed the beginning of another process to address the defects identified in the GPs by commencing the process of establishing an intergovernmental Working Group to initiate the process of establishing a binding treaty for corporate accountability,[5] nevertheless the mandate of the Working Group is open ended and the emergence of the expected treaty is certainly a matter for the long distant future.[6] Thus the 'Protect, Respect and Remedy framework of the GPs still remains an indispensable framework in the scheme of business and human rights.[7] From the three major principles proffered by the GPs[8] as the means of enhancing human rights responsibilities of corporations and protecting individuals, peoples and communities from human rights violations by corporations, the state duty to protect human rights is a very important aspect of the framework.[9] Consequently, with regard to the duty of the state to protect human rights the GPs note:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[10]

This article examines how the South African government has performed this duty by considering the existing institutional framework for corporate human rights protection in South Africa. It examines the questions whether corporations are duty bearers and whether they have responsibilities or obligations to respect human rights.

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4 See Deva and Bilchitz, *supra*, note 1, at p. 2.

5 See United Nations Human Rights Office of the High Commission (UNHRO), 'Human Rights Council Concludes Twenty-sixth Session after Adopting 34 Texts' (27 June 2014), Resolution (A/HRC/26/L.22/Rev.1) available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14798&LangID=E (accessed 25 October 2014).

6 *Ibid.*; J. Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors' (9 September 2014) available at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html (accessed 2nd October 2014).

7 While endorsing the commencement of a new process for a binding treaty, the HRC noted that states and companies should continue or commence the implementation of GPs. See UNHRO, *supra*, note 5.

8 The GPs are based on three major pillars, namely the duty of the states 'to respect, protect and fulfill human rights and fundamental freedoms' which is principle one, the duty of corporations to 'respect human rights' which is principle two and the availability of 'appropriate and effective remedies' to victims of corporate human rights violations which is principle three.

9 See Deva and Bilchitz, *supra*, note 1, at p. 13. Note that under GPs states are 'the predominant institutions for the regulation of MNCs … [and] undoubtedly have a critical role in ensuring that companies do not violate human rights'.

10 See GPs, *supra*, note 2, para. 1.

II. HUMAN RIGHTS IN THE DOMESTIC LAW OF SOUTH AFRICA

The post-apartheid era marks the beginning of a good rapprochement between international law, human rights treaties and the legal system of South Africa. As signatories by ratification to most of the international and regional human rights instruments[11] the drafters of the 1996 Constitution were meticulous in ensuring that the constitution comply with the obligations of South Africa with regard to international and regional human rights norms.[12] It protects the rights of the people to safety such as the right to life,[13] security,[14] health[15] and the environment,[16] to human rights in the labour market such as labour relations,[17] trade[18] demonstrations,[19] association[20] and against slavery, servitude and forced labour,[21] while others are political rights[22] to citizenship,[23] equality,[24] dignity[25] and property,[26] the rights of children[27] to education,[28] cultural and communal rights[29] and access to justice through the courts and its corollaries.[30]

The constitution imposes a duty on the state to ensure that these rights are respected, protected, promoted and fulfilled.[31] Any act of omission or negligence by the state or any of its organs or agents in ensuring that these duties are effectively protected may result in government liability. In addition, it also provides that the state and its organs and agents including artificial and non-artificial bodies must comply with the provisions of the Bill of Rights.[32] Thus in *Minister of Safety and Security & another* v. *Carmichele*[33] the court held that the state was liable for breach of its constitutional obligations to protect the applicant

11 For a list of international and regional treaties ratified by South Africa see South Africa's Country Report to the Human Rights Council's Universal Periodic Review Mechanism, 15 April 2008, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/A_HRC_WG6_1_ZAF_1_E.pdf (accessed 10 June 2014).
12 J. Dugard, 'International Law and the South African Constitution', 1 *European Journal of International Law* (1997): 77–92, at p. 84.
13 Section11 of the 1996 Constitution.
14 *Ibid*., section 12.
15 *Ibid*., section 27.
16 *Ibid*., section 24.
17 *Ibid*., section 23.
18 *Ibid*., section 22.
19 *Ibid*., section 17.
20 *Ibid*., section 18.
21 *Ibid*., section 13.
22 *Ibid*., section 19.
23 *Ibid*., section 20.
24 *Ibid*., section 9.
25 *Ibid*., section 10.
26 *Ibid*., section 25.
27 *Ibid*., section 28.
28 *Ibid*., section 29.
29 *Ibid*., section 30 and 31.
30 *Ibid*., section 34, 35 and 38.
31 *Ibid*., section 7(2).
32 *Ibid*., section 8.
33 *Minister of Safety and Security & another* v. *Carmichele*, 2004 (3) SA 305 (SCA) (its second judgment).

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'against invasion of [her] fundamental rights by perpetrators of violent crime' due to the negligence of its police officers. Therefore these constitutional provisions protect the individuals from the tyranny of the state[34] but it is arguable that their essence goes beyond that 'vertical relationship' to create a modicum of 'direct horizontal application' between two categories of individuals such as the artificial and natural persons in their private relationships with one another.[35] It means, therefore, that aside from the state, corporations may be held liable for breach of their obligations arising from these constitutional provisions. However, for that to be possible, regard must be had to the peculiar nature of the rights and their relevance to warrant duties on corporate entities.[36]

This is because corporations, unlike the state, are not directly answerable for infringement of all the rights enshrined in the Bill of Rights. In *Khumalo* v. *Holomisa*[37] the court dealt with this issue and spelt out the conditions for direct horizontal application of rights to corporations. In that case, Mr Bantu Holomisa, a politician, sued the *Sunday World* which published a defamatory statement against him that he was being investigated by the police for his involvement with a gang of bank robbers. The applicants pleaded that the claim did not disclose any reasonable course of action. In support of their application, they argued that the right of freedom of expression in section 16 of the 1996 Constitution was directly applicable in the case despite the fact that the state and any of its organs were not involved in the litigation.[38]

Indeed, the issue for determination in the case was to consider whether the common law of defamation as developed by the courts was inconsistent with the Constitution. Although, the court dismissed the applicants' case with regard to the interpretation of section 8(2) of the Constitution,[39] it is important to note that the court evolved three requirements which could be used to determine direct horizontal application of rights to private parties. Thus the court considered firstly the nature of the parties involved, secondly 'the intensity of the constitutional right in question' and thirdly the 'potential invasion' of the right in question. The court noted that the right in question could only be infringed by non-state actors rather than by the state or its organs and held that 'the right to freedom of expression is of direct horizontal application' in the case in line with section 8(2) of the Constitution.[40]

The meaning of the second criterion was said to be shrouded in ambiguity.[41] However, Currie and De Waal remarked that it might connote the 'force or

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34 I. Currie and J. De Waal, *The Bill of Rights Handbook* (Jutas, 2005), at p. 33.

35 D. Bilchitz, 'Business and Human Rights: The Responsibilities of Corporations for the Protection and Promotion of Human Rights', a report by the *South African Institute for Advanced Constitutional, Public, Human Rights and International Law* (SAIFAC) (2008).

36 See section 8(2) for the requirements.

37 *Khumalo* v. *Holomisa* (2002) 3 SA 401 (CC) (hereinafter the Khomani case).

38 *Ibid*., para. 29.

39 *Ibid*., paras 32 and 45.

40 *Ibid*., para. 33.

41 Bilchitz, *supra*, note 35, at p. 23.

strength of the right'[42] while David Bilchitz stresses 'the importance of the right' as the meaning of the phrase.[43] I am of the view that the phrase requires the court to consider the effect of the right on the beneficiaries as well as on the overall objectives of the Constitution itself, before coming to a decision on its applicability.

Despite the criticism[44] of that requirement, because of its inapplicability to certain enshrined rights in the Constitution, it is still a good requirement. A critical look at section 8(2) shows that the requirements for the determination of direct horizontal application should change from case to case. The fact that the second requirement does not apply to cases dealing with the rights of citizenship is not a permanent bar to its use in other cases where citizenship is not a major factor as the Constitutional Court applied it in the Khomani case. However, David Bilchitz argues that the third requirement needs further clarification before it can be properly applied.[45] According to him, it is important for the court to determine the form and nature of impacts that are sufficient,[46] whether they are 'potential impacts', 'actual impacts' or 'severe impacts' or 'any other form of impact'.[47]

Be that as it may, there is no doubt that direct horizontal application of human rights to non-state entities through constitutional recognition of corporations as duty bearers is a good step forward in attaining corporate accountability in South Africa.

However, in order to facilitate the implementation of the framework of corporate human rights accountability in the Constitutional provisions, it is essential that responsibilities and obligations to respect human rights be allotted to corporations in South Africa. Consequently, the next section seeks to interrogate the issue whether corporations have duties to respect human rights. If they have, I will examine the nature of those duties and their effects on corporate human rights accountability in general.

III. HUMAN RIGHTS OBLIGATIONS OF CORPORATIONS

The South African Bill of Rights aims to provide a binding regime for corporations to obey human rights. To achieve that objective, it makes the Constitution applicable directly to corporations. Consequently, rights of different types are extended to corporations as if they were human beings. Indeed, the effect of that extension of rights is ambivalent resulting, on the one hand, in benefits for the corporations to enjoy and on the other hand in responsibilities or obligations they must respect or bear. However, whether it results in benefits or responsibilities, the fact is that corporations in South Africa are bound to obey rights that are enshrined

42 Currie and De Waal, *supra*, note 34, at p. 52.
43 Bilchitz, *supra*, note 35, at p. 23.
44 *Ibid*.
45 *Ibid*.
46 *Ibid*.
47 *Ibid*.

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in the Bill of Rights.[48] In addition, every court of justice, including ordinary courts, tribunals or arbitration forums, must take greater cognisance of the Bill of Rights by promoting its 'spirit, purport and objects' while interpreting the Companies Act.[49]

No doubt, the clarion call to promote human rights in the course of resolving corporate disputes is a watershed in the history of South Africa; this is because it is capable of laying a solid foundation for a legal framework to actualise the vision and objectives of the Constitution in the corporate sector. The spirit behind the Bill of Rights is to protect human rights by all means and to avoid human rights violations that may occur due to failure of regulatory oversight. Since it is possible that certain rights that are relevant for the future are not codified in the Constitution, the Constitution makes room to fill such omission by clothing the judges or the juries with power to develop a relevant right, if necessary, in order to protect the citizens from any form of violation.

Again, rights are made applicable to private entities like corporations in order to ensure that they comply with all human rights written or unwritten in the Constitution in as much as these rights are relevant to their nature and manner of operation. In that context, one can confidently assume that corporations have responsibilities and duties to comply with human rights in their daily business transactions in South Africa and that if they don't comply with any of the enshrined rights, it will be a breach of the Constitutional rights by which the victims will be entitled to remedies.

Moreover, the law[50] requires all public companies[51] to establish two units (first, a social and ethics committee and, second, a social and ethics advisory panel) in their companies for the purpose of monitoring company activities with regard to issues that could come under the canopy of corporate social responsibility.[52]

However, in some situations, history teaches us that there is a wide gap between wishes and reality. The vehicle adopted to implement human rights responsibilities of corporations envisaged by the Constitution in South Africa left too much to be desired. It is unlikely, given the voluntary nature of the approach, that that the corporations will have greater responsibilities to obey human rights beyond what operates in other African countries that are without

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48 Section 8(2) of the 1996 Constitution.

49 *Ibid*., section 39(2); see also J. Katzew, 'Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights – The Impact of Section 7 of the Companies Act 71 of 2008', 128 (4) *South African Law Journal* (2011): 686–711, at p. 686.

50 For this purpose, see section 72(4) of the Companies Act 71 of 2008 which was enacted in April 2009 and came into force on 1 April 2011; section 43(1) of the Companies Regulations 2011; Regulation 26(2) of the Companies Regulations GN R351 in GG 34239 of 26 April 2011. For a discussion of the function of the committee, see H. J. Kloppers, 'Driving Corporate Social Responsibility (CSR) Through the Companies Act: An Overview of the Role of the Social and Ethics Committee', 16 (1) *Potchefstroom Electronic Law Journal* (2013):166–99.

51 *Ibid*. All the boards of all the public companies, whether they are listed or not, government corporations and other companies with a 'public interest score of over 500 points in any two of the previous five years' are affected by the law .

52 *Ibid*. See section 72(4) of the Companies Act.

such Constitutional provisions. Thus some scholars[53] are of the opinion that the vision propelled by the Bill of Rights might not be achieved with the method adopted for its implementation in the Companies Act.

As a matter of fact, section 7 of the Companies Act provides that the Constitution is the major criterion for consideration in the interpretation of corporate law. The implication of that provision is that the new Company law should be interpreted to 'promote compliance with the Bill of Rights, as enshrined in the Constitution'.[54] It is arguable therefore to contend that human rights issues are meant not only to be 'embedded in the holistic functioning of the company' but 'are placed at the centre of policy making within the corporate governance'[55] in compatibility with section 5 of the Companies Act.

Be that as it may, the truth is that the responsibilities imposed on corporations in any country depend on the nature of corporate governance adopted by the corporate rules of such country. Three notable models of corporate governance are open to consideration by the legislators of each country. The first is that 'shareholder primacy has been largely fostered as a leading principle of corporate law by the contractarian school in the United States'.[56] It provides that a company's responsibility is primarily to provide profit to the shareholders.[57] Consequently, the interests of all other stakeholders that could be found within the compass of the corporate framework and its distribution outlets are compromised.

It is disheartening that the 1973 Act was based on this capitalistic model.[58] But a new model which would take in to consideration the interests of all stakeholders was envisaged by the Department of Trade and Industry (DTI).[59] However, the drafters of the new Companies Act of 2008 opted for an enlightened shareholder value model instead of a pluralistic model as the new model for corporate governance in South Africa. Thus section 76(3b) of the Act provides that the interest of the company should be given priority by the directors in taking corporate decisions for the company.[60]

Indeed, the difference between the shareholder primacy model and an enlightened shareholder value model is very thin since they are of the same

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53 See, for example, D. Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations', 125 (4) *South African Law Journal* (2008): 754–89, at p. 772.

54 Section7(a) of the Companies Act, *supra*, note 50.

55 See Katzew, *supra*, note 49, at p. 687.

56 A. Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"', 29 *Sydney Law Review* (2007): 577–612, at p. 580.

57 See *Dodge* v. *Ford Motor Co*., 170 N.W. 668, 684 (Mich. 1919) where the court notes that 'A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.'

58 The Directors under sections 234–240 of the Companies Act 1973 were enjoined to protect the interests of the company as an entity and not the interests of all the stakeholders.

59 See the Department of Trade and Industry South Africa, 'South African Company Law for the 21st Century Guidelines for Corporate Law Reform' (May 2004). Available at http://www.pmg.org.za/bills/040715companydraftpolicy.pdf (accessed 2 November 2014), pp. 20–5.

60 This section defines company as the interest of the body of the shareholders.

pedigree. Like the shareholder primacy model, 'the main aim of the enlightened-shareholder-value approach is [also] the maximization of shareholder wealth'.[61] The little difference if any between the two is that the latter 'suggests that the term "company" relates to the interests of the shareholders, but with the possibility of other groups being included if their interests promote the interests of the shareholders'.[62] However, consideration of the interests of other stakeholders is not on the agenda of the former at all.

The argument that the interests of the shareholders should be given primary priority above or to the exclusion of other stakeholders in corporate governance is premised 'on two main policy considerations'.[63] First, since the shareholders are the owners of the company, the directors as agents of the shareholders are concomitantly expected to run the company in their interests.[64] Second, because shareholders are residual claimants, they are better positioned 'to police the efficiency of the company and its directors'.[65] Although these arguments appear to be sound, they have, however, been found to be faulty.[66] For example, corporations are separate entities and can hardly be owned by a group of persons.[67] According to Lynn Stout 'what shareholders really own is a contract with the corporation, called a "share of stock," which carries very limited rights'.[68] Similarly, it has been argued that shareholders are not the residual claimants of the company.[69] Even if it is conceded that they are, they are not the only ones.[70] On the contrary, they 'are only one of several groups that can be described

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61 I. M. Esser, 'A global perspective on African corporate governance: the protection of stakeholders' interests', 32 *South African Yearbook of International Law* (2007): 406–29, at p. 410.

62 *Ibid*., at pp. 410–11.

63 M. Ramnath and V. O. Nmehielle, 'Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration', 2 *Speculum Jurus* (2013): 98–115, at p. 104.

64 M. M. Magaro, 'Two Birds, One Stone: Achieving Corporate Social Responsibility Through the Shareholder-Primacy Norm', 85(3) *Indiana Law Journal* (2010): 1149–67, at p. 1154; for a detailed discussion see A. A. Berle Jr, 'Corporate Powers as Powers in Trust', 44 (7) *Harvard Law Review* (1931): 1049–74.

65 See Ramnath and Nmehielle, *supra*, note 63, at p. 104; F. H. Easterbrook and D. R. Fischel, 'Voting in Corporate Law', 26 *Journal of Law and Economics* (1983): 395, at p. 403 (noting that 'the shareholders are the group with the appropriate incentives … to make discretionary decisions').

66 For example, some scholars have faulted the arguments in favour of shareholder primacy. See M. M. Blair and L. A. Stout, 'A Team Production Theory of Corporate Law', 85 (2) *Virginia Law Review* (1999): 248–328, at p. 278; L. A. Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy', 75 *Southern California Law Review* (2002): 1189–210, at p. 1208; E. Elhauge, 'Sacrificing Corporate Profits in the Public Interest', 80 *New York University Law Review* (2005): 733–867 ; L. A. Stout, 'On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)', 36 *Seattle University Law Review* (2013): 1169–85, at p. 1174; I. Esser and J. J. Du Plessis, 'The Stakeholder Debate and Directors' Fiduciary Duties', 19 *South African Mercantile Law Journal* (2007): 346–63, at p. 358.

67 It is a trite law that once a company is incorporated in any legal system, it becomes a separate legal entity.

68 Stout (2013), *supra*, note 66, at p. 1174.

69 *Ibid*.

70 Stout (2002), *supra*, note 66, at p. 1194.

as ‘residual claimants’ or ‘residual risk bearers’ because they are expected ‘to enjoy benefits (and sometimes to endure burdens) beyond those provided in their explicit contracts’.[71] Consequently, as Professor Dodd argues, the directors should consider the interests of all ‘corporate constituencies’ and not only those of the shareholders.[72]

Indeed, the plurality model advocated by the trades union in South Africa is the model which ensures that the interests of all stakeholders are taken in to consideration by the company before decisions affecting the company are taken.[73] In *AP Smith Manufacturing Co* v. *Barlow*,[74] the court, while holding that that the philanthropic donation by the company was lawful and valid, dwelt on the justification of the plurality model of governance, though obiter, when it opined that ‘modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate’.

Of course, there is no doubt that a pluralistic model serves the interests of all other stakeholders better. Thus it should be desired as an ideal model of corporate governance by countries that seek corporate accountability above corporate impunity. That being said, it is important to note that the move in South Africa from a shareholder primacy model (where the primary consideration is profit) to an enlightened shareholder value (where the interests of other stakeholders is considered even if secondary to the interests of shareholders) is a step in the right direction. Such a transition should be commended by all and sundry.

As a result of this choice of model, South African law, like that of the United Kingdom, ought to protect not only the interests of the shareholders but those of the stakeholders too. Section 172 of the Companies Act in the UK provides that directors have a duty to all members of the company ‘as a whole’ and must run the company by considering their overall interests.[75] In contrast, it has been argued that this section is not likely to make any ‘significant change in UK company law’.[76] This is because the common law has already vested in the directors ‘a good degree’ of discretionary power ‘to take account of outside interests, provided that this was done with the intention of promoting the welfare of members’.[77]

Admittedly, the use of the common law to protect the interests of other stakeholders in the company is possible; however, it is crucial to note that there is

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71 *Ibid*.

72 See E. Merrick Dodd Jr, ‘For Who Are Corporate Managers Trustees?’, 45 (7) *Harvard Law Review* (1932): 1145–63, at p. 1162.

73 See M. F. Cassim and R. Cassim, ‘The Reform of Corporate Law in South Africa’, 16 (10) *International Company and Commercial Law Review* (2005): 411, for further study on the two models.

74 See the judgment of the Supreme Court of New Jersey in *AP Smith Manufacturing Co* v. *Barlow*, 98 A2d (NJ 1953) at 586.

75 The Companies Act 2006 makes provision for an ‘enlightened shareholder value approach’.

76 R. Williams, ‘Enlightened Shareholder Value in UK Company Law’, 35 (1) *UNSW Law Journal* (2012): 360–77, at p. 376.

77 *Ibid*.

a limit to the efficacy of such discretionary power without a regulatory support.[78] However, with respect to South Africa, it has been argued that section 76(3b) of the South African Act could be interpreted to imply an obligation on the directors to consider the interests of shareholders, as well as that of the stakeholders before taking a decision on behalf of their respective companies.[79] In support of that interpretation, the word 'company' has been taken to mean 'a social institution, creating a duty to act in the interests of all stakeholders instead of just shareholders alone'. Thus the fiduciary duty of the directors to the company demands eventual consideration of the interests of stakeholders as well.[80]

It is arguable that the new Act supports that view. In the first instance, the Act identifies a tripartite-type of interests that should be given consideration by the directors in corporate governance. The corporate unit deals with the interests of shareholders and those of the directors in the corporate sector,[81] the stakeholding group consists of varied stakeholders of different interests. This covers not only the environment in which the companies operate[82] but the economy,[83] the social status[84] and welfare of the stakeholders as an entity,[85] and lastly the interests of the nation as they affect its developmental economics.[86] By creating a framework for the wider consideration of varied interests, the Act aims to 'provide a predictable and effective environment for the efficient regulation of companies'[87] compatible with the global view of the company as a tool to attain 'economic and social benefits'.[88]

Another important argument is that some specific legislation follows this particular trend by imposing responsibilities on the directors to consider the human rights of some stakeholders within their reach, while taking corporate decisions on behalf of the company, for example the right of workers to a safe work environment in order not to violate their right to health,[89] the core labour rights of workers,[90] the right to 'equal opportunity and fair treatment in employment through the elimination of unfair discrimination'[91] and the

78 See, for example, Ramnath and Nmehielle, *supra*, note 63, at p. 105, noting that 'the common law position was conceived and bred in a society in which the human rights responsibilities of corporations were in its infancy'.

79 For this argument, see Esser and Du Plessis, *supra*, note 66, at pp. 356–60.

80 See International Commission of Jurists (ICJ), 'Access to Justice: Human Rights Abuses Involving Corporations in South Africa' (2010).

81 Companies Act, *supra*, note 50, section 7(i).

82 *Ibid*., section 7(i).

83 *Ibid*., section 7(b) (c) (d) (e) (f) and (g).

84 *Ibid*., section 7(d).

85 *Ibid*., section 7(k).

86 *Ibid*., section 7(e) and (b).

87 *Ibid*., section 7(l).

88 *Ibid*., section 7(d).

89 See the Occupational Health and Safety Act 85 of 1993.

90 See the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA).

91 See the Employment Equity Act 55 of 1998 (EEA).

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re-engineering of corporate ownership control to include the stakeholders who were previously excluded under the apartheid regime.[92]

The problem with this view, however, is that, in spite of the attempt to extend the responsibility of directors to cover the interests of the wide spectrum of stakeholders, the new Act, like a compass guide, merely spelt out the general duties of the directors, while omitting their duty, if any, to respect the human rights of the stakeholders. This omission has been described as a setback against the argument that the present legal system can be taken to impose obligations on the directors to respect human rights of the stakeholders. Some scholars who hold that view argue that even though the 'constitutional imperatives outweigh the drafter's intentions', courts are not likely 'to re-interpret the law' by extending the fiduciary duties of the directors to include the interests of the stakeholders.[93] In other words, the idea of the fiduciary duties shall be complicated by 'increasing the people or the interests the director must try and serve' and even if the court does so, that will not displace the fear that the directors will jettison such rights that protect stakeholders 'in favour of shareholders'.[94] Of course, that argument is sound but that does not defeat the possibility that human rights obligations can be inferred from the language of the Act, particularly, if read in conjunction with the Bill of Rights. It is noteworthy that these scholars who expressed caution conceded the fact that such interpretation can be implied, though they argued that the Act could have done better by expressly mentioning specific legal duties to be respected by the directors.[95]

In that regard, it is obvious that the King Reports attempt to fill the gap which is left open by the Act through the codes of practice facilitated at successive times. The first King Report sets the pace for a departure from the traditional model of corporate governance, albeit moderately. It points out the fact that companies operate in an environment that should be given the utmost consideration by corporate governance and identifies the line of connection between the corporate operations and a wide number of other stakeholders, the impact of whom, though they are not the shareholders of the company, is important to the performance of their business targets.[96] Thus it concludes that to ignore the environment where they operate and pretend that the interests of other stakeholders do not matter in their decision-making process is to play the ostrich game.[97] So, for companies to become friendly with their environment and other stakeholders, it published a *Code of Corporate Practices and Conduct*, which contained ethical principles and

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92 See the South African Broad Based Black Economic Empowerment Act 53 of 2003; I. Esser and A. Dekker, 'The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles', 3 (3) *Journal of International Commercial Law and Technology* (2008): 157–69, at p. 166.

93 See ICJ, 'Access to Justice', *supra*, note 80, at p. 10.

94 *Ibid*.

95 *Ibid*.

96 See I. Esser, *Recognition of Various Stakeholder Interests in Company Management, Corporate Social Responsibility and Directors' Duties* (VDM Verlag, 2008): 243–6.

97 See Institute of Directors Southern Africa, King I Code, available at http://www.iodsa.co.za/king.asp#King%20I%20Report%20-%201994 (accessed 18 August 2013).

an ethos that could enhance good decision-making processes in companies if the management of the company chose to apply them.

In 2002, the King II Report succeeded the King I Report. It takes up the gauntlet from the mere general guideline approach of its predecessor to in-depth consideration of specific issues in corporate governance. It formulated principles to address the issues of risk management, internal audits, accounting, and boardroom decision-making mechanisms and so on. It hits the nail on the head by introducing 'triple bottom line' reporting and good corporate citizenship for the first time with a view to taking care of the interests of other stakeholders[98] by bringing to the board for consideration' the economic, environmental and social aspects of a company's activities'.[99] However, the companies have a choice to either comply with the codes or explain why they are not able to comply. The underlying principle behind the report is to ensure that 'directors should act not only in accordance with the letter of the law, but also in the spirit of their fiduciary duties'.[100] In that regard, considering the nebulous and ambiguous manner in which the code was couched, Derek Botha argues that the report failed to address an important question 'of the nature and purpose of the corporation, particularly in the South African climate'.[101] He concludes that it is only when the philosophy of the report is clearly enunciated 'in regard to the nature and role of the corporation in the South African setting' can coherent and valid pronouncements 'be made about corporate governance'.[102]

The current report (King III) was expected to address the problems identified in King II. The questions are whether the duties of the corporations to stakeholders are explicitly spelt out to avoid ambiguity and what those duties are. Irene-Marié Esser and Johan Coetzee argued that though the issue of ambiguity in King I was exaggerated[103] the same cannot be said of King II which deals with corporate duty to stakeholders in a haphazard way that makes it susceptible to misconception, confusion and ambiguity.[104] On the other hand, it should be noted that while King III is not free from the criticism of confusion that trails its predecessors, it is nonetheless an improvement on the previous reports. It identifies and categorises stakeholders into different groupings and emphasises the fact that since companies have many stakeholders that can affect the attainment of their 'strategy and long-term sustained growth',[105] they should 'proactively

98 See Institute of Directors Southern Africa, *King Code of Governance Principles for South Africa 2009* (King III Code). Available at http://www.iodsa.co.za (accessed on 18 August 2014).

99 *Ibid*., section 17.

100 I. Esser and J. Coetzee, 'Codification of Directors' Duties', 12 *Juta's Business Law* (2004): 26–31, at p. 27.

101 D. Botha, 'Confusion in the King Report', 8 *South African Mercantile Law Journal* (1996): 26–39, at p. 27.

102 *Ibid*., at p. 39.

103 See I. Esser, 'The Protection of Stakeholder Interests in Terms of the South Africa King III Report on Corporate Governance: An Improvement on King II', 21 *South Africa Mercantile Law Journal* (2009): 188–201, at pp. 193–4.

104 *Ibid*., at p. 196 (noting that '*King II* does not really provide directors with practical guidelines on how to consider the interests of other stakeholders during company management').

105 King III, sections 8.1.1, 8.1.3.

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manage the relationships within its stakeholders'[106] and 'strive to achieve the correct balance between its various stakeholder groupings, in order to advance the interests of the company'.[107] Furthermore, it admonishes the companies to aspire to be responsible corporate citizens by their actions and deeds.[108] The board of directors must be responsible not only for the financial output of the bottom line of the company, but also for the company's engagement and performance with respect to other stakeholders within the triple bottom line. If the triple bottom line approach is adopted, by not yielding to the temptation of immediate financial gain, the company's goodwill and its economic value will increase and its reputation, which is the greatest asset in business, will be protected.[109] It insists that companies must 'respect and realise universally recognised, fundamental *human rights*',[110] by pursuing their business activities 'within the limits of the social, political and environmental responsibilities'[111] and to also serve humanity in the spirit of Ubuntu'.[112] It signifies a new era of corporate human rights, responsibility and accountability whereby companies are to operate legally within the context of their obligations as itemised in the Bill of Rights. Indeed, 'the notion of creating a structure that can pursue profit at the expense of human rights is legally untenable in South Africa'.[113] Consequently, corporations as 'social entities with both rights and responsibilities' must therefore perform their obligations in the Bill of Rights without considering the financial implications.[114]

Having said that, it should be noted that some scholars have critiqued its adoption of the stakeholder model and enlightened shareholder model of corporate governance at the same time. They argued that both models of corporate governance are not the same and adopting the two models concurrently is creating a web of confusion for the board of directors to unravel.[115]

In the stakeholder model, they explained that the duties of directors to all appropriate stakeholders are not only wide but are direct, whereas the duties of the directors to the stakeholders in the enlightened shareholder value model are not as wide (in fact they can be termed narrow) and are mostly indirect.[116]

The problem with this bipartite embrace of two corporate governance models is that it puts the board of the directors in a difficult situation to determine where the balance of their fiduciary duty will tilt in times of conflicting situations,

106 *Ibid.*, section 8.2.
107 *Ibid.*, section 8.3.
108 *Ibid.*, ch. 2, principle 2.1.
109 *Ibid.*, principle 2.1, para. 2.
110 King III, at p. 20.
111 *Ibid.*, at p. 22.
112 *Ibid.*, at p. 21.
113 *Ibid.*, at p. 23.
114 *Ibid.*
115 See M. Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance', 20 *Academy of Management Review* (1995): 92; R. Freeman and W. Evan, 'Corporate Governance: A Stakeholder Interpretation', 19 *Journal of Behavioural Economics* (1990): 337; T. Donaldson and L. Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, Implications', 20 *Academy of Management Review* (1995): 65.
116 *Ibid.* See also Esser, *supra*, note 103, at p. 197.

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between the interests of the stakeholders and those of the shareholders. But the problem is not one that is without solution. If such a situation arises the directors could use section 76(3)(b) of the Companies Act as a standard to determine where their allegiance should shift and that is what they are expected to do as responsible corporate citizens. Indeed, the best interests of the company go beyond the temporary profit maximisation of the shareholders to the intrinsic value of protecting the interests of all relevant stakeholder that will enhance the long-standing goal, goodwill status and reputation of the corporation itself as a law abiding corporate entity that respects the human rights of the stakeholders in their places of operation, their networks and where they are located.

The triple bottom line has the capacity to address the negative effects of company operations to the extent that some scholars argued that it has taken care the of social and ecological effects of a company's operations.[117] However, it could not sufficiently address the problem of the enforcement of human rights responsibilities in the corporate sector. The question is, how do we guarantee that the courts will enforce the human rights responsibilities of the companies when the King III is voluntary in nature?[118]

IV. THE ISSUE OF ACCESS TO JUSTICE

Human rights are not an empty charade; they contain benefits and values to be enjoyed. On the other hand, they are not an abstract concept that cannot be violated. The availability of unhindered opportunity open to the victims of human rights violations to access justice in order to obtain an effective remedy is the hallmark of all human rights. However, if access to justice is not explained or captured in the language of rights, the fulfilment of human rights might be a mirage. Thus the Universal Declaration of Human Rights proclaims that 'Everyone has the right to an effective remedy.'[119] The GPs in support also affirm 'as part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure … that when such abuses occur … those affected have access to effective remedy.'[120]

Therefore this section examines three issues relating to access to justice in South Africa. The first is the role of the South African Human Rights Commission (SAHRC) in the protection and fulfilment of human rights while the second and third issues consider the questions whether South Africa has effective remedies for the victims of corporate human rights violations and whether the victims have access to those remedies.

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117 G. Rossouw, A. Van der Watt and D. Malan, 'Corporate Governance in South Africa', *Journal of Business Ethics* (2002): 289.

118 Note that King III is only compulsory for corporations listed on the Johannesburg Stock Exchange while it is voluntary to others. In all, it is a soft law and not statutory legislation.

119 Article 8 of the Universal Declaration of Human Rights.

120 GPs, *supra*, note 3.

To ensure that human rights obligations are respected and not violated, the SAHRC was established[121] to monitor and promote the fulfilment of human rights obligations in the country.[122] The Commission performs its duties by investigating and reporting on the state of compliance of human rights obligations in the country and is also able to embark on any steps that will facilitate appropriate remedies to the victims of human rights violations.[123] It has the mandate, every year, to require information from the 'relevant organs of state' on the steps 'they have taken' to fulfil the observance of social economic and environmental rights protected by the Bill of Rights.[124] Although the Constitution assigns responsibility to five other state institutions[125] as it does to the SAHRC to strengthen their capability to promote South Africa's fledgling democracy, it is crystal clear, despite their overlapping duties, that the SAHRC has the most formidable and overwhelming responsibility to protect the people from corporate human rights violations. The Commission has not shielded itself from this Constitutional responsibility as it embarks on a series of investigations culminating in economic and social rights reporting to monitor not only the effectiveness and adequacy of policies put in place by the organs of the state, but also to determine the impacts of the policies against the backdrop of the budget disbursed in attaining them.[126]

In spite of the mandate to secure the fulfilment of social economic rights, a critical perusal of the legal, regulatory and constitutional framework of the SHRC in conjunction with the existing structure of the government in South Africa will reveal some stumbling blocks to the fulfilment of the objective for which it was established. The first of the problems is that of the independence of the members of the Commission which is guaranteed by the Constitution in the sense that it requires the majority of the members of the National Assembly to be appointed to the office or be dismissed out of the office. The essence of the security of tenure is to enable them to discharge their responsibilities without fear or favour by placing them outside the control of those whose policies they are bound to examine. However, it has been argued that the so-called independence is an exercise in futility taking into consideration the political structure of the South African government where the ANC is the dominant party with an overwhelming majority in the parliament, the consequence of which is that those who were eventually appointed were alleged to be cronies of the ruling party.[127] The effectiveness of the Commission staffed by political appointees contrary to the spirit of the

121 The Human Rights Commission Act 54 of 1994.

122 Section 184 of the Constitution of the Republic of South Africa, Act 108 of 1996.

123 *Ibid*.

124 *Ibid*., section 184(3).

125 *Ibid*., see ch. 9.

126 C. McClain, 'The SA Human Rights Commission and Socio-Economic Rights Facing the Challenges', 3 *ESR Review* (2002); J. Kollapen 'Monitoring Socio-Economic Rights: What Has the SA Human Rights Commission Done?', *ESR Review* (1999); D. Horsten, 'The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa', 9 (2) *Potchefstroom Electronic Law Journal* (2006): 177–97, at p. 180.

127 See C. Murray, 'Human Rights Commission et al.: What Is the Role of South Africa's Chapter 9 Institutions', 9 (2) *Potchefstroom Electronic Law Journal* (2006): 122–47, at p. 133.

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Constitution is left to the imagination. The outcome of such an ignoble scenario was the refusal of Mr Lawrence Mushwana, to investigate an allegation of R11 million fraud against the ANC on the ground that his Constitutional power of investigation as the then Public Protector does not cover a case of fraudulent activities between the ruling party and a corporate body. According to him, the payments that were alleged to have been paid into the coffers of the ANC were not public funds; they were funds belonging to a private entity and were paid to the benefit of another private entity.[128] Even though, the Court had set aside this Report and ordered a fresh investigation into the scandal,[129] the true position is that, apart from other problems with regard to the SHRC,[130] the government of South Africa has an overwhelming influence over the manner in which the Chapter 9 institutions, including the SHRC, perform their functions to the extent that the so-called independence enshrined in the Constitution is a mirage.

On the first and second questions, the first point of succour to the victims of human rights violations in South Africa is the Constitution which provides that they can approach a competent court for appropriate reliefs.[131] The first of those reliefs is declaratory, that is to declare any law or conduct which is inconsistent with the Constitution null and void and of no effect to the extent of its inconsistency.[132] Other reliefs available through general Constitutional litigations are 'severance from an offending statute, mandatory and structural interdicts, supervisory jurisdiction and an obligation for parties to negotiate relief themselves under court auspices'.[133] These reliefs are not adequate to satisfy the victims of human rights violations who may have suffered hardship, injuries, torture, loss of health or even death from the conduct of the corporations. Even though the Constitutional Court has recognised the fact that an award of damages in monetary form may be a suitable relief to protect the Constitution and enforce the rights therein within the context of section 38,[134] it is rarely resorted to. In fact, the court is unwilling to grant damages,[135] claiming that such payment will negatively affect the power of the government to meet its financial obligations to the nation.[136] That may have left the victims with no other option than to seek refuge in the law of

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128 See the ruling of His Lordship Judge Ntsikelelo Poswa in *M & G Media Ltd and others* v. *Public Protector*, Case No. 2263/06.

129 *Ibid.*

130 For a discussion of some of the problems of the SHRC and other institutions, see S. Djoyou Kamga and S. Heleba, 'Can Economic Growth Translate into Access to Rights? Challenges Faced by Institutions in South Africa in Ensuring that Growth Leads to Better Living Standards', 9 *SUR International Journal on Human Rights* (2012): 83–106, at pp. 95–7.

131 Section 38 of the Constitution.

132 *Ibid.*, section 172(1).

133 See ICJ, *supra*, note 80, at p. 20.

134 *Fose* v. *Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR (CC) 851, at para. 60. Note that section 38 of the Constitution is *in pari material* (both are the same) with section 7 of the Interim Constitution.

135 *Ibid.* The court held that it was not appropriate to award punitive damages.

136 *Ibid.* Judgment of Ackermann J at para. 72.

delict and its reliefs.[137] Unfortunately, the same fate awaits the litigants here since remedies in the private sphere are also scant and ineffective in getting completely to the root of the problem. As noted by the International Commission of Jurists, 'a payment of damages to individuals who can prove serious harm from a chemical spill does not clean up the effects of the spill.'[138] To avoid this problem, it has been suggested that plaintiffs could claim two kinds of relief concurrently, a claim in delict to obtain damages and a direct claim of constitutional breaches to obtain public relief.[139] But even if that is done, despite the fact that the litigation cost will increase, there is no certainty that the court will grant both reliefs, since the outcome of the case depends 'on the courts changing tack and being more willing to apply the Constitution directly in cases between non-state actors'.[140]

In addition to the problem created by reliefs, the high cost of litigation has debarred many victims of human rights corporate violations to access justice. For example, despite the killing of 34 striking mine workers by the South African Police Service (SAPS), no one could have envisaged that the litigation cost of their counsel will be a problem, considering the publicity and public outcry that attended the incident, but unfortunately nobody was ready to pay the cost until the high court in *Magidiwana and Another* v. *President of the Republic of South Africa and others*[141] ordered South African Legal Aid to foot the legal bill.

Similarly, the case of *Mankayi* v. *AngloGold Ashanti*[142] points to the fact that delay in the administration of justice amounts to a denial of justice. In that case, the plaintiff, an employee who suffered occupational lung disease in the course of working in the gold mines, claimed in court that South African's statutory compensation scheme which excluded the plaintiff and other workers of his class from certain benefits is inconsistent with the Constitution of South Africa. Even though the Constitutional Court ruled in his favour, he died a few days before the ruling. In fact, the case suffered a short delay in the courts for one reason or another before judgment.[143] What an irony.

V. CONCLUSION

As shown in this article, there is no doubt that the South African government has endeavoured to meet its international obligations by ensuring that its Bill of Rights adequately provides for the culture and entrenchment of corporate accountability for human rights. However, when it comes to the implementation and actualisation

137 See Justice Kate O'Regan 'Fashioning Constitutional Remedies in South Africa: Some Reflections', 24 *Advocate* (2011): 41–4. At p. 43, Justice Kate O'Regan notes that 'The South African law of delict provides suitable remedies for the breach of constitutional rights.'

138 See ICJ, *supra*, note 80, at p. 21.

139 *Ibid*.

140 *Ibid*.

141 *Magidiwana and Another* v. *President of the Republic of South Africa and Others* (37904/2013) [2013] ZAGPPHC 292; [2014] 1 All SA 76 (GNP) (14 October 2013).

142 *Mankayi* v. *AngloGold Ashanti*, 2011 32 ILJ 545 (CC).

143 R. Spoor, 'AngloGold Court Case Delayed', available at http://www.miningmx.com/news/archive/954989.htm (accessed 9 November 2014).

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of that universal objective of making all persons in the Republic (whether natural or corporate) respect and uphold human rights, it is certain that there is a wide gap between the fulfilment of the vision of the Constitution and the indices on the ground for its realisation. The major problem lies with the voluntary approach adopted by the government in respect of corporate human rights responsibilities which, though not inconsistent with the GPs, is not an easy path to the attainment of a corporate human rights culture in the Republic. It is doubtful if the voluntary approach can help the government to put in place the safeguard mechanisms essential for the actualisation of corporate human rights responsibilities envisaged in the Constitution. There is no doubt that reform of corporate law is essential if corporate impunity is to be adequately addressed in South Africa. Consequently, a departure from the voluntary approach to corporate accountability towards a binding regulatory framework for such accountability that could stand the test of time should be adopted.

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